

## THE HISTORY AND POLITICS OF PARLIAMENTARY JUDGE REMOVAL IN BANGLADESH

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*Removing judges often puts judicial independence at risk. Nevertheless, the 16<sup>th</sup> Amendment to the Bangladesh Constitution provides for the power on the part of the Parliament to remove judges by resolution. This article unpacks the debate on the power of parliaments to remove judges in the context of Bangladesh. It delves into the law and politics of introducing the parliamentary removal system by replacing the Supreme Judicial Council (SJC), bringing an end to the adjudication of allegations raised against any Bangladesh Supreme Court judge by an all-judges body.*

### I. INTRODUCTION

The 16<sup>th</sup> Amendment of Bangladesh Constitution provides that the judges of the Supreme Court of Bangladesh (hereinafter referred to as ‘superior judge’) could be removed from office ‘by an order of the President passed pursuant to a resolution of Parliament supported by a majority of not less than two-thirds of the total number of members of Parliament, on the ground of proved misbehaviour or incapacity’.<sup>1</sup> It is the third time that the removal process of superior judges has been experimented with since Bangladesh’s independence. The constitutional provision is one of the many enacted to ensure that the ruling party’s unitary parliament may have control over law-making through an absolute majority.<sup>2</sup> Yet, the provision poses a major concern to the independence of the judiciary in Bangladesh.<sup>3</sup> The result of this worry was a 788-page long judgment invalidating the amendment as being unconstitutional.<sup>4</sup> However, the matter remains unsettled as the government lodged a subsequent review petition against the verdict. Seven years after filing the review petition, the Supreme Court’s decision is still pending.

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<sup>1</sup> *The Constitution of the People’s Republic of Bangladesh* (Act No 76 of 1972) pt VI, ch 1, art 96 (*‘Constitution of Bangladesh’*).

<sup>2</sup> Ibid. From the general parliamentary election in 2001 onwards, there has been a continuous series of absolute majorities held by the ruling parties.

<sup>3</sup> Sadiat Mannan, ‘Parliament and Judiciary: Striking a Balance’, *The Daily Star* (online, 20 October 2014) <<https://www.thedailystar.net/parliament-and-judiciary-striking-a-balance-46452>>; Esther Felden, ‘Separation of Powers in Bangladesh Under Threat’, *The Deutsche Welle* (online, 18 September 2014) <<https://www.dw.com/en/separation-of-powers-in-bangladesh-under-threat/a-17933328>>; Mohammad YK Chowdhury, ‘Removal of Judges Under 16<sup>th</sup> Amendment of Bangladesh Constitution: A Euphemism to Curb on Judiciary’ (2015) 3 *Dhaka International University Journal of Humanities and Social Science* 89, 94-5; Anisur Rahman, ‘16<sup>th</sup> Amendment of Bangladesh Constitution: Another View’, *The Daily Star* (online, 23 September 2014) <<https://www.thedailystar.net/16th-amendment-of-the-constitution-another-view-42884>>.

<sup>4</sup> *The Government of Bangladesh v Advocate Asaduzzaman Siddiqui & Others* (2017) 5 CLR (AD) 214 (*‘Advocate Asaduzzaman Siddiqui’s case’*).

Politics against the independence of the judiciary is nothing new. Even in democracies, courts often struggle to retain their autonomy and independence against the political monopolisation of the executive and legislature.<sup>5</sup> Being a fragile democracy, Bangladesh is not an exception.

This article examines the law and politics of the removal of superior judges in Bangladesh. It will argue that the Supreme Judicial Council (SJC), an independent body comprising the most senior judges of the Supreme Court, is the preferred forum for investigating judicial misconduct as opposed to a parliamentary resolution as provided by the 16<sup>th</sup> Amendment.

Section II gives an introduction of the relationship between judges' removal and judicial independence. It argues that the judiciary's capacity to provide decisions impartially and in accordance with the letter of the law ensures the public's faith in the administration of justice remains untarnished and intact.<sup>6</sup> Thus, it is essential to ensure, among other traits, the stability of judges' tenure of office.<sup>7</sup>

Section III will outline the scope of international soft laws concerning judges' removal mechanisms. Judicial independence has been underscored in numerous international and regional documents and forums. The 1985 *UN Basic Principles on the Independence of Judiciary* state that '[T]he independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.'<sup>8</sup> Similarly, the *Beijing Statement*, the *Bangalore Principles*, the *Universal Charter of the Judge*, and other conventions stress the responsibility of state governments to establish a fair and independent framework for the removal of judges.<sup>9</sup>

Section IV delves into the constitutional commitment to judicial independence in Bangladesh. Bangladesh's constitutional laws and case law have both articulated the independence of the judiciary and its separation from other branches of the state. However, a more in-depth examination of the constitutional history and its present status will facilitate a deeper understanding of the extent of independence that is actually enjoyed by judges, especially in light of existing mechanisms for the removal of judges.

<sup>5</sup> Leonie von Braun and Annelen Micus, 'Judicial Independence at Risk: Critical Issues Regarding the Crime of Aggression Raised by Selected Human Rights Organizations' (2012) 10(1) *Journal of International Criminal Justice* 111.

<sup>6</sup> M Ehteshamul Bari, 'The Recent Changes Introduced to the Method of Removal of Judges of the Supreme Court of Bangladesh and the Consequent Triumph of an All-Powerful Executive Over the Judiciary: Judicial Independence in Peril' (2021) 4(2) *Cardozo International & Comparative Law Review* 653, 655.

<sup>7</sup> Jan van Zyl Smit, *The Appointment, Tenure and Removal of Judges Under Commonwealth Principles: A Compendium and Analysis of Best Practice* (Bingham Centre for the Rule of Law, 2015) 67-8.

<sup>8</sup> United Nations Congress on the Prevention of Crime and the Treatment of Offenders, *Basic Principles on the Independence of the Judiciary*, GA Res 40/32, UN Doc A/RES/40/32 (6 September 1985, adopted 29 November 1985) art 1 ('UN Basic Principles').

<sup>9</sup> LAWASIA, *Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region* (19 August 1995, as amended at Manila 28 August 1997) ('Beijing Statement'); The Judicial Group on Strengthening Judicial Integrity, *The Bangalore Principles of Judicial Conduct* (25 November 2002); Central Council of the International Association of Judges, *The Universal Charter of the Judge* (17 November 1999) [1].

Section V examines the actual instances of judges being removed from the Bangladesh Supreme Court. It will present a historiographic overview of cases involving the removal of judges. The section will demonstrate how the removal process was implemented, shedding light on the political influence and manipulation involved in the various judge removal procedures implemented in Bangladesh.

Finally, Section VI will elucidate why the SJC is the preferred mechanism to address judicial misconduct instead of a parliamentary resolution and why the establishment of the SJC is crucial to the country's constitutional development. Section VII will conclude the article.

## II. JUDICIAL INDEPENDENCE AND JUDGES REMOVAL

Judicial independence and security of tenure goes hand-in-hand.<sup>10</sup> The *UN Basic Principles* stress the need for constitutional guarantees for judicial independence and safeguards against 'improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason'.<sup>11</sup> The independence of judges is thought to be crucial to foster responsibility and accountability, that are entrusted to them in their exercise of judicial functions.<sup>12</sup> The conventional understanding of judicial independence is frequently viewed in the context of the political commitment that the judiciary would be as free as possible from the influence of the executive and the legislature.

Russell and O'Brien noted two aspects of judicial independence: firstly, in terms of the personal and collective autonomy of judges from others (eg individuals and organisations); secondly, with reference to the available environment, that helps judges think and decide independently.<sup>13</sup> 'Judicial independence', thus, should not be treated as a single aspect of not interfering with the judges' professional activities. Consideration must also be given to the institutional independence of judiciary, which other government institutions like the legislature and executive may often undermine.<sup>14</sup> If the judiciary is unable to function independently, the other two branches of government may come to control all national priorities and interests instead of upholding the rule of law, posing a threat to constitutionalism.<sup>15</sup>

The notion of 'judicial independence' emerged after the Glorious Revolution in England in 1688, a concept which was articulated to oppose monarchical oppression.<sup>16</sup> It was enshrined in the *Act of Settlement 1700*, solidifying the independence of the English judiciaries.<sup>17</sup> The Act includes provisions for judges to hold their

<sup>10</sup> Chowdhury (n 3) 89, 91; Thomas E Plank, 'The Essential Elements of Judicial Independence and the Experience of Pre-Soviet Russia' (1996) 5(1) *William and Mary Bill of Rights Journal* 1, 6; Martin H Redish, 'Federal Judicial Independence: Constitutional and Political Perspectives' (1995) 46 *Mercer Law Review* 697, 698-9.

<sup>11</sup> *UN Basic Principles* (n 8) [1], [2].

<sup>12</sup> Supreme Court of British Columbia, *Statement on Judicial Independence*, 2012.

<sup>13</sup> Peter H Russell, 'Toward a General Theory of Judicial Independence' in Peter H Russell and David M O'Brien (ed), *Judicial Independence in the Age of Democracy: Critical Perspectives from Around the World* (University of Virginia Press, 2001) 6.

<sup>14</sup> Archibald Cox, 'The Independence of the Judiciary: History and Purposes' (1996) 21(3) *University of Dayton Law Review* 565, 567-8.

<sup>15</sup> Bernd Hayo and Stefan Voigt, 'Explaining *De Facto* Judicial Independence' (2007) 27(3) *International Review of Law and Economics* 269, 270.

<sup>16</sup> Daniel M Klerman and Paul G Mahoney, 'The Value of Judicial Independence: Evidence from Eighteenth Century England' (2005) 7(1) *American Law and Economics Review* 1.

<sup>17</sup> Robert Stevens, 'The Act of Settlement and the Questionable History of Judicial Independence' (2001) 1(2) *Oxford University Commonwealth Law Journal* 253, 260.

position 'during [their] good behaviour', rather than '[at] the King's pleasure'.<sup>18</sup> Throughout the colonial expansion, the notion of judicial independence, coupled with a balanced mechanism for judges' removal, transcended jurisdictional boundaries.<sup>19</sup> As a result, modern international soft laws have emphasised judicial security of tenure, and due procedure for judges' removal.<sup>20</sup> These procedures further safeguard judges from being dismissed by politicians or even a judicial council simply due to dissatisfaction with a judge's judicial decision.<sup>21</sup>

At present, disciplining mechanisms for judges are expressly incorporated in the constitutions of many democratic countries.<sup>22</sup> This system of judicial regulation was initially envisaged by the United Kingdom's *Act of Settlement*, pronouncing that a judge could be removed from his office following the resolution of both houses of Parliament.<sup>23</sup> This aspect of constitutional design – the lack of protection for judges – influenced Alexander Hamilton, one of the founding fathers of the United States, to promote permanent positions for judges in the United States, subject to their good behaviour.<sup>24</sup> The idea of providing security of tenure to judges gradually turned to a global trend, as it has been recognised as one of the key factors to maintaining the professional standard of the judiciary.<sup>25</sup>

Nevertheless, safeguards for judicial independence were never regarded as absolute (nor were they intended to be).<sup>26</sup> Therefore, it is not uncommon nor controversial for judges to face charges for misusing their office, undignified behaviour, engaging in harmful or offensive conduct, committing a dereliction of duty, or displaying disrespect for the law (including of course, lawbreaking).<sup>27</sup> However, removal proceedings as a disciplining mechanism remain highly sensitive, as they can potentially undermine the constitutional guarantee of judges' security, ultimately affecting the rule of law. If employed casually, judges might always fear political reprisals.<sup>28</sup> This ongoing risk for judges could diminish the quality of their decisions and undermine the principles of fairness and objectivity. Ultimately, public trust in the judicial system will be severely

<sup>18</sup> Bernard Schwartz, *The Roots of Freedom: A Constitutional History of England* (Hill & Wang, 1967) 199; William Holdsworth, *A History of English Law Vol I* (Nabu Press, 1956) 195.

<sup>19</sup> Tom Ginsburg, 'Judicial Independence in East Asia: Implications for China' (University of Chicago Public Law & Legal Theory Working Paper, No 295, 2010).

<sup>20</sup> The report of the UN Special Rapporteur on the independence of judges and lawyers urged gradual increases in judges' tenures for judicial independence in post-authoritarian regimes, aiming to address the predicament of judges with short tenures, see Leandro Despouy, *Report of the Special Rapporteur on the Independence of Judges and Lawyers*, UN Doc A/HRC/11/41 (24 March 2009), [54-5]; The Commonwealth Latimer House Principles endorse this requirement of judges' tenure security by stressing a preference for stable appointments, see *The Commonwealth Principles on the Accountability and the Relationship between the Three Branches of Government ('Commonwealth Latimer House Principles')* adopted by the Commonwealth Heads of Government in Abuja in 2003 <<http://thecommonwealth.org/sites/default/files/history-items/documents/LatimerHousePrinciples.pdf>>.

<sup>21</sup> UN Basic Principles (n 8) art 12; Beijing Statement (n 9) art 18-32.

<sup>22</sup> Elliot Bulmer, 'Judicial Tenure, Removal, Immunity and Accountability', *International Institute for Democracy and Electoral Assistance* (Online Report, 2017) <<https://constitutionnet.org/sites/default/files/2017-10/judicial-tenure-removal-immunity-and-accountability-primer.pdf>>.

<sup>23</sup> *Act of Settlement 1700*, 12 & 13 Wm 3, c 2.

<sup>24</sup> Alexander Hamilton, 'The Judicial Department' *Federalist No. 78* (28 May 1788).

<sup>25</sup> Brian Opeskin, 'Models of Judicial Tenure: Reconsidering Life Limits, Age Limits and Term Limits for Judges' (2015) *Oxford Journal of Legal Studies* 627.

<sup>26</sup> Steven Lubet, 'Judicial Discipline and Judicial Independence' (1998) 61(3) *Law and Contemporary Problems* 59, 60.

<sup>27</sup> *In the Matter of William C McClain, Judge of the Vigo County Court* 662 NE 2d 935 (Ind, 1996); *United States v Lanier* 520 US 259, *Doan v Commission on Judicial Performance* 45 Cal Rptr 2d 254 (Cal, 1995); *In the Matter of Fournier* 480 SE 2d 738, 739 (SC, 1997); Lubet (n 26) 61-2.

<sup>28</sup> Martin H Redish, 'Judicial Discipline, Judicial Independence, and the Constitution: A Textual and Structural Analysis' (1998) 72 *Southern California Law Review* 673, 676.

compromised.

### III. INTERNATIONAL SOFT LAWS ON JUDGES REMOVAL

Common law jurisdictions have adopted various models for removing judges from their office, including through parliamentary resolutions, the use of ad hoc tribunals or disciplinary councils, and a combination of disciplinary councils and parliamentary resolutions.<sup>29</sup> Regarding the independence of judicial officers, the UN Human Rights Committee strongly supports the use of a distinct, independent governmental institution to adjudicate on their unethical behaviours, as outlined in Article 14(1) of the *International Covenant on Civil and Political Rights* (ICCPR).<sup>30</sup> The 1998 Latimer House Guidelines, while outlining accountability mechanisms for judges, emphasise the importance of proper notice, the opportunity for a hearing and defense, and adjudication by an independent and impartial tribunal.<sup>31</sup> Additionally, judges should be immune from liability for any financial losses arising from their rulings.<sup>32</sup> States must establish appropriate procedures and precise grounds for removal. A fair hearing should be conducted before an impartial and independent authority to determine whether a judge's specific behaviour or skill level warrants removal.<sup>33</sup> Principle 17 of the *UN Basic Principles* states:

a charge or complaint made against a judge in his/her judicial and professional capacity shall be processed expeditiously and fairly under an appropriate procedure. The judge shall have the right to a fair hearing. The examination of the matter at its initial stage shall be kept confidential, unless otherwise requested by the judge.<sup>34</sup>

Furthermore, a judge should not face charges for alleged misconduct or for having rendered unfair decisions unless it is sufficiently proven that they reached an erroneous verdict knowingly or recklessly.<sup>35</sup> The *UN Basic Principles* also endorse the necessity of implementing legislation to allow judges to appeal against disciplinary rulings.<sup>36</sup> The executive should not be the sole or primary decision-maker for a judge's removal from his office, a practice that has become a global minimum standard.<sup>37</sup>

The 1982 International Bar Association (IBA) Minimum Standard outlines the initial role of the executive in referring a complaint or requesting an investigation but strongly opposes their involvement in the adjudication process.<sup>38</sup> This international standard firmly emphasises the participation of the judiciary in the final

<sup>29</sup> van Zyl Smit (n 7) 91 [3.3.9].

<sup>30</sup> Office of the High Commissioner for Human Rights and International Bar Association, *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers* (New York, Geneva: United Nations 2003) 130 ('A Manual on Human Rights for Judges, Prosecutors and Lawyers').

<sup>31</sup> *Commonwealth Latimer House Principles* (n 20) art 5(1)(a)(i).

<sup>32</sup> *UN Basic Principles* (n 8) art 16; *Universal Charter of the Judge* (n 9) art 10.

<sup>33</sup> International Commission of Jurists, *International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors: Practitioners Guide No. 1* (2007) 56.

<sup>34</sup> *UN Basic Principles* (n 8).

<sup>35</sup> *Bose Corp v Consumers Union of US Inc*, 466 US 485 (SC, 1984); *New York Times v Sullivan* 376 US 254 (SC, 1964).

<sup>36</sup> *UN Basic Principles* (n 8) art 1.

<sup>37</sup> van Zyl Smit (n 7) 88-9 [3.3].

<sup>38</sup> International Bar Association, *IBA Minimum Standard of Judicial Independence* (1982) [4(a)].

adjudication of the case, ensuring that the judiciary plays a crucial role without any interference from the executive or legislature.<sup>39</sup> The Council of Europe has established clear guidelines for removal processes, including the creation of a special body subject to judicial control and granting judges' access to all procedural protections.<sup>40</sup>

According to the IBA Minimum Standards, parliamentary resolutions for the removal of judges must only be supported by judicial recommendations.<sup>41</sup> Furthermore, the *Beijing Statement* highlights the importance of 'due process' procedures to investigate complaints before a resolution is recommended for adoption by parliament.<sup>42</sup> These processes are crucial to safeguard the tenure of judges against capricious proceedings and legislative decisions. Regardless of who oversees legal proceedings, the right to a fair hearing remains a fundamental aspect of 'due process'.<sup>43</sup> Additionally, the *UN Basic Principles* advocate for the enactment of legislation allowing judges to contest disciplinary judgments. Principle 20 of the *UN Basic Principles* stipulates that 'decisions in disciplinary, suspension or removal proceedings should be subject to an independent review'.<sup>44</sup>

On various occasions, the UN Human Rights Committee has addressed the dismissal of judges. Concerning Sri Lanka, the Human Rights Committee highlighted the issue by stating that 'the procedure for the removal of judges of the Supreme Court and the Courts of Appeal [...] is incompatible with article 14 of the *Covenant* [ICCPR], in that it allows Parliament to exercise considerable control over the procedure for removal of judges'.<sup>45</sup> The Committee went further to recommend the State party to 'strengthen the independence of the judiciary by providing for judicial, rather than parliamentary, supervision and discipline of judicial conduct'.<sup>46</sup> In the case of Vietnam, the Committee urged the State to 'ensure that judges may not be removed from their posts unless they are found guilty by an independent tribunal of inappropriate conduct'.<sup>47</sup> It remarked that 'judges should be removed only in accordance with an objective, independent procedure prescribed by Law'.<sup>48</sup> Throughout the decisions and observations of international forums, it is clear that judges' removal should be impartial, independent, and fair.<sup>49</sup> In this regard, the intervention of the executive and legislature needs to be eliminated.

To conclude, judicial control in the adjudicating process can ensure a fair trial and legal protection for a prosecuted judge. While parliamentary approval may finalise the dismissal or any other disciplinary actions taken against a convicted judge, all the groundwork involving the trial and investigation should be conducted by an impartial and independent body. Finally, a convicted judge must have the right to appeal for a review of

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<sup>39</sup> *Ibid* [4(b)].

<sup>40</sup> Council of Europe Committee of Ministers, *Recommendation No R (94) 12 of the Committee of Ministers to Member States of the Independence, Efficiency and Role of Judges* (entered into force 13 October 1994) Principle VI.3.

<sup>41</sup> International Bar Association (n 38) [4(c)].

<sup>42</sup> *Beijing Statement* (n 9) art 25.

<sup>43</sup> *Ibid* art 26.

<sup>44</sup> *UN Basic Principles* (n 8) art 20.

<sup>45</sup> *A Manual on Human Rights for Judges, Prosecutors and Lawyers* (n 30) 124.

<sup>46</sup> United Nations Human Rights Committee, *Concluding Observations of the Human Rights Committee on Sri Lanka*, 79th sess, UN doc CCPR/CO/79/LKA (1 December 2003) [16].

<sup>47</sup> United Nations Human Rights Committee, *Concluding Observations of the Human Rights Committee on Viet Nam*, 75th sess, UN doc CCPR/CO/75/VNM (5 August 2002) [10].

<sup>48</sup> *Ibid*.

<sup>49</sup> Bulmer (n 22).

the decision taken against them.

### III. THE CONSTITUTIONAL PLEDGE TO JUDICIAL INDEPENDENCE IN BANGLADESH AND THE RULES FOR REMOVING JUDGES

In 1971, after nine months of bloodshed, Bangladesh became independent from Pakistan.<sup>50</sup> Immediately after acquiring its independence, Bangladesh enacted two provisional constitutional instruments until adopting its first original constitution in 1972. Amongst them, the Proclamation of Independence, adopted on 10 April 1971, laid down the provisions for forming the government and the creation of the Constituent Assembly empowered to draft a new constitution.<sup>51</sup> Reserving the Constituent Assembly only for constitutional matters, the Proclamation vested all executive and legislative powers in the hands of President.<sup>52</sup> This marked a stark departure from the practice adopted in both decolonised India and Pakistan based on the 1947 Independence Act of India, that conferred legislative powers to the Constituent Assembly.<sup>53</sup>

Interestingly, the 1971 Proclamation of Independence of Bangladesh is silent about judicial powers and their sources.<sup>54</sup> Nevertheless, following the attainment of independence, the Provisional Constitution of Bangladesh Order was issued on 11 January 1972 by the President. This Order retained the provision for establishing a High Court in Dhaka as the apex court of the unitary Bangladesh consisting of a Chief Justice and other judges appointed from time to time.<sup>55</sup> To complement this clause of the Provisional Constitution Order, the High Court of Bangladesh Order was adopted in 1972, which clarified the authority for appointing judges in the High Court.<sup>56</sup> It stipulated that the President of Bangladesh would appoint superior judges 'who would hold the office on such terms and conditions as the President may determine from time to time.'<sup>57</sup> This was a textbook example of the (in)security of judges' tenure, regulated solely by the President as the head of the Executive. Consequently, it granted extensive powers to the Executive to remove superior judges from their office.

The independence of the judiciary is asserted in Article 22 of the Bangladesh Constitution, which states that '[t]he State shall ensure the separation of the judiciary from the executive organs of the state.'<sup>58</sup> When considering 'independence' in terms of interactions between branches, this constitutional clause appears to be a safeguard to protect the judiciary from other branches' influence. This constitutional measure aligns with the Montesquieuian notion of 'separation of powers', ultimately advancing judicial independence:

[T]here is no liberty, if the judiciary power be not separate from the legislative and executive. Were

<sup>50</sup> The National Archives, *The Independence of Bangladesh in 1971: What Can British Documents Tell Us About the Creation of Bangladesh* <<https://cdn.nationalarchives.gov.uk/documents/education/independence-of-bangladesh-1971.pdf>>; Willem Van Schendel, *A History of Bangladesh* (Cambridge University Press, 2020).

<sup>51</sup> *Bangladeshi Declaration of Independence 1971* [9].

<sup>52</sup> *Ibid.*

<sup>53</sup> *Indian Independence Act 1947*, s 8(1).

<sup>54</sup> *Bangladeshi Declaration of Independence 1971*.

<sup>55</sup> *Provisional Constitution of Bangladesh Order 1972*, art 9.

<sup>56</sup> *High Court of Bangladesh Order 1972*, art 3.

<sup>57</sup> *Ibid.*

<sup>58</sup> *Constitution of Bangladesh* (n 1) art 22.

it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.<sup>59</sup>

Montesquieu's ideas have had a compelling influence on the constitutional framework of all ages.<sup>60</sup> In this backdrop, a constitution is devised to minimise the abuse of powers by the more dominant branches, and ultimately, to ensure the autonomy of the judiciary (which is often thought of as the weakest of all three branches).<sup>61</sup>

The above understanding on the separation of the judiciary has been enshrined in the Bangladesh Constitution, as was expounded in the landmark case *Masdar Hossain*.<sup>62</sup> After a long legal battle, the Bangladesh Judicial Service Commission was set up in 2007 to appoint judges independently, without any interference from the government.<sup>63</sup> Unfortunately, its jurisdiction is limited to the lower judiciary, and it lacks the authority to bestow independence upon the upper judiciary.<sup>64</sup>

Following the institutional protection of the judiciary from other governmental organs, articles 94(4) and 116A of the Bangladesh Constitution proclaim the individual independence of judges in the exercise of their functions.<sup>65</sup> Article 94(4) specifically states that 'subject to the provisions of this Constitution, the Chief Justice and other judges shall be independent in the exercise of their judicial functions'.<sup>66</sup> Article 116A specifies that 'subject to the provisions of the Constitution, all persons employed in the judicial service and all magistrates shall be independent in the exercise of their judicial functions'<sup>67</sup> explicitly affirm the independence of judges, allowing them to exercise their judicial powers without interruption.

Moreover, the commitment to judicial independence was established as an entrenched provision of the Constitution through the *Eighth Amendment Case* in 1989.<sup>68</sup> This decision affirmed the core value of judicial

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<sup>59</sup> Baron De Montesquieu, *Spirit of the Laws* (Nugent ed. 1823) 152.

<sup>60</sup> *Ibid* 159.

<sup>61</sup> Nadia Fiorino, Fabio Padovano and Grazia Sgarra, 'Judicial Branch, Checks and Balances and Political Accountability' (2003) 14 *Constitutional Political Economy* 47, 52.

<sup>62</sup> *Secretary, Ministry of Finance v Masdar Hossain* (1999) 52 DLR (AD) 82 (Supreme Court of Bangladesh): Masdar Hossain and 441 judicial officers who served as judges of several civil courts filed a writ suit in the High Court Division in 1995 to establish judicial independence, that was mostly controlled by the executive branch. They claimed that the 1980 Bangladesh Civil Services (Re-organization) Order's inclusion of judicial service under the term 'BCS (Judicial)' violated the Constitution. They strongly demanded for establishing the Bangladesh Judicial Service Commission, which would work independently. They argued that such establishment is quite necessary for the implementation of article 22 of the Bangladesh Constitution, dealing with the separation of judiciary.

<sup>63</sup> Mohammad A Hannan, and Md Arifuzzaman, 'Separation of Judiciary and Judicial Independence in Bangladesh: An Appraisal' (2021) 8 *Open Access Library Journal* 1.

<sup>64</sup> Awal Hossain Mollah, 'Independence of Judiciary in Bangladesh: An Overview' (2012) 54(1) *International Journal of Law and Management* 61.

<sup>65</sup> *Constitution of Bangladesh* (n 1) art 94(4) and art 116(A).

<sup>66</sup> *Ibid* art 94(4).

<sup>67</sup> *Ibid* art 116(A).

<sup>68</sup> *Anwar Hossain Chowdhury v Bangladesh* (1989) 41 DLR (AD) 165 (Supreme Court of Bangladesh).

independence, which is integral to the basic structure of the Constitution.<sup>69</sup> The Bangladesh Supreme Court justified this finding by observing that judicial independence is indispensable to allowing access to justice and the equal protection of law.<sup>70</sup> Additionally, this case marked the first case where the Indian 'Basic Structure Doctrine' was endorsed in Bangladesh.<sup>71</sup>

The importance of judicial independence from the intervention of other organs of government is also affirmed in the *Second Judges* case,<sup>72</sup> which asserted that '[t]he judiciary stands between the people of the country and the State as a bulwark against Executive pressure, excesses and misuse of power by the Executive.'<sup>73</sup> Consequently, in Bangladesh, not only have constitutional provisions solidified judicial independence, but case law has also confirmed its permanence.

Yet, despite commitments to judicial independence on paper, the reality of whether judges truly enjoy independence can often be discerned from the judges' removal laws. In the original Constitution of Bangladesh, the power to remove superior judges was vested in the Parliament.<sup>74</sup> However, in 1975, the Fourth Amendment to the Bangladesh Constitution took away the parliamentary authority for removing judges, and instead, the President was granted this power.<sup>75</sup> Nevertheless, the situation changed shortly. In 1977, with the democratic government in exile, the President was no longer in a position to exclusively remove superior judges.<sup>76</sup> In 1978, the Martial Law Proclamation introduced a new constitutional body, the SJC, composed of three judges of the Supreme Court, headed by the Chief Justice.<sup>77</sup> The SJC, was empowered to investigate allegations against superior judges and recommend disciplinary actions, including removal, to the President.<sup>78</sup> This change in judges' removal law was ratified by the Fifth Amendment to the Constitution in 1979.<sup>79</sup>

It is important to note that the presidential regimes before and after 1975 exhibited substantial differences. The laws regarding the judiciary were altered to align with the political changes, aiming to uphold the political legitimacy of the then martial law administrator, who also acted as the head of the state.<sup>80</sup> Following the replacement of the democratic government, an unelected government came to power in August 1975.<sup>81</sup> Right from the outset, they pursued strategies to appease the public in order to garner their support.<sup>82</sup> Interestingly, when the Fifth Amendment was challenged in the court, the High Court Division of the Supreme

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<sup>69</sup> Ibid.

<sup>70</sup> Ibid.

<sup>71</sup> Ibid.

<sup>72</sup> *Idrisur Rahman v Bangladesh* (2009) 61 DLR 523, 528 (Supreme Court of Bangladesh).

<sup>73</sup> Ibid [208].

<sup>74</sup> *Constitution of Bangladesh* (n 1) art 96.

<sup>75</sup> The Constitution (Fourth) Amendment Act, 1975 sec 15.

<sup>76</sup> Shyamali Ghosh, 'Constitutional Changes in Bangladesh: Process of Political Development' (1986) 42(4) *India Quarterly* 391, 396.

<sup>77</sup> Proclamations (Tenth Amendment) Order, 1977.

<sup>78</sup> This arrangement was enshrined in the Martial Law Proclamation in 1977 that was ratified by the Fifth Amendment to the *Constitution of Bangladesh* (n 1).

<sup>79</sup> Proclamations (Tenth Amendment) Order, 1977, ratified by the Fifth Amendment to the *Constitution of Bangladesh* (n 1).

<sup>80</sup> Kawser Ahmed, 'Revisiting Judicial Review of Constitutional Amendments in Bangladesh: Article 7B, the Asaduzzaman Case, and the Fall of the Basic Structure Doctrine' (2023) 56(2) *Israel Law Review* 263.

<sup>81</sup> Azizul Haque, 'Bangladesh 1979: Cry for a Sovereign Parliament' (1980) 20(2) *Asian Survey* 217.

<sup>82</sup> Ibid.

Court declared the Amendment illegal.<sup>83</sup> In their efforts to promote judicial independence and transparency, they endorsed the practices of the SJC.<sup>84</sup> The Appellate Division of the Supreme Court also upheld this finding in the appeal petition, though it only lasted until the end of December 2011.<sup>85</sup> Subsequently, in a move to reinforce the SJC, the Government introduced the 15<sup>th</sup> Amendment to the Constitution. Despite this, the 16<sup>th</sup> Amendment, which reinstated parliamentary authority to remove superior judges, was adopted on 22 September 2014, replacing the SJC without explanation.

In addition to the permanent appointment clause for superior judges,<sup>86</sup> there exists a constitutional provision for temporary appointments,<sup>87</sup> which is considered another technically constructed method of judges' removal in Bangladesh. In practice, all the judges of the High Court Division of the Supreme Court are temporarily appointed under the provision of Article 98 of the Constitution.<sup>88</sup> After serving two years as provisional judges, they are either appointed to the permanent positions or compelled to leave their offices.<sup>89</sup> Through temporary appointments, judges who have either supported the ruling party in the course of employment or at least remained sympathetic to its political ideologies are usually regularised in the High Court Division.<sup>90</sup> During the period where temporary appointments were made, a number of qualified judges were not retained for undisclosed reasons.<sup>91</sup>

Apart from the direct role of the Parliament in curtailing the independence of judiciary through the 16<sup>th</sup> Amendment, the Legislature, on several occasions, appears to be accountable for its inactivity or omission, as they have shown reluctance in holding the Executive accountable when it undermined judicial independence.<sup>92</sup> The Executive's decisions to decline retaining superior judges upon the expiration of their two-year term could have been challenged by the Parliament.<sup>93</sup> Although the non-regularisation of temporary judges is not a straightforward case of removal, it carries deeper ramifications for judicial independence.<sup>94</sup> The Montreal Declaration denounces the practice of provisional appointment, considering it 'inconsistent with judicial independence'.<sup>95</sup> As noted by the Venice Commission, the introduction of probationary periods impairs judges'

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<sup>83</sup> *Advocate Asaduzzaman Siddiqui's case* (n 4) 148.

<sup>84</sup> *Bangladesh Italian Marble Works Limited v Government of Bangladesh and others (Fifth Amendment Case)* (2005) Writ Petition No 6016 of 2000.

<sup>85</sup> *Hossain v Bangladesh Italian Marble Works Limited* (2009) Civil Petition for Leave to Appeal No 1044 of 2009.

<sup>86</sup> *Constitution of Bangladesh* (n 1) art 95.

<sup>87</sup> *Ibid* art 98.

<sup>88</sup> *Ibid*.

<sup>89</sup> *Ibid*.

<sup>90</sup> Mohammad Abdul Mutaleb, 'Bangladesh', in Shimon Shetreet and Jules Deschenes (ed), *Judicial Independence: The Contemporary Debate* (Martinus Nijhoff Publishers, 1985) 39.

<sup>91</sup> Sarkar Ali Akkas, *Independence and Accountability of Judiciary: A Critical Review* (CRIG 2004) 184-87.

<sup>92</sup> In Bangladesh, both individual and collective ministerial responsibilities are determined by the Parliament. *Constitution of Bangladesh* (n 1) art 55.

<sup>93</sup> For example, in 2000, Justice AFM Mesbahuddin, AKM Shafiuddin, Nazmun Ara Sultana and NK Chakravarty were recommended by the Chief Justice to be appointed as the permanent judges of the High Court Division. Only Nazmun Ara became permanent, and no public clarification of this issue was made. The additional judges of the High Court Division, appointed in June 2012, were regularised in 2014 except for ABM Altaf Hossain. In this regard, the government had not shown any reason for his discontinuity. See Ahmed Zayef, 'SC Grants Appeal on Altaf's Regularisation', *The Daily Dhaka Tribune* (Dhaka, 6 November 2014) 9; *Valentine v The Queen* (1985) 2 SCR 673; Article 2.19 of *Universal Declaration on the Independence of Judges*, 1983, s 2.19; *UN Basic Principles on the Independence of Judiciary* (n 8) s 11.

<sup>94</sup> *Ciraklar v Turkey* (2001) 32 EHRR 23.

<sup>95</sup> *Universal Declaration of the Independence of Justice* (adopted 10 June 1983 at Montreal on June 10th) art 2.20.

independence by pressuring them to make certain decisions.<sup>96</sup> These issues were also highlighted in another opinion of the Venice Commission, that criticised the judgments of the Scottish Court in *Starr v Ruxton*,<sup>97</sup> and *Millar v Dickson*.<sup>98</sup> Expressing dissatisfaction regarding the independence of judges in case of their probationary appointment, the Venice Commission aptly stated:

[T]he case does not perhaps go so far as to suggest that a temporary or removable judge could in no circumstances be an independent tribunal within the meaning of the *Convention*, but it certainly points to the desirability of ensuring that a temporary judge is guaranteed permanent appointment except in circumstances which would have justified removal from office in the case of a permanent judge.<sup>99</sup>

Crises in judges' tenure or issues related to their removal have been recognised as affecting legal systems worldwide. The instability of judges' terms of office is sometimes considered an indirect or de facto form of removal, which has also compromised judicial independence in Bangladesh.

In theory, judicial independence could be seen as an insurance to the politicians<sup>100</sup> when they are not in power.<sup>101</sup> For instance, the Bangladesh Supreme Court, as the guardian of the Constitution, can strike down illegal, irrational and improper legislations, constitutional amendments and executive orders passed to vindictively suppress the opposition.<sup>102</sup> Unfortunately, politicians often perceive this power of the judiciary as a threat to their political aspirations,<sup>103</sup> prompting responses from both past and present governments in Bangladesh aimed at constraining it.<sup>104</sup>

To conclude, the removal processes of superior judges in Bangladesh are not always transparent, as the laws appear to be manipulated for political purposes. The practice of removing judges by both political and military governments has raised doubts about the underlying intentions. The widespread practice of appointing judges on a temporary basis rather than permanently increases the vulnerability of judges' tenure, significantly compromising judicial independence.

Political influence on judges, stemming from state-sponsored sources, undermines the delicate balance

<sup>96</sup> Council of Europe, European Commission for Democracy Through Law (Venice Commission), *Judicial Appointments (Opinion)*, CDL-AD (2007) 028, 16-17 March 2007, 9 [40].

<sup>97</sup> *Starr v Ruxton* [2000] HRLR 191.

<sup>98</sup> *Millar v Dickson* [2001] HRLR 1401.

<sup>99</sup> Council of Europe, Venice Commission, *Draft Opinion on Draft Constitutional Amendments concerning the Reform of the Judicial System in the Former Yugoslav Republic of Macedonia* CDL (2005) 066, 12 October 2005, 6 [23].

<sup>100</sup> Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (Cambridge University Press 2003) 22-6.

<sup>101</sup> Kirk Randazzo, Douglas Gibler and Rebecca Reid, 'Examining the Development of Judicial Independence' (2015) 69(3) *Political Research Quarterly* 585.

<sup>102</sup> *Constitution of Bangladesh* (n 1) art 102.

<sup>103</sup> Justin Fox and Matthew C Stephenson, 'Judicial Review as a Response to Political Posturing' (2011) 105(2) *The American Political Science Review* 397.

<sup>104</sup> Ridwanul Hoque, 'Constitutionalism and the Judiciary in Bangladesh' (2013) *Comparative Constitutionalism in South Asia* 303.

between independence and impartiality, and accountability.<sup>105</sup> This concern is amplified when the government holds political control over the appointment and removal of superior judges. Such interferences, masked as regulation, negatively impact constitutionalism itself.<sup>106</sup>

#### IV. JUDGES REMOVAL CASES AND THE UNDERLYING POLITICS

Two types of processes for removing judges are practised in Bangladesh. The first involves direct removal from judicial office based on the grounds of incapacity and misconduct.<sup>107</sup> The second, indirect type, occurs when additional judges of the Supreme Court's High Court Division are not regularised after completing their provisional period.<sup>108</sup>

During the martial law regime spanning from 1982 to 1986, the removals of Justice KM Subhan, Justice SM Hossain, and Justice Abdur Rahman Chowdhury stand as glaring examples of arbitrary and unjustified removals by the military administration.<sup>109</sup> In addition to these cases, Chief Justice Kamaluddin Hossain was removed from his office using a technical method of lowering the retirement age.<sup>110</sup> The First Proclamation Order of 1982 dictated that the Chief Justice would retire from office either after completing three years of appointment or upon reaching the age of 62, whichever came earlier.<sup>111</sup> This removal procedure seemed tailored to Chief Justice Kamaluddin Hussain, forcing his retirement due to his three-year tenure as Chief Justice.

Following the military regime, cases of judges' removal once again ignited debates about judicial independence in Bangladesh. For instance, Justices AFM Mesbahuddin, AKM Shafiuddin, Nazmun Ara Sultana, Munsurul Huq Chowdhury, and NK Chakravarty were appointed as additional judges to the High Court Divisions in May 2000. However, none of them was regularised to their offices in May 2002, except Justice Nazmun Ara Sultana.<sup>112</sup> It was speculated that the judges who were not regularised did not align with the political considerations emphasised by the government at that time.<sup>113</sup> In another instance, ABM Altaf Hossain was appointed as an additional judge to the High Court Division of the Supreme Court along with five other judges, namely Ashish Ranjan Das, Md Badruzzaman, Zafar Ahmed, Mahmudul Hoque and Kazi Md Ejarul Haque Akondo in June 2012.<sup>114</sup> However, after two years of their provisional service, the government issued a gazette regularising all except ABM Altaf Hossain.<sup>115</sup> This move was likely influenced by his ruling against the then Speaker over the alleged 'derogatory statement' made by the High Court Division judge AHM Shamsuddin Choudhury Manik on the Parliament.<sup>116</sup> Against his non-regularisation, ABM Altaf Hossain has lodged a writ

<sup>105</sup> Charles Gardner Geyh, 'The Dimensions of Judicial Impartiality' (2013) 65 *Florida Law Review* 503.

<sup>106</sup> Aziz Z Huq, 'Judicial Independence and Rationing of Constitutional Remedies' (2015) 65(1) *Duke Law Journal* 1.

<sup>107</sup> *Constitution of Bangladesh* (n 1) art 96(2).

<sup>108</sup> SM Solaiman and Rafiqul M Islam, 'The Enforcement of Rulings of the Supreme Court on Judicial Independence in Bangladesh: When Enforcer Becomes Violator' (2002) 4(2) *Australian Journal of Asian Law* 107, 114-15.

<sup>109</sup> Badrul Haider Chowdhury, *Evolution of the Supreme Court of Bangladesh* (Dhaka University Press 1990) 164.

<sup>110</sup> Akkas (n 91) 190.

<sup>111</sup> Proclamation (First Amendment) Order No.1 of 1982 [10].

<sup>112</sup> Akkas (n 91) 192-93.

<sup>113</sup> Ibid.

<sup>114</sup> '5 HC Judges Job Confirmed', *The Daily Star* (online, 10 June 2014) <<https://www.thedailystar.net/5-hc-judges-job-confirmed-27825>>.

<sup>115</sup> Ibid.

<sup>116</sup> Ibid.

petition that is still pending in the Appellate Division of the Supreme Court.<sup>117</sup>

Similarly, Justice Farid Ahmed Shibli was appointed as an additional High Court Division judge in February 2015 but could not be regularised as a permanent judge of the same division in February 2017, unlike the other nine judges who were.<sup>118</sup> When journalists inquired about his situation, the then Secretary of the Law Ministry ASSM Zahirul Haque, stated that the President had not provided any reasons for it.<sup>119</sup> Justice Shibli too challenged the government's decision of not regularising him, and his case has been combined with Altaf Hossain's petition and is currently being heard jointly.<sup>120</sup>

Before being abolished by the 16<sup>th</sup> Amendment, the SJC dealt with three cases involving the discipline or removal of the judges from the Bangladesh Supreme Court.<sup>121</sup> The first instance involved a sitting judge of the High Court Division of the Supreme Court, Syed Shahidur Rahman, who faced allegations of misconduct related to bribery.<sup>122</sup> In October 2003, the then President of the Supreme Court Bar Association levelled an accusation against him, claiming that he had accepted 50,000 BDT in exchange for granting a favourable ruling for a defendant charged under the *Prevention of Cruelty against Women and Children Act 2000*.<sup>123</sup> Recognising this as a grave matter eroding public confidence in the higher court, the then President directed the SJC to investigate the case in accordance with Article 96(5)(b) of Bangladesh Constitution.<sup>124</sup> During the course of the investigation, the SJC found merit in the allegations, and subsequently recommended the removal of the accused judge.<sup>125</sup> Acting upon their report, the President dismissed the judge on 20 April 2004, thus restoring public trust.<sup>126</sup>

Following this incident, allegations of academic result tampering were raised against Justice Faisal Mahmud Faizee, an additional judge of the High Court Division of Bangladesh Supreme Court.<sup>127</sup> The SJC was once again invoked, and they confirmed the truth of the allegation, finding that the accused judge tampered with his LLB certificate obtained from the University of Chittagong.<sup>128</sup> Despite the gravity of this accusation, 'the SJC ... did not consider it prudent to seek the President's direction ... for conducting an investigation'.<sup>129</sup> Nonetheless, both the Bangladesh Bar Council and the University of Chittagong acted by revoking his

<sup>117</sup> *A B M Altaf Hossain and others v Bangladesh and others* (2014) Civil Appeal No 232 together with CP 602 of 2017 and CP 2680 of 2014. Civil Appeal No 232 of 2014 and CP 602 of 2017.

<sup>118</sup> *Ibid.*

<sup>119</sup> 'Oath of Eight Newly Appointed HC Judges on Sunday', *New Age* (online, 9 February 2017) <<https://www.newagebd.net/article/8810/article/index.php>>.

<sup>120</sup> *Ibid.*

<sup>121</sup> M Ehteshamul Bari, *The Independence of Judiciary in Bangladesh: Exploring the Gap Between Theory and Practice* (Springer 2022) 138.

<sup>122</sup> 'Bail Fix Allegation Against Judge: CJ Sends File to President', *The Daily Star* (online, 21 October 2003) <<https://archive.thedailystar.net/2003/10/21/d3102101022.htm>>.

<sup>123</sup> *Ibid.*

<sup>124</sup> 'Bail Fix, Judge Shahidur Axed', *The Daily Star* (online, 21 April 2004) <<https://archive.thedailystar.net/2004/04/21/d4042101022.htm>>.

<sup>125</sup> *Md Idrisur Rahman v Syed Shahidur Rahman and Others* (2005) Civil Appeal No 145 with Civil Petition for Leave to Appeal No 405 of 2005, 56.

<sup>126</sup> 'Bail Fix, Judge Shahidur Axed', *The Daily Star* (online, 21 April 2004) <<https://archive.thedailystar.net/2004/04/21/d4042101022.htm>>.

<sup>127</sup> 'Justice Faizee's Advocate Ship Certificate Cancelled, Faces Criminal Case', *BDNEWS24.COM* (Online News Site, 24 April 2005) <<https://bdnews24.com/bangladesh/justice-faizee-s-advocate-ship-certificate-cancelled-faces-criminal-case>>.

<sup>128</sup> Bari (n 121) 139-40.

<sup>129</sup> *Ibid* 139.

advocate-enrolment license and LLB certificate.<sup>130</sup> Owing to the immense public pressure and the unprecedented move by the Bar Council, Chief Justice Ruhul Amin, immediately upon taking office, approached the President regarding Faizee's eligibility to remain a Supreme Court judge.<sup>131</sup> Once officially engaged, the SJC unearthed 'strong evidence of forgery'.<sup>132</sup> In due course, Faizee resigned from his judicial position.<sup>133</sup>

In February 2013, an allegation was raised against Justice Mizanur Rahman Bhuiyan, who was accused of distributing photocopies of a newspaper article reporting a blogger advocating the death sentence for all war criminals.<sup>134</sup> Due to the enormous pressure from the ruling party's MPs, some of them were also part of the government's ministerial cabinet, the SJC was engaged.<sup>135</sup> However, the allegation of 'misconduct' was not substantiated,<sup>136</sup> thus allowing the judge to continue his role without consequences.

Nevertheless, two exceptional modes of removal have recently emerged in Bangladesh, resulting in the displacement of superior judges from their positions without official explanations or adherence to formal procedures. To illustrate, SK Sinha, the former Chief Justice of Bangladesh,<sup>137</sup> who presided over the appeal against the decision of the High Court Division of Bangladesh Supreme Court on the 16<sup>th</sup> Amendment, was allegedly forced to resign from his office on 11<sup>th</sup> November 2017 by the ruling party.<sup>138</sup> This situation was exacerbated by disrespectful statements from influential ministers and a sudden surge of allegations from his fellow colleagues.<sup>139</sup> The implication of such an incident conveys a disconcerting message, creating a potential risk to tenure of superior judges in Bangladesh. When the Chief Justice, as leader of all superior judges, had to confront such a challenging predicament imposed by the executive branch, the independence and tenure assurance of other superior judges can easily come into question.

Recently, an incident involving the incapacitation of three judges from the High Court Division has also garnered significant attention. Three High Court judges, Justices Salma Masud Chowdhury, Quazi Reza-Ul Hoque and AKM Zahirul Hoque, have been under investigation for at least two years.<sup>140</sup> The SJC, comprised of Syed Mahmud Hossain, Justice Muhammad Imman Ali, and Justice Hasan Foez Siddique, requested written explanations from them in response to a complaint regarding alleged bribery.<sup>141</sup> Although they provided their

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<sup>130</sup> Ibid 138-9.

<sup>131</sup> Ibid 138-40.

<sup>132</sup> Ibid.

<sup>133</sup> Ibid 140.

<sup>134</sup> 'HC Judge to Face Investigation', *The Daily Star* (online, 26 February 2013) <<https://www.thedailystar.net/news-detail-270497>>.

<sup>135</sup> Ashutosh Sarkar, 'Justice Mizanur Cleared', *The Daily Star* (online, 5 August 2013) <<https://www.thedailystar.net/news/justice-mizanur-cleared>>.

<sup>136</sup> Ibid.

<sup>137</sup> The 21<sup>st</sup> Chief Justice in Bangladesh from January 2015 to November 2017.

<sup>138</sup> Partha Pratim Bhattacharjee, 'Awami League Leaders Now Calling for CJ to Step Down', *The Daily Star* (online, 23 August 2017) <<https://www.thedailystar.net/frontpage/al-leaders-now-calling-cj-step-down-1452682>>; David Bergman, 'Bangladesh: Chief Justice Alleges He was "Forced" to "Resign"', *Aljazeera* (online, 28 September 2018) <<https://www.aljazeera.com/news/2018/9/28/bangladesh-ex-chief-justice-alleges-he-was-forced-to-resign>>.

<sup>139</sup> 'Bangladesh Chief Justice Resigns Amid Criticism Over Constitutional Amendment Verdict', *Business Standard*, (online, 11 November 2017) <[https://www.business-standard.com/article/news-ians/bangladesh-chief-justice-resigns-amid-criticism-over-constitutional-amendment-verdict-117111100730\\_1.html](https://www.business-standard.com/article/news-ians/bangladesh-chief-justice-resigns-amid-criticism-over-constitutional-amendment-verdict-117111100730_1.html)>.

<sup>140</sup> 'Three HC Judges Out of Court for Two Years' *New Age* (online, 23 August 2021) <<https://www.newagebd.net/article/147021/three-hc-judges-out-of-court-for-two-years>>.

<sup>141</sup> Ibid.

explanations, the investigation remains unfinished, and they are no longer assigned to benches.<sup>142</sup> Interestingly, while they still enjoy professional benefits, they are no longer actively serving as functional judges.<sup>143</sup> This approach to rendering judges inactive can also be categorised as a form of de facto removal, which poses a threat to both individual and institutional judicial independence.

The examples depicted above suggest that in Bangladesh, incidents of de facto or masked removal of superior judges are more numerous than de jure or direct removal. Not only did the military regimes show little concern for judicial independence, the democratically elected governments too undermined judicial independence by removing superior judges, including the Chief Justices, without reasonable grounds.<sup>144</sup> Meanwhile, despite operating under different political regimes and facing pressure from partisan groups, the SJC has not compromised its integrity and independence.<sup>145</sup> This underscores the value of the SJC as a protective constitutional apparatus against any arbitrary, malicious, or politically questioned removal.

## V. THE INCOMPATIBILITY OF THE PARLIAMENTARY REMOVAL PROCESS IN THE LIGHT OF BANGLADESHI CONSTITUTIONAL LAWS AND POLITICS

On 22 September 2014, the Parliament unanimously passed the Constitution (16<sup>th</sup> Amendment) Bill 2014, despite fierce objections from the Bangladesh Nationalist Party (BNP), one of the two largest political parties in the country (but who were then expelled from the Parliament) and many senior lawyers.<sup>146</sup> Speaker Shirin Sharmin Chaudhury presided over the late-night passage of the Bill introduced by Law Minister Anisul Huq earlier in the day.<sup>147</sup> The Act, from drafting to final enactment, was processed hastily.<sup>148</sup> This Amendment to the Constitution granted the Parliament the authority to remove Supreme Court judges for any misconduct or incompetence, subject to the approval of two-thirds of members of Parliament.<sup>149</sup>

Ministers and spokespersons of the ruling party repeatedly claimed that the change was simply a return to the 1972 Constitution, which gave lawmakers the power to remove judges from their office.<sup>150</sup> Reformers also sought to defend the constitutional change on the ground that the process of removing judges is a policy decision that belongs to the Parliament.<sup>151</sup>

Nevertheless, the 16<sup>th</sup> Amendment, providing for the power of the Parliament to remove judges based

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<sup>142</sup> Ibid.

<sup>143</sup> Ibid.

<sup>144</sup> Bari (n 6).

<sup>145</sup> M Rafiqul Islam, 'The Judiciary of Bangladesh: Its Independence and Accountability' in HP Lee and Marilyn Pittard (eds), *Asia-Pacific Judiciaries: Independence, Impartiality and Integrity* (Cambridge University Press, 2017) 35-56.

<sup>146</sup> Moinul Huq Chowdhury et al, '16<sup>th</sup> Amendment Passed to Restore Parliament's Power to Sack Judges' BDNEWS24.COM (online, 18 September 2014) <<https://bdnews24.com/bangladesh/16th-amendment-passed-to-restore-parliaments-power-to-sack-judges>>.

<sup>147</sup> Ibid.

<sup>148</sup> Ibid.

<sup>149</sup> Ibid.

<sup>150</sup> '16<sup>th</sup> Amendment Debate: Here Is What You Need to Know', *Dhaka Tribune* (online, 18 August 2017) <<https://archive.dhakatribune.com/bangladesh/2017/08/18/16th-amendment-debate-need-know>>.

<sup>151</sup> *Advocate Asaduzzaman Siddiqui's case* (n 4).

on resolution is incompatible with the Constitution of Bangladesh in the following ways. First, the 16<sup>th</sup> Amendment is incompatible with judicial independence and constitutional supremacy. The separation of the judiciary from other branches of government is the cardinal kernel of judicial independence in Bangladesh as entrenched by the *Eighth Amendment Case*, as well as article 7B,<sup>152</sup> which is brought by the 15<sup>th</sup> Amendment to the Bangladesh Constitution. The challenged 16<sup>th</sup> Amendment has been declared ultra vires by the Supreme Court of Bangladesh due to the parliamentarians' direct intervening role in the judiciary.<sup>153</sup> It has been simultaneously the first ever use of article 7B, that has provided the constitutional recognition to the 'basic structure' doctrine endorsed by the *Eighth Amendment case*.<sup>154</sup> In the said case, the Chief Justice unequivocally declared that the SJC, which is embodied in article 96 of the Constitution, fosters the independence of the judiciary, pledged in article 94(4) of the Constitution.<sup>155</sup>

Essentially, the 16<sup>th</sup> Amendment was invalidated, because it empowered the Parliament to influence superior judges, which was incompatible with the constitutional pledges of judicial independence and the separation of powers. The government argued that the parliamentary removal procedure was based on 'popular sovereignty', which was a constitutional norm in Bangladesh.<sup>156</sup> It argued that judges too need to be accountable to the people through their representatives.<sup>157</sup> Attorney General Mahbubey Alam claimed that the parliamentary removal should not be treated as an institutional intervention but rather an institutional participation for balancing and ensuring the accountability of the State's organs.<sup>158</sup> The Court, however, rejected the approach, as the concept of 'popular sovereignty' was neither clarified nor addressed by the Constitution, which provides for 'constitutional supremacy'.<sup>159</sup> In Bangladesh, the Constitution serves as the solemn expression of people's will and entrusts its guardianship to the Supreme Court of Bangladesh through the latter's 'judicial review' powers.<sup>160</sup> This is considered one of the features of the basic structure of the Constitution of Bangladesh.<sup>161</sup> To the contrary, the Court observed that 'nowhere in [the] Constitution there is a provision to the effect that the Judiciary shall be responsible or accountable to the Parliament'.<sup>162</sup> Consequently, any legislative act, even where it concerns a constitutional amendment, can be examined and regulated by the Supreme Court, as is the case in other common law jurisdiction.<sup>163</sup> The government failed to justify the abolition of the SJC.

Criticising the constitutional reform, four eminent jurists Dr Kamal Hossain (the Chair of the original constitution drafting body), Barrister Amir-Ul-Islam (who was heavily involved in the work of the original

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<sup>152</sup> *Constitution of Bangladesh* (n 1) art 7B provides that 'the preamble, Part nos. I, II & III, Article 150, and all other provisions that relate to the basic structures of the Constitution are not amendable by way of insertion, modification, substitution, repeal or by any other means.'

<sup>153</sup> *Advocate Asaduzzaman Siddiqui's case* (n 4) [92-100].

<sup>154</sup> *Anwar Hossain Chowdhury v Bangladesh* (1989) 41 DLR (AD) 165 (Supreme Court of Bangladesh).

<sup>155</sup> *Advocate Asaduzzaman Siddiqui's case* (n 4) [352] - [354].

<sup>156</sup> *Ibid* [92] - [100].

<sup>157</sup> *Ibid* [28].

<sup>158</sup> *Ibid*.

<sup>159</sup> *Constitution of Bangladesh* (n 1) art 7: 'All powers in the Republic belong to the people, and their exercise on behalf of the people shall be effected only under, and by the authority of this Constitution. This Constitution is, as the solemn expression of the will of the people, the supreme law of the Republic, and if any other law is inconsistent with this Constitution and other law shall, to the extent of the inconsistency, be void.'

<sup>160</sup> *Ibid* arts 7(2), 26 and 102.

<sup>161</sup> *Constitution of Bangladesh* (n 1) arts 7(2), 26 and 102.

<sup>162</sup> *Advocate Asaduzzaman Siddiqui's case* (n 4) 144.

<sup>163</sup> Leonard B Rosenberg, 'Constitutional Supremacy: An Early Advocate of Judicial Review' (1969) 7(4) *Duquense Law Review* 515.

constitution drafting body), Advocate Mahmudul Islam (a leading constitutional jurist and former Attorney General of Bangladesh) and Barrister Rokonuddin Mahmud (a renowned constitutional lawyer) questioned the effectiveness of the removal process and pointed to its constitutional and political anomalies.<sup>164</sup> Citing Hormasji Maneckji Seervi (a prominent Indian scholar),<sup>165</sup> they argued that judicial independence (especially the powers of the courts to judicially review the actions of the legislature) is at risk if superior judges are exposed to politics.

Second, Bangladesh adopts a unicameral legislature system, which is particularly unsuited for the parliamentary removal model. Despite the variations found in different jurisdictions regarding the processes of removing judges, the concern of judicial independence is universal and needs to be adequately recognised within any democratic constitutional framework.<sup>166</sup> According to the constitutions of various democratic countries, such as India, USA, UK, Canada, Australia, South Africa, New Zealand, Sri Lanka and others, the parliaments have the authority to impeach high-ranking governmental officials including judges.<sup>167</sup>

Prior to passing the 16<sup>th</sup> Amendment, the Law Ministry studied the removal systems of the leading democracies such as the UK, USA, Canada, Australia, India, and Sri Lanka.<sup>168</sup> However, law and policymakers completely overlooked the bicameral legislature and objective debating culture of the parliamentarians in those jurisdictions.<sup>169</sup> Furthermore, the political context and the long history of disrupted judicial independence in Bangladesh were ignored when the current government considered this parliamentary removal process.<sup>170</sup> However, evaluating the suitability and significance of any legal procedure through constitutional borrowing poses a challenge.<sup>171</sup> This is because it is not simply a matter of transplanting these elements, assuming they will function seamlessly.<sup>172</sup> Similar to many delicate democracies, Bangladesh also tends to adopt a copy-and-paste approach to legal rules, without adequately assessing their resilience in the current context.<sup>173</sup>

Third, the Parliament of Bangladesh is dominated by one single political alliance.<sup>174</sup> The concern over manipulating the parliamentary removal of judges while undermining judicial independence appears significant in Bangladesh, owing to its political culture over the past two decades and the delicate nature of the

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<sup>164</sup> 'Impeachment Bill: 4 Jurists Urge Consultation', *The Daily Star* (online, 08 September 2014) 10 <<https://epaper.thedailystar.net/Main%20Edition?eid=1&edate=08/09/2014&pgid=128118&device=desktop&view=2>>.

<sup>165</sup> See Hormasji Maneckji Seervi, *The Position of Judiciary under the Constitution of India: Sir Chimanlal Setarval Lectures* (University of Bombay Press, 1970).

<sup>166</sup> Peter M Shane, 'Interbranch Accountability in State Government and the Constitutional Requirement of Judicial Independence' (1998) 61(3) *Law and Contemporary Problems* 22.

<sup>167</sup> *Advocate Asaduzzaman Siddiqui's case* (n 4).

<sup>168</sup> Bari (n 121) 137-55.

<sup>169</sup> *Ibid.*

<sup>170</sup> Noriyuki Asano and Kazuki Minato, 'Politicisation of the appointment and removal of judges in a declining democracy: the case of Bangladesh' (Discussion Paper No 758, Institute of Developing Economies, Japan External Trade Organization, 2019) <<https://core.ac.uk/download/pdf/288469659.pdf>>.

<sup>171</sup> Bruce Ackerman, 'Constitutional Politics/Constitutional Law' (1989) 99 *Yale Law Journal* 453.

<sup>172</sup> Morton J Horwitz, 'Constitutional Transplants' (2009) 10(2) *Theoretical Inquiries in Law* 535, 536.

<sup>173</sup> Arpeeta Shams Mizan, 'The Law of Language and the Language of the Law: A Socio-Legal Appraisal of Colonial Legal Language in Bangladesh' (2021) 32 *Dhaka University Law Journal* 119.

<sup>174</sup> Rounaq Jahan, 'The Parliament of Bangladesh: Representation and Accountability' (2015) 21(2) *The Journal of Legislative Studies* 250.

Westminster parliamentary system.<sup>175</sup> The presence of an overwhelming majority in the Parliament from a single political alliance has cast a shadow on fair political competition.<sup>176</sup> The last four terms since 2001 witnessed an absolute majority of two major alliances headed by either Bangladesh Awami League or Bangladesh Nationalist Party (BNP).<sup>177</sup> This alliance has controlled the Parliament and is unlikely to face any challenges in enforcing any political agenda.<sup>178</sup> This political scenario becomes more concerning due to the undemocratic implications of Article 70 of the Constitution,<sup>179</sup> which prevents parliamentarians from voting against the wishes of their political parties. The anti-floor crossing law has eroded the freedom of expression, conscience and the decision-making capacity of MPs.<sup>180</sup> This inherently undemocratic law blatantly serves to enforce the desires of the Prime Minister and her ruling party, overshadowing the individual opinions of any member of the Parliament.<sup>181</sup> In practice, they are rarely emboldened to engage in objective debates within the Parliament.

The political setting in Bangladesh affects the integrity of the judges removal process (by Parliamentary resolution) in two ways: (i) the Parliament, with its absolute majority, can remove a judge based on any allegations without prior investigation without any opposition; (ii) conversely, a judge will never have to be removed, no matter what the allegation is and how strong the evidence, as long as he or she has the support of the political alliance. In practice, not only does the process undermine judicial independence, it also encourages political parties to retain judges at their discretion, without considering their individual merits or qualifications. This significantly impacts the quality of the country's judiciary.

The above factors highlighting how the parliamentary removal process may impede the constitutional development of Bangladesh stand in stark contrast to the reasons why the SJC is particularly suitable for Bangladesh. Specifically, the SJC meets the requirements laid down in the Latimer House Guidelines, which stipulates fair trial protections in judge removal procedures.<sup>182</sup> It also complies with the observations from the UN Human Rights Committee, which objects to any executive interference with such procedures.<sup>183</sup> In Commonwealth countries, approximately 42% of these nations practice ad hoc tribunals, while 33% adopt parliamentary resolutions for judge removal.<sup>184</sup> The ad hoc tribunals bear strong similarities to the SJC of Bangladesh, as both consist of either serving or retired judges, and both are empowered to independently conduct investigations and subsequently make recommendations.<sup>185</sup> The Head of State typically oversees the official act of removal from office, once the ad hoc tribunal's decision is reached.

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<sup>175</sup> Md Emdadul Haque, 'Constitutional Amendments in Bangladesh: Political Trends and Debates' (2017) 3(4) *Journal of Asian and African Social Science and Humanities* 56, 76-77.

<sup>176</sup> Ibid.

<sup>177</sup> Mohammad Moniruzzaman, 'Parliamentary Democracy in Bangladesh: An Evaluation of the Parliament During 1991– 2006' (2009) 47(1) *Commonwealth & Comparative Politics* 100.

<sup>178</sup> Jahan (n 174).

<sup>179</sup> *Constitution of Bangladesh* (n 1) art 70: 'A person elected as a member of Parliament at an election at which he was nominated as a candidate by a political party shall vacate his seat if he resigns from that party or votes in Parliament against the party.'

<sup>180</sup> Khabele Matlosa and Victor Shale, 'The Impact of Floor-Crossing on Party Systems and Representative Democracy: The Case of Lesotho' (2008) 7(1) *Journal of African Elections* 138.

<sup>181</sup> Joseph Smiles, 'Floor Crossing in South Africa: A Controversial Democratic Process' (2011) 3(2) *Insight on Africa* 159, 160-1.

<sup>182</sup> *Commonwealth Latimer House Principles* (n 20).

<sup>183</sup> UN Human Rights Committee, *General Comment 32: Right to Equality Before Courts and Tribunals and to a Fair Trial*, 90th sess, UN Doc CCPR/C/GC/32 (23 August 2007), [20].

<sup>184</sup> van Zyl Smit (n 7) 91.

<sup>185</sup> Ibid 92.

The SJC fulfils both constitutional supremacy and the judicial independence. It can safeguard judicial independence and has no impact on the parliamentary process, which is unfairly manipulative due to the dominance of a single political alliance in the legislature.

## VI. CONCLUSIONS

Within the first decade of the adoption of its first democratic constitution, Bangladesh faced two instances of usurpation.<sup>186</sup> For 16 years, unelected governments disrupted regular political practices.<sup>187</sup> Reflecting on the nation's founding, enhancing the judiciary's independence and security could have been a crucial step to fortify democracy, as seen in the experiences of other newly democratised states.<sup>188</sup>

Nonetheless, judicial independence is continually under threat through the judge removal process under the 16<sup>th</sup> Amendment.<sup>189</sup> This is particularly worrying given that the Bangladesh politics is dominated by one political power and the existence of anti-floor crossing laws, which further prevents objective debates within the Parliament. In similar vein, the International Commission of Jurists, immediately after the passage of the 16<sup>th</sup> Amendment, expressed its deep concern about the independence and future of Bangladesh's judiciary.<sup>190</sup>

The evolving international standards for an independent judiciary should be a fundamental aspiration for any democracy. Considering the nation's unicameral parliament structure, a parliamentary removal procedure is only appropriate if investigations into judicial misconduct are conducted by an independent body of judges, such as the SJC. The recommendations provided by such a commission regarding the presence of misconduct should carry binding authority over the Parliament when it deliberates any resolution for the removal of judges.

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<sup>186</sup> Muhammad Dawood, 'The Causes of Military Interventions in Politics: A Case Study of Pakistan and Bangladesh' (2014) (August) *European Scientific Journal* 283.

<sup>187</sup> Mubashar Hasan, 'The Geopolitics of Political Islam in Bangladesh' (2012) 14(1-2) *Harvard Asia Quarterly* 60.

<sup>188</sup> Christopher M Larkins, 'Judicial Independence and Democratization: A Theoretical and Conceptual Analysis' (1996) 44(4) *The American Journal of Comparative Law* 606.

<sup>189</sup> *Constitution of Bangladesh* (n 1) art 7(1): 'All powers in the Republic belong to the people...'.

<sup>190</sup> 'Bangladesh: ICJ Urges Parliament to Ensure Laws Governing Impeachment of Supreme Court Judges Respect the Independence of the Judiciary', *International Commission of Jurists* (Web Page, September 24 2014) <<https://www.icj.org/bangladesh-icj-urges-parliament-to-ensure-laws-governing-impeachment-of-supreme-court-judges-respect-the-independence-of-the-judiciary/>>.