THE RECENT CHANGES INTRODUCED TO THE METHOD OF REMOVAL OF JUDGES OF THE SUPREME COURT OF BANGLADESH & THE CONSEQUENT TRIUMPH OF AN ALL-POWERFUL EXECUTIVE OVER THE JUDICIARY: JUDICIAL INDEPENDENCE IN PERIL

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ABSTRACT

Nothing contributes more to the firmness and independence of the judiciary as permanency in office, as it enables judges to decide cases, regardless of whether their decisions please the executive or the legislature. The Constitution of Bangladesh, 1972, originally empowered the Parliament to remove judges of the Supreme Court only on the grounds of proved misbehavior or incapacity. However, the Constitution (Fourth Amendment) Act, 1975, which replaced parliamentary democracy with a presidential form of government, empowered the President to remove the judges of the Supreme Court in accordance with his own will. But two years later in April 1977, the Martial Law regime of General Zia, once again changed the method of removal of the judges through a Proclamation Order, which was later validated by the Constitution (Fifth Amendment) Act, 1979. This removal procedure stipulated that a judge of the Supreme Court could only be removed from office by the President on the recommendation of the Supreme Judicial Council, which was to be composed of the Chief Justice of the nation and the two next senior judges of the Supreme Court. This method of removal of judges was consistent with the international norms concerning judicial independence. However, the current government of Bangladesh Awami League (BAL) used its absolute majority in the Parliament to pass the Constitution (Sixteenth Amendment) Act, 2014 for repealing this transparent method of removal. Instead, this amendment once again vested the power to remove judges in the Parliament. The Supreme Court, however, in July 2017, under the

stewardship of Chief Justice SK Sinha declared that the Sixteenth Amendment was ultra vires the Constitution. In retaliation for the Chief Justice's fearless judgment in the Sixteenth Amendment Case, the regime of BAL not only forced him to resign from office, but also to leave the country. The objective of this Article is to demonstrate that the enactment of the Sixteenth Amendment and the subsequent measures have been preferred for bringing the superior judiciary under the control of an all-powerful executive. It will be shown that these measures have unduly impaired the independence of the judges to decide cases without the fear of adverse consequences. Consequently, this Article will put forward recommendations for safeguarding the independence of the superior judiciary.

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I. INTRODUCTION

An independent judiciary is indispensable to the very existence of any society based on democratic values, such as the observance of the rule of law and respect for the human rights of individuals.[1] For only an independent judiciary can uphold the supremacy of law over the arbitrary exercise of power by either the executive or legislature, guarantee the equal protection of law to all people without exception, and ensure that cases pending before it are decided on their legal and factual merits.[2] The judiciary's ability to decide cases impartially in accordance with the dictates of law guarantees that the "lamp of justice" does not go "out in darkness,"[3] and that public confidence in the administration of justice also remains unshaken and unaffected. Referring to the importance of an independent judiciary, Henry Sidgwick has gone so far as to say that "in determining a nation's rank in political civilization, no test is more decisive than the degree in which justice as defined by the law is actually realized in its judicial administration; both as between one private citizen and another, and as between citizens and members of the Government."[4]

In order to ensure that the judiciary's interpretation of the law is not bound by the will of the executive and that it is able to call the executive accountable by protecting the life, as well as liberty of the governed, it is imperative to guarantee, among other things, the

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1 Francis J. Larkin, *The Variousness, Virulence, and Variety of Threats to Judicial Independence*, 36 JUDGES J. 4, 7 (1997); M. EHTESHAMUL BARI, STATES OF EMERGENCY AND THE LAW: THE EXPERIENCE OF BANGLADESH 1, 42 (2017).

2 Liversidge v. Anderson [1942] A.C. 206, 244 (Can.).

3 2 JAMES BRYCE, MODERN DEMOCRACIES 384 (1921).

4 HENRY SIDGWICK, THE ELEMENTS OF POLITICS 481 (1897).

security of tenure of judges.[5] The guarantee of security of tenure enables judges to arrive at their decisions free from interference of the political branches, namely, the executive and the legislative, and without any apprehension of suffering personally as a result of such decision-making.[6] As Sir Harry Gibbs, the former Chief Justice of Australia, observed:

> no judge should have anything to hope or fear in respect of anything which he or she may have done properly in the course of performing judicial functions. So neither the parliament nor the executive should be able to bring pressure of any kind to bear upon a judge in the performance of judicial duties.[7]

Taking into account the importance of an independent judiciary in a democratic society, the framers of the Constitution of Bangladesh, 1972, incorporated elaborate provisions in the Constitution to shield judges from the improper influences of the political branches of government in the performance of their judicial functions. In this context, reference can be made, for example, to the provisions contained in Articles 22 and 94(4) of the Constitution. First, Article 22 stipulates that the "State shall ensure the separation of the judiciary from the executive organs of the State."[8] Second, Article 94(4) provides that: "Subject to the provisions of this Constitution the Chief Justice and the other Judges shall be independent in the exercise of their judicial functions."[9] It can be strongly argued that these constitutional guarantees, which protect the independence of the judiciary, are necessary for realizing the fundamental aim of the state, as is evidenced from the third preamble paragraph of the Constitution, "to realise . . . a society

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5 *See* M. Ehteshamul Bari, *The Substantive Independence of the Superior Judiciary Under the Constitutions of Bangladesh and Malaysia: A Comparative Study* 9-10 (2011) (unpublished L.L.M. Thesis, University of Malaya) (on file with author and the Ahmad Ibrahim Library, University of Malaya) [hereinafter Bari, The Substantive Independence of the Superior Judiciary]; RM DAWSON, THE GOVERNMENT OF CANADA 486 (1954); J. VAN ZYL SMIT, THE APPOINTMENT, TENURE AND REMOVAL OF JUDGES UNDER Commonwealth Principles: A Compendium And Analysis Of Best Practice 67-68 (2015); Canadian Judicial Council, Why Is Judicial Independence Important To You? 14 (2016).

6 DAWSON, *supra* note 5*;* CANADIAN, *supra* note 5.

7 *Quote, in* PARLIAMENTARY SUPREMACY AND JUDICIAL INDEPENDENCE: A COMMONWEALTH APPROACH 82 (John Hatchard & Peter Slinn ed., 1999).

8 BANGL. CONST., art. 22.

9 *Id*., art. 94(4).

in which the rule of law, fundamental human rights and freedom, equality and justice . . . will be secured for all citizens . . . ."[10]

It is evident from the above discussion that the concept of independence of the judiciary is the cornerstone within the scheme of the Constitution of Bangladesh. Consequently, the Appellate Division of the Supreme Court in the case of *Anwar Hossain Chowdhury and Others v. Bangladesh,*[11] has recognized the principle of the independence of the judiciary as one of the basic features or structures of the Constitution,[12] i.e., one of the structural pillars on which the constitutional edifice is built upon, and which, if altered, will cause the entire edifice to crumble. Thus, the principle of judicial independence, as guaranteed by the Constitution of Bangladesh, is placed beyond the powers of the transient majority in the Parliament to wipe out by the "amendatory process."[13]

In order to further the principle of judicial independence, the Constitution, as amended by the Proclamations (Tenth Amendment) Order, 1977[14] and later validated by the Constitution (Fifth Amendment) Act, 1979, stipulated a transparent procedure for the removal of judges of the Supreme Court—the highest court of law in Bangladesh.[15] The Constitution provided that a judge of the Supreme Court could only be removed from office by the recommendation of a body headed by the Chief Justice of the country and additionally composed of the two senior-most judges of the Supreme Court.[16] Thus, the Constitution guaranteed the security of tenure of the judges by ensuring that they could not be removed from office at the whim of the political branches of the government. However, on September 17, 2014, the current regime of Bangladesh Awami League (BAL) used its absolute majority in the Parliament, to pass the Constitution (Sixteenth Amendment) Act, 2014, which replaced this transparent method of removal of judges with a controversial parliamentary method of removal.[17]

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10 BANGL. CONST., Mar. 26, 1971, pmbl.

11 *Anwar Hossain Chowdhury and Others v. Bangladesh* (1989) 18 CLC (AD).

12 *Id.* ¶ 347.

13 *Id.* ¶ 416.

14 Proclamations (Tenth Amendment) Order, 1977, art. 2; *see* BARI, *supra* note 1, at 203.

15 M. Ehteshamul Bari, *The Incorporation of the System of Non-Party Caretaker Government in the Constitution of Bangladesh in 1996 as a Means of Strengthening Democracy, Its Deletion in 2011 and the Lapse of Bangladesh into Tyranny Following the Non-Participatory General Election of 2014: A Critical Appraisal*, 28 (1) TRANSNAT'L L. & CONTEMP. PROBS. 27, 80 (2018).

16 BANGL. CONST., Nov. 4, 1972, art. 96(3), (5), (6).

17 BANGL. CONST., Nov. 4, 1972, amend. XVI § 2.

This Article will first shine light on the importance of the security of tenure of the judges as a constituent element of judicial independence. Subsequently, it will examine the method of removal of judges of the superior courts, as originally stipulated by the 1972 Constitution of Bangladesh, and the various amendments introduced to the method of removal over the years. The objective of this examination will be to demonstrate that the method of removal of judges involving the Supreme Judicial Council, as introduced by the Martial Law regime of General Zia, was more conducive to maintaining the independence of the judiciary.[18] To this end, this Article will also critically evaluate the functioning of the Supreme Judicial Council in safeguarding the independence of the judiciary. Subsequently, it will be made manifestly evident that the deletion of the constitutional provisions concerning this transparent procedure of the removal of the judges of the Supreme Court through the Constitution (Sixteenth Amendment) Act, 2014 and the subsequent measures, for instance, forcing the Chief Justice of the country to not only resign from office, but to also leave the country for declaring the Sixteenth Amendment unconstitutional, have been preferred for exerting the supremacy of the BAL government over the judiciary.[19] Furthermore, light will be shed on the fact that these adverse measures have substantially impaired the ability of the judges of the Supreme Court to administer justice without the fear of adverse consequences. Consequently, this Article will put forward recommendations for ensuring that the superior judiciary in Bangladesh can once again assume its status of "an impenetrable bulwark against every assumption of power in the legislature or executive."[20]

II. THE IMPORTANCE OF THE SECURITY OF TENURE OF THE JUDGES AS A CONSTITUENT ELEMENT OF JUDICIAL INDEPENDENCE

The principle of the independence of the judiciary implies that "judges are not dependent on governments in any way which might influence them in coming to decisions in individual cases."[21] In other words, individual judges should be independent of the political

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18 *See infra* Part III.

19 *See infra* Parts V-VII.

20 Alfred P. Carlton Jr., *Preserving Judicial Independence: An Exegesis*, 29 FORDHAM URB. L. J. 835, 835-36 (2002) (quoting James Madison, Speech to the House of Representatives (June 8, 1789), *reprinted in* 12 THE PAPERS OF JAMES MADISON 198, 207 (Robert A. Rutland et al. eds., 1977)).

21 J.A.G. GRIFFITH, THE POLITICS OF THE JUDICIARY 29 (3rd ed. 1977).

branches of government, especially the executive, so that they have "nothing to lose by doing what is right and little to gain by doing what is wrong."[22]

Consequently, it can be argued that there is nothing that can contribute more to the firmness and independence of the judiciary as the security of tenure of the judges. For such security enables them to decide cases regardless of whether their decisions are in line with the desires of the political branches of the government.[23] Therefore, once appointed, a judge should remain in office for a long term, preferably for life[24] or until he attains a specified age.[25] This argument is further bolstered by reference to the international standards on the independence of judges, such as the International Bar Association's Minimum Standards of Judicial Independence, 1982, which, among other things, stipulates that: "Judicial appointments should generally be for life, subject to removal for cause and compulsory retirement at an age fixed by law at the date of appointment."[26] A judge should be removable from office only for misconduct or incapacity, whether physical or mental, "that clearly renders . . . [him] unfit to discharge . . . [his] duties."[27] Such removal must be made a difficult process, involving careful consideration by more than one person. Otherwise, a judge would be made vulnerable to the process being used against him by the government of the day for "applying the law as . . . [he] saw it,"[28] thereby preventing him from acquiring the habit of independence requisite in his office.

Accordingly, the international norms concerning judicial independence advocate for a transparent method for the removal of judges, which is not susceptible to the influence of the political branches of the government.[29] In this context, reference can be made, in the first

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22 Martin L. Friedland, *Judicial Independence and Accountability in Canada*, 59 ADVOCATE (VANCOUVER) 859, 861 (2001) (quoting R. MCGREGOR DAWSON, THE GOVERNMENT OF CANADA 486 (University of Toronto Press, 1954)).

23 MIA SWART, INDEPENDENCE OF THE JUDICIARY 33 (2019).

24 U.S. CONST. art. III § 1 (stipulating that the "Judges, both of the supreme and inferior Courts, shall hold their Offices during good behavior.").

25 Australian Constitution s 72 (stipulates that "[t]he appointment of a Justice of the High Court shall be for a term expiring upon his attaining the age of seventy years.").

26 International Bar Association's Minimum Standards of Judicial Independence, art. 22 (1982).

27 SMIT, *supra* note 5, at 79.

28 *Chapter 3: Removal From Office*, 41(4) COMMW. L. BULL. 523, 524 (2015).

29 Congress of Delhi, 1959, Committee IV, cl. 4; SMIT, *supra* note 5, at xxi.

instance, to the recommendation of the International Congress of Jurists, which was held in New Delhi in 1959, that:

> [t]he reconciliation of the principle of irremovability of the judiciary with the possibility of removal in exceptional circumstances necessitates that the grounds for removal should be before a body of judicial character assuring at least the same safeguards to the judge as would be accorded to an accused person in a criminal trial.[30]

Furthermore, in the same vein, the Latimer House Guidelines for the Commonwealth, 1998, *inter alia*, provide that "[i]n cases where a Judge is at risk of removal, the Judge must have the right to be fully informed of the charges, to be represented at a hearing, to make full defense and to be Judged by an independent and impartial tribunal."[31] It is noteworthy that a majority of the Commonwealth jurisdictions invest either ad hoc or permanent disciplinary tribunals with the responsibility of inquiring into the facts alleged against a judge and of subsequently recommending, if proved, the removal of the concerned judge from office.[32]

The issue with ad hoc tribunals is that their composition is generally not specified by constitutions.[33] Consequently, they provide the executive with the leeway to pack tribunals with loyalists, thereby enabling the branch to influence the functioning of the tribunals. In order to substantiate this argument, reference can be made to the removal method prescribed by the Federal Constitution of Malaysia, which in Article 125(4) entrusts the *Yang di-Pertuan Agong*—the head of the State—with the authority to appoint the members of the tribunal constituted for investigating whether a judge of the Federal Court should be removed from office "on the ground of any breach of any provision of the code of ethics . . . or on the ground of inability, from infirmity of body or mind or any other cause," which has impeded his ability to properly "discharge the functions of his office."[34] The susceptibility of this removal method to executive manipulation was manifestly apparent during the judicial crisis of 1988.

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30 Congress of Delhi, 1959, Committee IV, cl. 4.
31 SMIT, *supra* note 5, at xxi.
32 Congress of Delhi, 1959, Committee IV, cl. 4 at 533-34.
33 *See* MALAYSIA CONST. art. 125.
34 MALAYSIA CONST. art. 125(3).

The crisis began when the Government, led by Mahathir Mohamad and angered by some of the decisions of the superior judiciary, persuaded the Parliament to amend Article 121 of the Constitution for depriving the courts of the judicial power of the Federation.[35] Consequently, courts in Malaysia are to exercise only those powers granted to them by the Parliament. When the head of the judiciary—Lord President of the Supreme Court, Tun Salleh Abas—took a stand against these arbitrary actions aimed at limiting the independence of the judiciary,[36] Mahathir advised the *Yang di- Pertuan Agong* to remove the Lord President from office on account of misconduct.[37] As a result, for the first time in the nation's history, the *Yang di-Pertuan Agong* appointed a tribunal under Article 125(3) of the Constitution to investigate the allegations of misconduct brought against the Lord President, who had been suspended pending the determination of the tribunal. It is striking that in exercising the powers under Article 125(4) of the Constitution, the executive entrusted the person who stood to benefit the most from the removal of Lord President Abas, namely, Acting Lord President Tan Sri Abdul Hamid Omar, with the responsibility of heading the Tribunal.[38] Consequently, in accordance with the designs of the government of the day, the tribunal recommended the removal of Lord Abas from office.[39] Based on this recommendation, the *Yang di-Pertuan Agong* formally removed Tun Salleh Abas from the office of the Lord President. The judicial crisis of 1988—a crisis "from which the nation never fully recovered"[40]—is considered a "watershed" moment in the judicial history of Malaysia, which compromised "both the appearance and reality of judicial autonomy."[41]

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35 Bari, The Substantive Independence of the Superior Judiciary, *supra* note 5, at 27-28.

36 Lord President Abas issued a statement stressing the importance of an independent judiciary. He also chaired a meeting of the judges of the Supreme Court in Kuala Lumpur, in which he persuaded the judges to send a joint letter to the *Yang di-Pertuan Agong*. This letter read: "All of us are disappointed with the various comments and accusations made by the honourable prime minister against the judiciary, not only outside but within the Parliament." Shaila Koshy, Chelsea L.Y. Ng, Shahanaaz Habib, Cecil Fung, Teh Eng Hock & Jo Teh, *Events That Led to Judicial Crisis of '88*, STAR (Apr. 18, 2008), https://www.thestar.com.my/news/nation/2008/04/18/events-that-led-to-judicial-crisis-of-88.

37 Yvonne Tew, *On the Uneven Journey to Constitutional Redemption: The Malaysian Judiciary and Constitutional Politics*, 25 WASH. INT'L. L.J. 673, 679 (2016).

38 *Id*.

39 *Id*.

40 Bari, *supra* note 15, at 60.

41 HARDING, *quoted in* Tew, *supra* note 37, at 679.

By way of contrast, it can be argued that the establishment of a permanent disciplinary tribunal preserves the objectivity and fairness of the removal proceedings initiated against a judge of the superior court provided that the constitution of a nation itself specifies the composition of the tribunal and confines the membership to senior members of the superior judiciary, for obviating the possibility of either the executive or the legislature influencing the functioning of the tribunal. To this end, the provisions of the 1973 Constitution of Pakistan deserve special attention. The Constitution, in the first instance, establishes a Supreme Judicial Council for enquiring whether a judge of the superior judiciary is either incapable of properly performing the duties of his office, due to physical or mental incapacity or is guilty of misconduct.[42] Subsequently, it confines the membership of the Council to the senior members of the superior judiciary, namely, the Chief Justice of Pakistan, the two next most senior judges of the Supreme Court and the two most senior Chief Justices of the High Courts.[43] Thus, it is evident that a permanent disciplinary tribunal meeting the above requirements is more conducive to upholding the independence of the judiciary from the political branches of the government.

Having discussed the importance of the security of tenure of the judges for safeguarding the independence of the judiciary, the constitutional provisions concerning the removal of the judges of superior courts of Bangladesh will be discussed in Part III.

III. THE PROCEDURE OF REMOVAL OF THE JUDGES OF THE SUPERIOR COURTS UNDER THE ORIGINAL PROVISIONS OF THE CONSTITUTION OF BANGLADESH, 1972

Before discussing the method of removal of the judges of superior courts of Bangladesh as originally stipulated by the 1972 Constitution of Bangladesh, it is appropriate to briefly discuss the provisions concerning the structure and function of the Supreme Court (SC)—the highest court of the land—which are contained in Part V, Chapter I of the Constitution.

The Constitution stipulates that the SC shall be composed of two divisions, namely the Appellate Division (AD) and the High Court Division (HCD).[44] The Constitution has vested the HCD with original and appellate jurisdictions and powers, while the AD has been

42 PAKISTAN CONST. art. 209(1), read together with arts. 209(5) and (6).
43 *Id*. art. 209(2).
44 BANGL. CONST., Mar. 26, 1971. art. 94(1).

entrusted with the authority "to hear and determine appeals from judgments, decrees, orders or sentences" of the HCD.[45] The AD however, has been entrusted with the authority "to hear and determine appeals from judgments, decrees, orders or sentences" of the HCD.[46]

The Constitution originally provided that a judge of the SC could hold office until he attained the age of 62 years.[47] He could only be removed from his 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 misbehavior or incapacity."[48] The Parliament was further empowered to regulate by law the procedure that dictated the resolution for removal, investigation and proof of the misbehavior or the incapacity of a judge of the SC.[49] It seems that these constitutional provisions, which empower the Parliament to regulate by law the procedure for removal of the judges, were closely modeled after Article 124(4) and (5) of the Constitution of India, 1950.[50] Article 124(4) of the Indian Constitution stipulates that a judge of the Supreme Court cannot be removed from office unless the President passes an order pursuant to a resolution passed by two-thirds of the members of each house of the Parliament praying for such removal on the ground of "proved misbehaviour or incapacity."[51] Furthermore, Article 124(5) empowers the Parliament to regulate by law the procedure "for the investigation and proof of the misbehavior or incapacity of a Judge."[52] However, unlike the Parliament of India, which enacted the Judges (Inquiry) Act of 1968 pursuant to Article 124(5) of the Constitution to establish the procedure for the removal of a judge on the grounds of proved misbehavior or incapacity, the Parliament of Bangladesh did not pass any such Act pursuant to the constitutional provisions.

Thus, it is evident that under the original constitutional provisions in Bangladesh, the judges of the SC were to hold office for extended terms and could not be removed during their tenure by the President acting alone, even for acts of misbehavior or due to incapacity. However, since the Constitution of Bangladesh does not provide for the strict separation of powers between the executive and legislative

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35 *Id*. at art 101.
46 *Id*. at art 103.
47 *Id*. at original art. 96(1).
48 *Id*. at original art. 96(2).
49 *Id*.
50 *See* INDIAN CONST. art. 124(4).
51 *Id.*
52 *Id*. at art. 124(5).

branches of the government by mandating that at least "nine-tenths of [cabinet members] shall be appointed from among members of Parliament,"[53] it can be argued that the executive could adversely influence the removal procedure of the judges, if it commanded the support of two-thirds of the total number of members of the Parliament.

A. The Changes Introduced to the Method of Removal of the Judges of the Supreme Court of Bangladesh by the Constitution (Fourth Amendment) Act, 1975

The most far-reaching amendment to the Constitution of Bangladesh, i.e., the Constitution (Fourth Amendment) Act, was enacted by the regime of Sheikh Mujibur Rahman (Mujib), who had ascended to the office of Prime Minister on January 11, 1972, riding a wave of popular support, on January 25, 1975.[54] The amendment was passed at a time when the nation was under a state of emergency, which was proclaimed on December 28, 1974, as a means for perpetuating Mujib's rule.[55] Mujib through the enactment of the Fourth Amendment, substituted a parliamentary democracy with a government presidential system based on the American model.[56]

However, unlike the American model, the presidential system envisaged by the Fourth Amendment was devoid of any reliable system of checks and balances for constraining the powers of the President.[57] For instance, the amendment substantially curtailed the competence of the Parliament to hold the President accountable for his transgressions, such as violating the terms of the Constitution, grave misconduct, or physical or mental incapacity, by stipulating that any initiative to impeach or remove the President had to receive the support of at least two-thirds of the total number of the Members of the Parliament (MPs) and subsequently had to be passed by no less than three-fourths of the total number of MPs.[58] Since Mujib's party, the BAL, commanded the support of 293 of the 300 MPs,[59] it was highly unlikely that such an initiative, which would seek the impeachment of the President, would see the light of day. It is noteworthy that although

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53 BANGL. CONST. proviso to art. 56(2).
54 BARI, *supra* note 1, at 173.
55 *Id*. at 175-77.
56 BARI, *supra* note 1, at 175.
57 *Id.*
58 BANGL. CONST. amend. IV, § 4.
59 Jalal Firoj, *Forty Years of Bangladesh Parliament: Trends, Achievements, and Challenges*, 58 J. ASIATIC SOC'Y. BANGL. 83, 85 (2013).

the Fourth Amendment stipulated a direct popular election of the President, no such election was conducted.[60] Rather the Fourth Amendment proclaimed Mujib to be the holder of the office of the "President of Bangladesh as if [he was] elected to that office under the Constitution as amended by this Act [the *Constitution (Fourth Amendment) Act*]."[61]

Furthermore, the Fourth Amendment granted President Mujib the unfettered power to declare Bangladesh a one-party state in order to give "full effect to any of the fundamental principles of state of policy" of socialism, nationalism, secularism, and democracy contained in Part II of the Constitution.[62] Consequently, on February 24, 1975, Mujib issued an Order declaring Bangladesh a one-party state.[63]

In line with the above changes, the Fourth Amendment also altered the method of removal of the judges of the SC.[64] Although the Act retained the original provision of the Constitution that a judge of the SC would hold office until he attained the age of sixty-two years, it inserted a new provision which stated that: "A judge may be removed from his office by the President on the ground of misbehavior or incapacity."[65] Thus, President Mujib was invested with the blanket unilateral power to remove the judges of the SC, thereby effectively signaling the end of the independence of the superior judiciary.

B. The Changes Introduced to the Method of Removal of Judges by the Martial Law Regime of 1975

Since the changes introduced by the Fourth Amendment turned Bangladesh into a dictatorship obviating the possibility of a democratic change of government, the nation on August 15, 1975, witnessed not only the assassination of Mujib and his family by a group of Army Officers, but also the declaration of Martial Law.[66] It is pertinent to note here that Martial Law was invoked in Bangladesh notwithstanding the fact that the country was already under a state of emergency, which, as pointed out above in Part III.A, had been declared on December 28, 1974.[67]

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60 BARI, *supra* note 1, at 175.
61 BANGL. CONST. amend. IV, § 35.
62 *Id*. § 23.
63 BARI, *supra* note 1, at 176.
64 BANGL. CONST. amend. IV, § 15.
65 *Id*.
66 BANGL. PROCLAMATION OF MARTIAL LAW, Aug. 20, 1975, second pmbl. para.
67 *See infra* Part III.A.

It should be stressed here that unlike both the 1956 and 1962 Constitutions of Pakistan, which had been abrogated after the proclamations of Martial law in 1958 and 1969 respectively, the 1972 Constitution of Bangladesh was neither abrogated, nor suspended at any time by the 1975 Martial Law administration.[68] However, the Constitution ceased to exist as the supreme law of the country as it was made subservient to the First Proclamation, which was issued on August 20, 1975, and Martial Law Regulations or Orders issued by the Martial Law regime, which were issued from time to time.[69] Notwithstanding the fact that the Constitution only empowers the Parliament to amend its provisions and does not authorize the President under any circumstances to alter or suspend any part of the Constitution in the exercise of his powers in the making of ordinances, the President assumed such powers on September 19, 1975 through the Proclamation of the (First Amendment) Order, 1975 (Proclamation Order no. 1 of 1975).[70] Consequently, he amended various provisions of the Constitution, including the provisions concerning the method of the removal of judges of the superior courts by issuing the Proclamations (Amendments) Orders during the continuance of the Martial Law (1975-1979).[71]

The Second Proclamation (Seventh Amendment) Order, 1976 increased the retirement age of the judges of the SC by stipulating that "a Judge of the Supreme Court shall hold office until he attains the age of sixty-five years."[72] Furthermore, the Amendment Order reinstated the original constitutional provisions concerning the removal of the judges of the SC, which, as pointed out earlier in Part III.A, were repealed by the Fourth Amendment.[73] For the Order stipulated that a judge of the SC could not be removed from office except by an "order of the President made pursuant to a resolution of Parliament passed by a majority of not less than two-thirds of the total number of members of Parliament on the ground of proved misbehavior, or incapacity."[74]

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68 BARI, *supra* note 1, at 8.

69 BANGL. PROCLAMATION OF MARTIAL LAW, Aug. 20, 1975, cls (d) and (e).

70 M. Ershadul Bari, *Martial Law in Bangladesh, 1975-1979: A Legal Analysis* 154 SOAS, UNIV. OF LONDON (1985) (unpublished Ph.D. Thesis).

71 *Id*.; *see* BANGL. SECOND PROCLAMATION (SEVENTH AMENDMENT) ORDER, art. 4; Proclamations (Tenth Amendment) Order 1977, art. 2.

72 BANGL. SECOND PROCLAMATION (SEVENTH AMENDMENT) ORDER, art. 4. However, the Constitution (Fourteenth Amendment) Act 2004 increased the retirement of the judges of the Supreme Court from 65 to 67 years. Thus, judges of the Supreme Court of Bangladesh are to remain in office until they have attained the age of 67 years.

73 *Id*.

74 *Id*.

The Parliament was also given the discretion to regulate the procedure in relation to a resolution of removal and for the investigation and proof of misbehavior or incapacity of a judge of the SC.[75]

However, only a day after assuming the office of the President, on April 22, 1977, General Ziaur Rahman (Zia)—the Chief Martial Law Administrator—issued the Proclamations (Tenth Amendment) Order, 1977,[76] which changed the above constitutional method of removal of the judges of the SC. It provided that a judge of the SC could be removed from office by the President only on the recommendation of the Supreme Judicial Council, which was to consist of "the Chief Justice of Bangladesh and the two next senior judges of the Supreme Court."[77] The Order stipulated that the Council could recommend such removal of a judge of the SC, if after an investigation into his capacity or conduct, the Council determined that the judge had "ceased to be capable of properly performing the functions of his office by reason of physical or mental incapacity" or had been "guilty of gross misconduct."[78]

Following the revocation of Martial Law on April 6, 1979, the above changes introduced by the Proclamations (Tenth Amendment) Order, 1977, regarding the removal of the judges of the SC were validated by the Constitution (Fifth Amendment) Act, which was passed by the Parliament on April 6, 1979.[79]

Arguably, this new constitutional method of the removal of judges of the SC as introduced by the Martial Law regime was conducive to maintaining the integrity and independence of the judiciary. It entrusted the most senior judges of the SC with the responsibility of carrying out investigations into the allegations brought against a judge and precluded the representation of the executive and legislative branches in the Supreme Judicial Council, nor afforded these branches the opportunity to influence the investigative processes, thereby insulating judges from the whims of the political branches of the government. It should be further stressed here that this procedure for removing judges of the SC also conformed with the international norms

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75 *Id*.

76 PROCLAMATIONS (TENTH AMENDMENT) ORDER 1977.

77 *Id.* at art. 2.

78 *Id.*

79 M. Ehteshamul Bari, *The Incorporation of the System of Non-Party Caretaker Government in the Constitution of Bangladesh in 1996 as a Means of Strengthening Democracy, Its Deletion in 2011 and the Lapse of Bangladesh into Tyranny Following the Non-Participatory General Election of 2014: A Critical Appraisal*, 28 (1) TRANSNAT'L L. & CONTEMP. PROBS. 27, 80 (2018).

concerning judicial independence, which were discussed earlier in Part II of this Article.[80]

Accordingly, the AD of the SC shed light on the efficacy of the removal method involving the Supreme Judicial Council in two landmark constitutional cases. In *Anwar Hossain Chowdhury v. Bangladesh*,[81] popularly known as the Eight Amendment Case, Justice Badrul Haider Chowdhury observed that:

> Judges cannot be removed except in accordance with provisions of Article 96—that is the Supreme Judicial Council. Sub-article (5) says if after making the inquiry, the Council reports to the President that in its opinion the Judge has ceased to be capable of properly performing the functions of his office or has been guilty of gross misconduct, the President, shall by order remove the Judge from office. This is [sic] unique feature because the Judge is tried by his own peers—'thus there is secured a freedom from political control' (1965 A.C.P 190).[82]

Twenty years later, the AD in *Khondker Delwar Hossain v. Bangladesh Italian Marble Works Ltd., and others*[83] (the Fifth Amendment Case) in unequivocal terms observed that "the procedure for removal of a Judge of the Supreme Court of Bangladesh by the Supreme Judicial Council . . . [is a] more transparent procedure than that of the earlier ones [namely, Parliamentary and Presidential method of removal] and also [for] safeguarding the independence of the judiciary."[84]

IV. THE FUNCTIONING OF THE SUPREME JUDICIAL COUNCIL

In addition to vesting the Supreme Judicial Council with the authority to conduct an investigation into allegations of incapacity or misconduct against a judge of the SC, the Constitution also empowered the Council to "prescribe a Code of Conduct to be observed by the Judges."[85] Consequently, on May 7, 2000, the Council, in exercise of its constitutional power, prescribed a 14-point Code of Conduct for

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80 *See infra* Part II.

81 *Anwar Hossain Chowdhury v. Bangladesh* (1989) 18 CLC (AD).

82 *Id.* at para. 292(21).

83 Civil Petition for Leave to Appeal Nos 1044 and 1045, Hossain v. Bangladesh Italian Marble Works Ltd., C.P. Nos. 1044, 1045 (2009) (Bangl.).

84 *Id.* at 177.

85 CONSTITUTION OF THE PEOPLE'S REPUBLIC OF BANGLADESH art. 96(4)(a).

the Judges detailing the "values of judicial life."[86] The formulation of such a code also had "the positive rule of law value of informing judges about the minimum standards of conduct that . . . [were] expected of them, and provide[d] fair warning to any who may be tempted to transgress those standards."[87]

Since the formulation of the Code of Conduct, the Council had the opportunity to investigate allegations into the capacity or conduct of the judges of the SC on three separate occasions. The Council was presented with the opportunity to conduct such investigation for the first time, when the President of the Supreme Court Bar Association (SCBA) in October 2003, brought a grave allegation of gross misconduct against Justice Syed Shahidur Rahman—a judge of the HCD. The SCBA President alleged that Justice Rahman in violation of the Code of Conduct for Judges[88] had accepted a bribe of BDT 50,000 to fix bail for an individual accused under the Women and Children Repression Prevention Act.[89] This allegation of bribery against a judge of the HCD[90] seriously undermined and eroded public confidence in the credibility of the superior judiciary of the country as an effective and efficient arbitrator of disputes.[91] Consequently, the President, in pursuance of Article 96(5)(b) of the Constitution of Bangladesh, directed the Council to inquire into the allegations brought against Justice Rahman. After conducting the inquiry, the Council reported that "on consideration of the facts and circumstances and the materials on record in their entirety it cannot be said that there is total absence of material in support of the allegations nor can it be said that the allegations are without any basis."[92] Accordingly, the Council recommended to the President that in its opinion "Mr. Justice Syed Shahidur Rahman should not continue as . . . a Judge of the High Court Division of the

86 Latifur Rahman, Bimalendu Bikash Roy Chowdhury & Mahmudur Rahman, *Code of Conduct for the Judges*, BANGL. L. HOUSE [no longer in force] (May 7, 2000), http://bdlawhouse.blogspot.com/2011/10/code-of-conduct-for-judges.html. The life of the Code of 2000 came to an abrupt end when the constitutional provisions concerning the Supreme Judicial Council were repealed through the enactment of the Constitution (Sixteenth Amendment) Act, 2014.

87 *Chapter 3: Removal from office*, *supra* note 28, at 525.

88 *Code of Conduct*, *supra* note 86, at 8-10.

89 *Bangladesh top court upholds dismissal of judge Shahidur*, THE DAILY STAR (Sept. 17, 2015), https://www.thedailystar.net/backpage/sc-upholds-dismissal-judge-shahidur-144355.

90 *Code of Conduct*, *supra* note 86, at 8-10.

91 *See generally* Anisur Rahman, *Citizens' concern over appointment of judge in Supreme Court*, THE DAILY STAR (Nov. 8, 2003), https://www.thedailystar.net/law/200311/02/index.htm.

92 Md. Idrisur Rahman v. Syed Shahidur Rahman and Others, (2005) 3 ADC 896.

Supreme Court of Bangladesh."[93] In pursuance of this recommendation, the President, on April 20, 2004, issued an order removing Justice Rahman from office,[94] thereby restoring public confidence in the integrity of the SC.

On October 30, 2004—only six months and ten days after Justice Rahman was removed from office—another grave allegation of serious misconduct surfaced against Justice Faisal Mahmud Faizee, a judge of the HCD.[95] Two national dailies ran a story alleging that Justice Faizee had not only tampered with his academic transcript, but that he also forged the certificate of his LLB examinations at the University of Chittagong.[96] The dailies ran this story as a result of an investigation that the University of Chittagong was carrying out at the time into allegations of certificate tampering against 2400 examinees—one of whom was Justice Faizee.[97] Notwithstanding the seriousness of this allegation, the Supreme Judicial Council headed by the then Chief Justice JR Mudassir Husain, did not consider it prudent to seek the President's direction under Article 96(5) of the Constitution for conducting an investigation.[98] However, succumbing to growing pressure from the lawyers of the SC, who demanded stern action against Justice Faizee, the Chief Justice took a largely symbolic step in withdrawing the concerned Justice from the bench.[99] Furthermore, the Bangladesh Bar Council, which is the licensing and regulatory body for all legal practitioners of the country, served a show cause notice on Justice Faizee on November 4, 2004, requiring him to explain why his enrollment certification as a legal practitioner should not be cancelled due to, among other things, the dispute regarding his LLB certificate.[100] Since Justice Faizee did not furnish any reply to the show cause notice attempting to disprove the allegations brought

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93 *Id.*

94 *SC stays HC order declaring illegal Shahidur's removal*, BDNEWS24.COM (Apr. 24, 2005), https://bdnews24.com/bangladesh/2005/04/24/sc-stays-hc-order-declaring-illegal-shahidur-s-removal.

95 *Mark Sheet Tampering: CU cancels certificate of Judge Faizee, 2,350 others*, THE DAILY STAR (Mar. 4, 2007), http://archive.thedailystar.net/2007/03/04/d7030401011.htm.

96 *Id*.

97 *Id*.

98 *See generally Justice Faizee's advocate ship certificate cancelled, faces criminal case*, BDNEWS24.COM (Apr. 24, 2005), https://bdnews24.com/bangladesh/2005/04/24/justice-faizee-s-advocate-ship-certificate-cancelled-faces-criminal-case.

99 *Id*.

100 *Id.*

against him, the Bar Council, in an unprecedented move, proceeded to cancel the judge's enrollment certificate as an advocate of the SC.[101]

The above issues were compounded by the fact that the authorities of the University of Chittagong, on completion of the inquiry into allegation of certificate forgery against Justice Faizee, concluded that there was merit to the allegations, and as such, the University duly cancelled his LLB Certificate.[102] It should be stressed here that the Constitution of Bangladesh stipulates that in order for an individual to be eligible for appointment as a judge of the SC, they should, among other things, be enrolled as an advocate of the SC[103]—an enrolment which can be attained after successfully completing, among other things, an LLB. Furthermore, in order to maintain the integrity and dignity of the judiciary, judges of the SC must be of unimpeachable integrity and of spotless character. Therefore, the cancellation of Justice Faizees' LLB certificate on account of forgery and the cancellation of his enrollment as an advocate, not only cast serious doubts over his constitutional eligibility to continue as a judge of the SC but they also had the dreadful impact of undermining and eroding the integrity and dignity of the superior judiciary.

Accordingly, within nine days of assuming the office of the Chief Justice on March 10, 2007, Chief Justice Md Ruhul Amin wrote to the President stressing the necessity of resolving the constitutional crisis concerning Faizee's continuation as a judge of the HCD.[104] Consequently, the President directed the Supreme Judicial Council, headed by Chief Justice Amin, to investigate the allegations of forgery against Justice Faizee. The Council found "strong evidence of forgery" against the concerned judge.[105] Sensing the writing on the wall, Justice Faizee considered it prudent to resign as a judge of the HCD on July 12, 2007,[106] thereby depriving the Council of the opportunity to put forward its recommendation to the President.

The Supreme Judicial Council was convened for the third and final time on February 25, 2013 to conduct an investigation into an

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101 *Id.*

102 *Mark Sheet Tampering, supra* note 96.

103 CONSTITUTION OF THE PEOPLE'S REPUBLIC OF BANGLADESH Dec. 16, 1972, art. 95(2)(a).

104 *Supreme Judicial Council holds first meeting on Faizee*, BDNEWS24.COM (Mar. 28, 2007), https://bdnews24.com/bangladesh/2007/03/28/supreme-judicial-council-holds-first-meeting-on-faizee.

105 *HC Judge Faizee bows out*, BDNEWS24.COM (Jul. 13, 2007), https://bdnews24.com/bangladesh/2007/07/13/hc-judge-faizee-bows-out.

106 *Id.*

allegation of misconduct against Justice Mizanur Rahman Bhuiyan, who was appointed as a judge of the HCD on July 29, 2002 by the government of the BNP and Jamaat-e-Islami Alliance.[107] The allegation involved Justice Bhuiyan distributing photocopies of a contentious news report among his colleagues at the SC.[108] The news report in question termed Ahmed Rajib Haider—a high-profile activist who demanded the death sentence for all those accused of committing war crimes in 1971, including prominent leaders of the Jamaat-e-Islami, and those who were hacked to death on February 15, 2013 by miscreants[109]—an apostate for allegedly defaming the religion of Islam and the Prophet Muhammad through his blog posts.[110]

The members of the ruling BAL, which at the time commanded the support of three-fourths of the elected members of the Parliament,[111] were incensed when news broke out about the alleged distribution of the controversial news reports by Justice Bhuiyan. For instance, Sheikh Selim—an influential MP of the ruling BAL—took to the parliamentary floor to remark that by distributing the above report, Justice Bhuiyan had not only violated the Constitution, but had also sided with war criminals in an attempt to thwart the mass movement, which was being carried out at the time demanding the imposition of capital punishment on all war criminals.[112] Selim went so far as to demand that Justice Bhuiyan be questioned in order to find his possible link with the killing of Rajib.[113] Other ruling party MPs, including the Chief Whip of the Parliament, also echoed Selim's sentiments. Consequently, in light of these demands, the Minister for Law, Justice and Parliamentary Affairs assured his party colleagues in the Parliament

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107 *HC Judge to face Investigation*, THE DAILY STAR (Feb. 26, 2013), https://www.thedailystar.net/news-detail-270497.

108 *Id.*

109 Sahidul Hasan Khokon, *Ganajagaran Mancha blogger Ahmed Rajib's killer held in Dhaka*, INDIA TODAY (Feb. 20, 2017), https://www.indiatoday.in/world/story/ahmed-rajib-blogger-murder-ganajagaran-mancha-killer-dhaka-961678-2017-02-20.

110 *Alleged Misconduct: Justice Mizanur replies to judicial council*, THE DAILY STAR (Mar. 19, 2013), https://www.thedailystar.net/news/justice-mizanur-replies-to-judicial-council-2; Md Maidul Islam, *Secularism in Bangladesh: An Unfinished Revolution*, 38(1) SOUTH ASIAN RES. 20, 29 (2018).

111 European Parliament, *Legislative Elections in Bbangladesh, Election Observation Delegation* 2 (2008), http://www.epgencms.europarl.europa.eu/cmsdata/upload/36287860-18fe-4c47-92b1-5aa527c34129/Election_report_Bangladesh_29_December_2008.pdf.

112 *Justice faces JS music*, THE DAILY STAR (Feb. 20, 2013), https://www.thedailystar.net/news-detail-269768.

113 *Id.*

that he would discuss the idea of forming a Supreme Judicial Council with the Chief Justice for "taking action" against Justice Bhuiyan as his "behavior . . . [could] be termed as misconduct."[114] Therefore, it is manifestly evident that the ruling party MPs reached a conclusion regarding Justice Bhuiyan's alleged misconduct even before the Council had the opportunity to impartially investigate the allegation, thereby attempting to exert undue pressure on the Council to recommend the removal of the concerned judge from office.

It should be argued here that the ruling party MPs, including the Minister for Law, Justice and Parliamentary Affairs, did not shed light on how Justice Bhuiyan, according to them, had violated the Constitution by allegedly distributing the news report.[115] Furthermore, since the Constitution of Bangladesh does not define what would construe as misconduct on the part of a judge of the SC, the Supreme Judicial Council, as pointed out earlier, had prescribed a Code of Conduct for putting flesh on the bare bones of the Constitutional text.[116] The Code, among other things, prescribed in rule 5 that a judge should maintain "a degree of aloofness consistent with the dignity of his high office"[117] and Justice Bhuiyan's alleged distribution of the news report concerning the deceased blogger could have only been construed as a violation of the rule regarding the maintenance of aloofness.

The Council's investigation into the allegation of misconduct against Justice Bhuiyan lasted for more than five months—from February 25 to August 5, 2013.[118] During this time, Justice Bhuiyan was given the opportunity to submit a written response to the Council explaining the allegation that had been brought against him.[119] Finally, on August 5, 2013, the Council reported to the President that it had found no merits to the allegation of misconduct against Justice Bhuiyan,[120] thereby clearing him of any wrongdoing and thwarting in the process the BAL's plan to secure his removal.

It is evident from the above discussion that the Supreme Judicial Council—composed of the senior-most judges of the AD—since its formation had performed its function in an objective manner by

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114 *Id.*

115 *Id*.

116 *Code of Conduct*, *supra* note 86.

117 *Id.* at 5.

118 *HC Judge to face Investigation, supra* note 108; Ashutosh Sarkar, *Justice Mizanur cleared: Judicial Council finds no proof of misconduct*, THE DAILY STAR (Aug. 5, 2013), https://www.thedailystar.net/news/justice-mizanur-cleared.

119 *Alleged Misconduct*, *supra* note 110.

120 Sarkar, *supra* note 118.

recommending the removal of judges guilty of moral turpitude from office, thereby maintaining the public's confidence in the integrity and dignity of the judiciary. Furthermore, the Council did not succumb to any political pressure while carrying out its investigation into the allegation of misconduct against Justice Bhuiyan, thereby frustrating the design of the ruling BAL to secure the removal of a judge who was appointed by its opposing BNP-Jamaat alliance while it was in power, and maintaining the independence of the judiciary.

V. DELETION OF THE PROVISIONS CONCERNING THE SUPREME JUDICIAL COUNCIL FROM THE CONSTITUTION OF BANGLADESH BY THE CONSTITUTION (SIXTEENTH AMENDMENT) ACT OF 2014

Notwithstanding the effectiveness of the constitutional provisions concerning the Supreme Judicial Council in safeguarding the independence of the judiciary, the government of BAL used its brute majority in the Parliament on September 17, 2014 to pass the Constitution (Sixteenth Amendment) Act 2014 to repeal the provisions concerning the Council from the Constitution.[121] It is necessary to point out here that the Sixteenth Amendment was preferred by the BAL regime only thirteen months and three days after its attempt to secure the removal of Justice Bhuiyan of the HCD, as pointed out above in Part IV, from office was duly frustrated by the Supreme Judicial Council.[122] However, in order to gain a proper understanding of the adverse impact of the deletion of such constitutional provision concerning the Council on the independence of the judiciary, it is necessary to briefly discuss the manner in which the BAL has perpetuated its grip on power since the formation of the government following the general election, which was held in December 2008.[123]

The general election of 2008 was the last to have been conducted under the supervision of a "Non-Party Care-taker Government" (NPCG).[124] The mechanism of NPCG was inserted in the Constitution through the Constitution (Thirteenth Amendment) Act in 1996 for upholding the democratic right of the citizens of the country "to vote in free, fair and impartial general elections"[125] and "to effect change of

121 Bari, *supra* note 79, at 80.
122 *See supra* Part IV.
123 Bari, *supra* note 79, at 69-75.
124 *Id.* at 65, 72.
125 *Id.* at 57.

government in a peaceful manner."[126] The country's electoral history had been marred with numerous instances of the incumbent government resorting to various forms of electoral malpractices, such as ballot stuffing, voter intimidation, disruptions regarding the registration of voters, which manipulated the outcome of the election in its favor.[127] Accordingly, as amended by the Thirteenth Amendment, the Constitution provided that a NPCG—led by the last retired Chief Justice of the nation[128] and composed of 10 additional advisers chosen from the eminent citizens of the country[129]—would enter upon office after the dissolution of the Parliament[130] with the primary mandate to provide "all possible aid and assistance" to the Election Commission for holding the general election.[131] Since the members of the NPCG were not affiliated with any political parties, it was expected that such a neutral government would conduct general elections "peacefully, fairly and impartially."[132] The effectiveness of the system of NPCG can be gathered from the fact that it was successful in overseeing three credible general elections in 1996, 2001, and 2008 respectively.[133]

However, notwithstanding the effectiveness of the system of the NPCG, the BAL began to take concrete measures for dispensing with the system taking into account the fact that since the introduction of the system, the electorate had "never returned the incumbent party to power."[134] Thus, the BAL identified the system of NPCG as the main obstacle to its aspiration of retaining permanent power. Consequently, the regime adopted a twofold strategy to dispense with the system. First, on September 26, 2010, the regime appointed Justice A.B.M. Khairul Haque as the Chief Justice of Bangladesh contravening the principle of seniority—a convention followed in appointing the Chief Justice among the judges of the AD—to secure the declaration of the Thirteenth Amendment that concerned the NPCG as being ultra vires the Constitution of Bangladesh.[135] This plan came into fruition on May

126 *Id.* at 72.

127 *Id.* at 31.

128 THE CONSTITUTION OF THE PEOPLE'S REPUBLIC OF BANGLADESH Nov. 4, 1972, art. 58C(1)(3).

129 *Id.* at art. 58C(1)(7).

130 *Id.* at art. 58C(1)(2).

131 *Id.* at art. 58D(2).

132 *Id.* at art. 58D(2).

133 Bari, *supra* note 79, at 32.

134 *Id.* at 72.

135 *Id.* at 70; M. Ehteshamul Bari, *Supersession of the Senior-Most Judges in Bangladesh in Appointing the Chief Justice and the Other Judges of the Appellate*

10, 2011, when Justice Haque issued a one-page "short order"[136] in the case of *Abdul Mannan Khan v. Bangladesh (Thirteenth Amendment Case)*[137] declaring the Thirteenth Amendment unconstitutional.[138] Second, although Justice Haque's one-page "short order" did not detail the reasons for declaring the NPCG as being ultra vires the Constitution, the BAL regime moved swiftly to take advantage of the declaration of unconstitutionality by using its three-fourths majority in the Parliament to enact the Constitution (Fifteenth Amendment) Act on July 3, 2011, only fifty-three days after the issuance of the "short order" abolishing the system of NPCG from the Constitution.[139]

The omission of the system of NPCG from the Constitution paved the way for the BAL to conduct a sham general election in January 2014.[140] The election was a sham, for it was only contested by the BAL and its allies in the Grand Alliance.[141] The omission of the system of NPCG and the consequent apprehension of the election being rigged in favor of the incumbent BAL persuaded all the major opposition political parties, including the BNP-led eighteen party Alliance, to refuse to participate in the election.[142] Facing no competition, the BAL-led Grand Alliance won 154 out of the 300 seats uncontested, thereby securing the simple majority required to form a government at the expense of the voting rights of forty-eight million registered voters in these constituencies.[143] When the elections for the remaining 146 seats were held, a vast majority of the electorate chose to stay away from the polls due to the absence of a meaningful choice.[144] However, in a desperate bid to lend some degree of credibility to the polls, the BAL government used its machineries to inflate the voter turnout numbers by resorting to "widespread electoral malpractices such as

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Division of the Supreme Court: A Convenient Means to a Politicized Bench, 18(1) SAN DIEGO INT'L L.J. 33, 47 (2016).

136 *SC Sets Aside Caretaker Govt System*, BDNEWS24.COM (May 10, 2011), https://bdnews24.com/bangladesh/2011/05/10/sc-sets-aside-caretaker-govt-system.

137 *See generally* The Supreme Court of Bangladesh Appellate Division Civil Appeal No. 139 of 2005 with Civil Petition for Leave to Appeal No. 596 of 2005 (Bangl).

138 *SC Sets Aside Caretaker Govt System*, *supra* note 137; *id.*

139 Bari, *supra* note 79, at 72; *see* BANGL. CONST. amend. XV, § 21 (In the Constitution, "CHAPTER IIA- NON-PARTY CARETAKER GOVERNMENT" shall be omitted).

140 *Id*. at 75-76.

141 *Id.* at 75-76.

142 *Id.* at 76; Bari, *supra* note 135, at 49.

143 Bari, *supra* note 79, at 76.

144 *Id.*

stamping and stuffing of ballot papers in ballot boxes."[145] These electoral malpractices further underscored the utility and necessity of the NPCG in Bangladesh for guarding against manipulation of the electoral processes.

The final seat count following the controversial polls revealed that the BAL had won a total 234 parliamentary seats on its own, while its principal ally in the Grand Alliance—the Jatiya Party (JP)—had won thirty-four seats.[146] As mentioned above, since no other major political party had contested the general election, the BAL had opportunely selected the JP to perform the functions of the opposition in the Parliament.[147] However, the BAL's political adventurism did not stop there. The regime went further by not only appointing three JP MPs as cabinet ministers, but also by making the head of the JP, General HM Ershad, the special envoy to Prime Minister Hasina with the rank and status of a cabinet minister.[148] Thus, it is manifestly evident that the BAL regime had purposefully incapacitated the Parliament to act as a check on its powers, thereby reducing it to act as a mere rubber stamp.

Having ensured the subservience of the Parliament, the ruling BAL passed the Sixteenth Amendment on September 17, 2014—seven months and three days after retaining power through the "one-sided and voter-less" election[149]—for curtailing the independence of the judiciary. As the Sixteenth Amendment dispensed with the constitutional provisions concerning the Supreme Judicial Council and subsequently, entrusted the Parliament with the power to remove the judges of the SC.[150] The BAL, however, claimed that it had merely restored the original provisions of the 1972 Constitution of Bangladesh by entrusting the Parliament with the power to remove the judges.[151] It should be stressed here that the BAL's pretension in restoring the sanctity of the 1972 Constitution is unfounded. For it is the BAL government which for the first time, as referred to in Part III, had undermined the sanctity of the Constitution by, among other things,

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145 *Id.*

146 *See Bangladeshi Ruling Party Wins Election by Default*, UCA NEWS (Jan. 6, 2014), https://www.ucanews.com/news/bangladeshi-ruling-party-wins-election-by-default/70019; Bari, *supra* note 59, at 77.

147 Bari, *supra* note 79, at 77.

148 *Id.*

149 *Id.* at 75.

150 CONSTITUTION OF THE PEOPLE'S REPUBLIC OF BANGLADESH XVI § 2(2).

151 Sumon Mahbub, *16th Amendment passed to restore Parliament's power to sack judges*, BDNEWS24.COM (Sept. 17, 2014), https://bdnews24.com/bangladesh/2014/09/17/16th-amendment-passed-to-restore-parliaments-power-to-sack-judges.

repealing the original provisions concerning the removal of judges through the enactment of the Fourth Amendment of 1975.[152] Instead of the Parliament, the Fourth Amendment authorized Mujib—the father of the current Prime Minister Hasina—to remove the judges of the SC according to his pleasure, thereby undermining the independence of the judiciary.[153]

Furthermore, it should be stressed here that the Constitution should be seen as a "living force"[154]—one that is capable of changing to reflect "changing social condition and changing needs."[155] Accordingly, the framers incorporated flexible amendment provisions in the Constitution of Bangladesh.[156] However, in freezing the Constitution according to its original provisions regarding the removal of judges by the Parliament, the BAL overlooked the fact that the method of removal of judges involving the Supreme Judicial Council did not leave the fate of the judges at the mercy of the political branches of government and, as such, was more in line with the contemporary norms concerning the independence of the judiciary.[157]

It can be strongly argued that like the Fourth Amendment, the Sixteenth Amendment was also preferred for curbing the independence of the judiciary by making it extremely convenient for an "all-powerful executive"[158] which could remove any judge of the SC who drew its ire for delivering justice in a fearless and impartial manner in a dispute where it was a party. For in the absence of an actual opposition, the Parliament emerging out of the 2014 election, was reduced, as pointed out above, to a toothless body—subject to the absolute control of the BAL government. The argument that the Sixteenth Amendment undermined the independence of the judiciary by granting the Executive the unconstrained authority to sack the judges of the SC through the subservient Parliament, gains further momentum due to the anti-defection provision contained in Article 70 of the

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152 *See supra* Part III.

153 *Id*.

154 *Theophanous v. Herald and Weekly Times Ltd* (1994) 182 CLR 104, 174 (Austl.).

155 David A. Strauss, *The Living Constitution*, THE UNIVERSITY OF CHICAGO, THE LAW SCHOOL (Sept. 27, 2010), https://www.law.uchicago.edu/news/living-constitution.

156 CONSTITUTION OF THE PEOPLE'S REPUBLIC OF BANGLADESH art. 142(1)(a) (stipulating that any proposed bill for amendment to the Constitution can be passed by the votes of "two-thirds of the total number of members of the Parliament.").

157 *See supra* Parts III & IV.

158 Bari, *supra* note 79, at 80, 81.

Constitution.[159] Article 70 requires MPs to blindly defer to the directives of their nominating political parties in order to keep their membership in the Parliament.[160] Thus, it can be said that Article 70 would operate to preclude the competence of the MPs to defy arbitrary directives of the BAL government, while exercising the potential power of removing a judge of the SC.

VI. THE SC'S INVALIDATION OF THE SIXTEENTH AMENDMENT AND THE CONSEQUENT SCATHING ATTACK OF THE CHIEF JUSTICE

The constitutional validity of the Sixteenth Amendment was challenged before the HCD within a few months of its enactment in the case of *Advocate Asaduzzaman Siddiqui v. Bangladesh* (the *Sixteenth Amendment Case*).[161] On May 5, 2014, a HCD majority of 2:1, invalidated the amendment as being "colourable, void and ultra vires" the Constitution of Bangladesh.[162] Justice Moyeenul Islam, who delivered the majority judgment, articulated three grounds in favor of this finding. First, Justice Islam took notice of the fact that the majority of the Commonwealth nations do not invest the legislative branch of the government with the power to remove judges of the superior courts.[163] Rather these nations, as has been previously discussed in Part II of this article, invest either ad hoc tribunals or permanent disciplinary councils, which are akin to the Supreme Judicial Council as had been provided for by the Constitution of Bangladesh prior to the enactment of the Sixteenth Amendment, with the power to remove judges of superior courts.[164] The learned judge observed that these Commonwealth jurisdictions prefer such removal mechanisms "for upholding the separation of powers among the 3(three) organs of the State and for [ensuring] complete independence of the Judiciary from the other two organs of the State."[165] Accordingly, Justice Islam observed that the constitutional provisions "relating to the Supreme

159 CONSTITUTION OF THE PEOPLE'S REPUBLIC OF BANGLADESH art. 70 (stipulating that "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 . . . votes in Parliament against that party.").

160 *Id*.

161 *Advocate Asaduzzaman Siddiqui v. Bangladesh* (2014) Writ Petition No. 9989/2014 (HCD).

162 *Id.* at 165.

163 *Id.* at 76.

164 *Id*.

165 *Id*.

Judicial Council are more transparent in safeguarding the independence of the Judiciary."[166]

Second, Justice Islam shed light on the adverse impact that Article 70 has on the independence of the MPs to perform their functions in the Parliament. As he observed:

> I must say that this Article has fettered the Members of Parliament unreasonably and shockingly. It has imposed a tight rein on them. Members of Parliament can not [sic] go against their partyline or position on any issue in the Parliament. They have no freedom to question their party's stance in the Parliament, even if it is incorrect and flawed. They can not vote against their party's decision. They are, indeed, hostages in the hands of their party high command.[167]

Consequently, the learned judge held that due to Article 70, MPs would be required to "toe the partyline in case of removal of any Judge of the Supreme Court,"[168] thereby leaving the judge "at the mercy of the party high command"[169] and impairing in the process the independence of the judiciary.

Finally, Justice Islam took cognizance of the past decisions of the AD, which have identified "Independence of the Judiciary" as one of the basic structures of the Constitution.[170] Since security of tenure is one of the fundamental elements of judicial independence, the learned judge observed that by investing the subservient Parliament with the power to remove the judges of the SC, the Sixteenth Amendment had diminished one of the basic structures of the Constitution in violation of the terms of Article 7B of the Constitution.[171] For Article 7B explicitly provides that the constitutional provisions relating to the basic structures are not amenable to the amendatory process.[172] Consequently, Justice Islam held that the "Court . . . has power to undo

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166 *Id.* at 123.

167 *Advocate Asaduzzaman Siddiqui*, No.9989/2014 at 123.

168 *Id*. at 124.

169 *Id*.

170 *Id.* at 92-100.

171 *Id*.

172 BANGL. CONST. art. 7B ("Notwithstanding anything contained in article 142 of the Constitution . . . the provisions of articles relating to the basic structures of the Constitution including article 150 of Part XI shall not be amenable by way of insertion, modification, substitution, repeal or by any other means.").

any amendment if it transgresses its limits and alters any basic structure of the Constitution."[173]

When the BAL government instituted an appeal against the HCD's declaration of unconstitutionality of the Sixteenth Amendment, the AD—the highest court of appeal in the country—unanimously upheld the decision of the HCD.[174] Chief Justice SK Sinha—the first judge of Hindu faith to ascend to the Muslim majority nation's highest judicial office—delivered the judgment of the Court on August 1, 2017.[175] In affirming the decision of the HCD, Chief Justice Sinha rightly observed that since the Parliament resultant of the sham 2014 general election remained completely under the thumb of the executive branch of government, the "judiciary should not be made answerable to the Parliament."[176] The learned judge also echoed the observations of Justice Islam of the HCD regarding the undue restrictions imposed by Article 70 of the Constitution on the MPs, which further curtailed their competence to be independent of partisan political directives, including at the time of exercising the potential power of impeaching a judge of the SC. As he observed:

> [I]t is difficult for a member of Parliament [by reason of Article 70] to form an opinion independently ignoring the directions given by the party high command of the political party in power[177]. . . [This] leads to the . . . conclusion that . . . [the] new mechanism [for removing judges] cannot be expected to function independently and neutrally if a Judge attracts displeasure from the political party in power, he may be subjected to removal by the Parliament. There can be little argument that the function of judicial review by Judges involve dealing with views in respect of which political parties in the government and opposition could have opposing views with which the Judges may not reflect or agree in their judgment. Without a political tradition in which members of Parliament could clearly demonstrate that they can act neutrally and impartially if they are given the power of removal and will not be affected by the party's views under article 70, the purported process of impeachment introduced by Sixteenth

173 *Advocate Asaduzzaman Siddiqui v. Bangladesh* (2014), Writ Petition No. 9989/2014 (HCD), at 64.

174 *Bangladesh v. Advocate Asaduzzaman* Siddiqui (2017), Civil Appeal No. 06/2017 (AD).

175 *Id*.

176 *Id*. at 205.

177 *Id*. at 284.

> Amendment would clearly undermine the independence of judiciary and will definitely alter the basic structure of the constitution.[178]

Finally, Chief Justice Sinha after articulating the reasons for upholding the HCD's decision to invalidate the Sixteenth Amendment, put forward the reasons why the BAL government after ensuring the subservience of the Parliament had turned its focus to curbing the independence of the Judiciary. The learned judge observed:

> The greed for power is like a plague, once set in motion it will try to devour everything. Needless to say, this WAS NOT at all the aims and vision of our liberation struggle. Our Forefathers fought to establish a democratic State, not to produce any power-monster. The human rights are at stake, corruption is rampant, Parliament is dysfunctional, crores of people are deprived of basic health care, mismanagement in the administration is acute, with the pace of the developed technology, the crimes dimension is changing rapidly, the life and security of the citizens are becoming utterly unsecured, the law enforcing agencies are unable to tackle the situation and the combined result of all this is a crippled society, a society where good man does not dream of good things at all; but the bad man is all the more restless to grab a few more of bounty. In such a situation, the Executive becomes arrogant and uncontrolled . . . Even in this endless challenge, the judiciary is the only relatively independent organ of the State which is striving to keep its nose above the water though sinking. But judiciary too, cannot survive long in this situation . . . [However,] [i]nstead of strengthening the judiciary, the Executive is now trying to cripple it and if it happens, there could be disastrous consequences.[179]

The decision of the AD to uphold the Sixteenth Amendment's unconstitutionality restored the constitutional provisions concerning the removal of judges of the SC involving the Supreme Judicial Council.[180] However, Chief Justice Sinha's judgment, in particular his blunt observations about the BAL's hunger for power, incensed the BAL hierarchy, including its chief—Prime Minister Hasina. As soon as the

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178 *Id*. at 209-11.
179 *Id*. at 228-29.
180 Bari, *supra* note 79, at 82.

written judgment was published, Prime Minister Hasina, her cabinet and parliamentary colleagues began using unparliamentary language questioning Chief Justice Sinha's character, integrity and propriety in declaring the Sixteenth Amendment ultra vires the Constitution.[181] The Prime Minister and her colleagues not only called for Chief Justice Sinha to step down, but also advised him to "either leave the country or get treatment in Hemayetpur [a mental facility situated in Pabna, Bangladesh]."[182] These unkind remarks about the head of the judiciary vindicated the concerns, as mentioned above, raised by both benches of the SC in the *Sixteenth Amendment Case* regarding the prospect of entrusting the Parliament with the power to impeach judges.

However, the BAL was not merely issuing empty threats against Chief Justice Sinha. Rather the regime made good on its threats. On October 2, 2017, the Minister for Law, Justice and Parliamentary Affairs, who like his colleagues had also criticized Chief Justice Sinha for his verdict in the *Sixteenth Amendment Case*,[183] told the media that the Chief Justice would "go on a month's leave . . . on health grounds."[184] This announcement was followed by the publication of a gazette notifying the public that Justice MA Wahhab Miah—the senior most judge of the AD—would act as the Chief Justice in the absence of Chief Justice Sinha.[185] The appointment of the Acting Chief Justice was made in pursuance of Article 97 of the Constitution, which in an attempt to prevent a patronage appointment, obliges the President to follow the mechanical rule of seniority in appointing the Acting Chief Justice when a vacancy arises in the office of Chief Justice or when "absence, illness, or any other cause" renders the Chief Justice incapable of discharging the duties of his office.[186]

Eleven days after the announcement of the Law Minister, Justice Sinha, on October 13, 2017, left the country for Australia. However, before leaving, Chief Justice Sinha refuted the government's claim by telling the journalists gathered at his official residence that:

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181 *Denigrating CJ: Who Said What*, TIMES NEWS (Nov. 11, 2017), http://bangladesh.timesofnews.com/denigrating-cj-who-said-what.html; *Leave Bangladesh or Get Treated for Mental Problem*, BDNEWS24.COM (Aug. 27, 2017), https://bdnews24.com/politics/2017/08/27/leave-bangladesh-or-get-treated-for-mental-problem-minister-matia-to-chief-justice.

182 *Id*.

183 *Id*.

184 *Chief Justice Goes on a Month's Leave*, THE DAILY STAR (Oct. 3, 2017), https://www.thedailystar.net/frontpage/cj-goes-months-leave-1470712.

185 *Wahhab Miah Made Acting Chief Justice*, DAILY SUN (Oct. 3, 2017), https://www.daily-sun.com/post/258788.

186 BANGL. CONST. art. 97.

> *I'm not sick*.[187] I'm not fleeing. I'll come back. I'm a little embarrassed. I'm the guardian of the judiciary. I'm leaving for a brief period in the interest of the judiciary, and so that the judiciary is not polluted . . . .[188]

His one-page long written statement, which was distributed to the journalists, further shed light on the political pressures exerted on him: "[T]he way a political quarter, lawyers, and especially some honourable ministers of the government and the honourable prime minister are criticising me recently over a verdict made me embarrassed."[189]

Within a few hours of Justice Sinha leaving for Australia, the BAL regime took the unprecedented move of instituting eleven charges, including "money laundering, financial irregularities, corruption, moral turpitude," against him.[190] It is pertinent to mention here that at the time a furore had erupted over the judgment in the *Sixteenth Amendment Case*, Justice Sinha had served as the Chief Justice for approximately two years and nine months.[191] During this period, no allegations of corruption had ever been brought against the learned judge. Rather, it was only after the pronouncement of the judgment in the *Sixteenth Amendment Case* that the BAL regime had suddenly discovered that Chief Justice Sinha was guilty of conduct unbecoming of the holder of highest judicial office in Bangladesh.[192] It is, therefore, manifestly evident that the BAL regime had gone to great lengths to persecute Justice Sinha for thwarting its attempt to subjugate the judiciary. Owing to such persecution, Justice Sinha prematurely resigned from his office on November 11, 2017[193]—two months and twenty days before he was supposed to retire. Since retirement, Justice Sinha

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187 *I'm Not Sick*, THE DAILY STAR (Oct. 14, 2017), https://www.thedailystar.net/frontpage/cj-set-leave-australia-1476169.

188 *Id.*

189 *Id.*

190 *11 'Charges' Against CJ*, THE DAILY STAR (Oct. 15, 2017), http://www.thedailystar.net/frontpage/11-charges-against-cj-1476448.

191 Justice Sinha assumed the office of the Chief Justice on January 17, 2015. *Bangladesh Appoints Surendra Kumar Sinha as New Chief Justice*, THE ECONOMIC TIMES (Jan. 12, 2015), https://economictimes.indiatimes.com/news/international/world-news/bangladesh-appoints-surendra-kumar-sinha-as-new-chief-justice/articleshow/45852712.cms?from=mdr.

192 *11 'Charges' Against CJ, supra* note 190.

193 *SK Sinha Resigns from Chief Justice Post, Says President's Press Secretary*, THE DAILY STAR (Nov. 11, 2017, 01:17 PM), https://www.thedailystar.net/politics/chief-justice-cj-surendra-kumar-sinha-resigns-1489639.

has been living in exile—first in the US and now in Canada, where he has sought asylum.[194]

VII. THE AFTERMATH OF THE RESIGNATION OF JUSTICE SINHA: THE EMERGENCE OF A SUBSERVIENT JUDICIARY

Although Justice Sinha resigned as the Chief Justice on November 11, 2017, the BAL Government did not proceed to appoint Acting Chief Justice MA Wahhab Miah as the regular Chief Justice in pursuance of Article 95(1) of the Constitution.[195] Rather, two months and twenty-two days after Justice Sinha's resignation, the regime appointed Justice Syed Mahmud Hossain—the second senior-most judge of the AD—as the regular Chief Justice on February 2, 2018.[196] In overlooking the senior-most judge of the AD, namely, Acting Chief Justice Miah for such an appointment, the regime had blatantly violated the time-honored convention of following seniority in appointing the Chief Justice.[197] Furthermore, it is pertinent to stress here that Justice Miah, as pointed out above in Part VII, in his capacity as the senior-most judge of the AD, had discharged the duties of the office of the Chief Justice for four months in an interim capacity since October 2017. Thus, it is evident that the BAL frustrated Justice Miah's legitimate expectation of being appointed to the highest judicial office of the land, notwithstanding his seniority and his performance of the functions of such office on an interim basis.[198] Consequently, Justice Miah considered it dignified to resign as a judge of the AD within hours of being overlooked for the position of the Chief Justice.[199] Hence, the BAL regime's decision to flout the principle of seniority in appointing the Chief Justice has deprived the nation of the service of a senior and experienced judge.

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194 *SK Sinha seeks asylum in Canada*, THE DAILY STAR (July 26, 2019), https://www.thedailystar.net/country/news/sk-sinha-seeks-asylum-canada-1777318.

195 BANGL. CONST. art. 95(1).

196 *Justice Mahmud Hossain Made New CJ*, THE NEW NATION (Feb. 2, 2017) http://m.thedailynewnation.com/news/163639/justice-mahmud-hossain-made-new-cj.

197 Bari, *supra* note 79, at 84-85.

198 *Id*; *see supra* Part VII.

199 Justice Wahhab, *Miah Resigns after Justice Mahmud Hossain Is Named Chief Justice*, BDNEWS24.COM (Feb. 02, 2018), https://bdnews24.com/bangladesh/2018/02/02/justice-wahhab-miah-resigns-after-justice-mahmud-hossain-is-named-chief-justice.

Although the regime did not offer any reasoning for depriving Justice Miah of the Chief Justiceship, it seems that he was overlooked for the position as he went against the wishes of the BAL regime by pronouncing a dissenting judgment in the *Thirteenth Amendment Case,* which upheld the constitutionality of the system of NPCG.[200] The learned judged reached such a conclusion in light of the fact that the system had further consolidated the principle of democracy in Bangladesh.[201] On account of this objective judgment, the regime did not consider Justice Miah trustworthy to implement its agenda of securing the reversal of the AD's unanimous decision in the *Sixteenth Amendment Case* on the basis of the review petition that it had filed on December 24, 2017, under Article 105 of the Constitution.[202]

It should be stressed here that although the judgment of the AD in the *Sixteenth Amendment Case*, as pointed out earlier in Part VI, had the effect of restoring the constitutional provisions concerning the Supreme Judicial Council, Attorney General Mahbubey Alam—a pro BAL lawyer[203] who even sought nomination from the BAL for contesting the 2018 general election[204]—has casted doubt on such restoration as a result of the pendency of the review petition before the AD. However, it is difficult to agree with the interpretation held by the principal law officer of the country. For, according to a unanimous decision of the full bench of the AD, which also consisted of the current Chief Justice—Justice Hossain—a review petition should not be "equated with an appeal."[205] Accordingly, it can be strongly argued that unlike the pendency of the BAL regime's appeal against the decision of the HCD in the *Sixteenth Amendment Case*, which prevented the restoration of the provisions concerning the Supreme Judicial Council, the pendency of a review petition instituted against the

200 *Abdul Mannan Khan v. Bangladesh*, Civil Appeal No. 139 of 2005 with Civil Petition for Leave to Appeal No. 596 of 2005 (Bangl.), at 35.

201 *Id*.

202 BANGL. CONST. art 105 (stipulating that the "Appellate Division shall have power, subject to the provisions of any Act of Parliament and of any rules made by that division to review any judgment pronounced or order made by it.").

203 *Bangladesh: End the politically chosen 'disposable' attorney and prosecutorial,* ASIAN HUMAN RIGHTS COMMISSION (Jan. 14, 2009), http://www.humanrights.asia/news/ahrc-news/AHRC-STM-016-2009/.

204 Jishnu, Brahmaputra, *Attorney General Mahbubey hopes for Awami League nomination in next election*, DHAKA TRIBUNE (Apr. 29, 2018), https://www.dhakatribune.com/bangladesh/politics/2018/04/29/attorney-general-mahbub-hopes-awami-league-nomination-next-election.

205 *Abdul Quader Mollah v. The Chief Prosecutor*, International Crimes Tribunal, Dhaka, Crim. Rev. Petition Nos. 17-18 of 2013, at 21.

determination of the final court of appeal, namely, the AD, in the *Sixteenth Amendment Case*, cannot be said to have the same effect.

Furthermore, a review of a decision of the AD is only permissible when there is a manifest error of law or fact on the face of the decision which either "undermines its soundness or results in miscarriage of justice."[206] In light of the detailed examination of the AD's decision in the *Sixteenth Amendment Case* in Part VI of this Article, it is evident that the decision does not exhibit any "apparent and patent"[207] error which casts doubt on its reasonableness. Rather, the AD had prevented the executive's attempt to encroach on the independence of the judiciary—a basic structure of the Constitution—by unanimously nullifying the Sixteenth Amendment. In this context, the observations of Justice Hossain—the current Chief Justice—in the *Sixteenth Amendment Case* are noteworthy:

> The Sixteenth Amendment impairs the independence of the judiciary by making the judiciary vulnerable to a process of impeachment by the legislature which would be influenced by political influence and pressure.[208]

Justice Hossain in his judgment also termed the method of removal of judges on the recommendation of the Supreme Judicial Council a more "transparent procedure"[209] when compared to the procedure concerning the removal of judges by the Parliament. However, notwithstanding such observations, it is striking that Justice Hossain, after being sworn in as the Chief Justice—in supersession of Justice Miah—has not proceeded to promptly dispose of the review petition seeking the reversal of the decision of the AD in the *Sixteenth Amendment Case*. Rather it seems that out of "a sense of gratitude"[210] to the BAL regime, Justice Miah has now radically transformed his views regarding the efficacy of the provisions concerning the Supreme Judicial Council for safeguarding the independence of the judiciary. Such transformation became evident when it came to fore that Chief Justice Hossain had unilaterally carried out a primary investigation against three judges of the HCD who were accused of misconduct or

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206 *Id*.

207 *Id*. at 22.

208 *Bangladesh v. Advocate Asaduzzaman Siddiqui*, (2017) Civil Appeal No. 06 of 2017 (AD), 549.

209 *Id*. at 545.

210 E. CAMPBELL & H.P. LEE, AUSTRALIAN JUDICIARY 95 (2001).

incapacity.[211] Subsequently, Justice Hossain upon consultation with the head of the state—President Md Abdul Hamid, who has been elected to the office on a BAL ticket[212]—ordered the concerned judges to refrain from their judicial duties.[213]

The method adopted by the Chief Justice for taking disciplinary action against the judges of the SC in consultation with the executive branch of government, is not only devoid of any constitutional foundation, but also lacks the objectivity and transparency of the process involving the Supreme Judicial Council.[214] For unlike the functioning of the Supreme Judicial Council, it does not represent the plurality of the opinion of the senior-most judges of the nation for precluding the likelihood of arbitrariness or bias, even subconsciously, against the judge accused of wrongdoing and permits the executive branch to adversely influence such a method. Furthermore, unlike the Supreme Judicial Council, there is no evidence to suggest that the method adopted by the Chief Justice provides the accused judge any opportunity to defend the charges brought against him.[215]

The unceremonious ouster of Justice Sinha from the office of the Chief Justice, coupled with the adoption of an unconstitutional and arbitrary method by Justice Hossain for taking disciplinary action against judges accused of misconduct, have had the impact of unduly curtailing the competence of the judiciary to impartially adjudicate cases where the executive is a party, and to act as the final bulwark against executive encroachment on the liberty of individuals. In this context, reference can be first made to a recent deferential decision of the HCD in dismissing a writ petition challenging the constitutionality of the anti-defection provision contained in Article 70 of the Constitution for contravening, among other things, the tenets of the principle of democracy as enshrined in various provisions of the Constitution.[216]

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211 *Three High Court Judges Facing Probe, Ordered to Refrain from Judicial Activities,* BDNEWS24.COM (Aug. 23, 2019), https://bdnews24.com/bangladesh/2019/08/22/three-high-court-judges-facing-probe-ordered-to-refrain-from-judicial-activities.

212 *Hamid Elected President for a Second Term*, THE DAILY STAR (Feb. 7, 2018), https://www.thedailystar.net/politics/abdul-hamid-elected-president-of-bangladesh-second-term-1531225.

213 *Three High Court Judges Facing Probe, Ordered to Refrain from Judicial Activities*, *supra* note 212.

214 *See* BANGL. CONST. art. 96.

215 *Three High Court Judges Facing Probe, Ordered to Refrain from Judicial Activities, supra* note 212.

216 BANGL. CONST. arts 7, 19, 26, 27, 31, 44 and 119; *Article 70 of Constitution: It's a Safeguard for Democracy,* THE DAILY STAR (May 26, 2018),

It is striking that in dismissing the petition, Justice Abu Taher adopted an erroneous interpretation of the observations of both the AD and the HCD in the *Sixteenth Amendment Case*, as discussed earlier in Part VI, regarding the adverse impact of Article 70 on the independence of the MPs to act as an effective check on the powers of the executive branch of the government. For he concluded that the observations of both the divisions of the SC regarding Article 70 in the *Sixteenth Amendment Case* were not of precedential value, as these were incidental or collateral to the delivery of their judicial opinion in the case.[217] Justice Taher reached such a conclusion notwithstanding the fact that the detrimental impact of Article 70 on the independence of the MPs was, as pointed out earlier in Part VI, one of the grounds on the basis of which both the HCD and AD had declared the Sixteenth Amendment ultra vires the Constitution.[218]

Justice Moyeenul Islam Chowdhury, in delivering the majority judgment of the HCD to strike down the amendment, shed light on the undesirable impact of Article 70, which has become a principal tool for the government of the day to ensure the subservience of the MPs. As he observed:

> Because of Article 70 of the Constitution, a Member of Parliament effectively loses his character as an agent of the people and becomes the nominee of his party. What is dictated by the cabinet of the ruling party or the shadow cabinet of the opposition, Members of Parliament must follow them meekly ignoring the will and desire of the electorate of their constituencies. There starts a process of distance and apathy between the Members of Parliament and their electors. Such Members are dummies in Parliament. Having a solid grip over the majority of the Members of Parliament, the party-in-power moves to influence the executive, judiciary and other instrumentalities. It eventually results in what we say, 'daleokaran'—the political terminology to indicate a 'group oriented society.'[219]

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https://www.thedailystar.net/backpage/article-70-constitution-its-safeguard-democracy-1581670.

217 *Id.*

218 *See supra* Part VI.

219 *Advocate Asaduzzaman Siddiqui v. Bangladesh* (2014), Writ Petition No. 9989/2014 (HCD), at 123-24.

Consequently, Justice Chowdhury held that the terms of Article 70 coupled with the parliamentary method of the removal of judges as contemplated by the Sixteenth Amendment would firmly put the fate of judges in the hands of the party in power, thereby undermining the independence of the judiciary.[220]

On appeal, Chief Justice Sinha in delivering the judgment of the AD, as discussed earlier in Part VI, had endorsed the observations of the HCD by maintaining that due to the unwarranted restrictions imposed by Article 70 on the independence of MPs to carry out their functions in the Parliament, the method of the removal of judges as envisaged by the Sixteenth Amendment "would clearly undermine the independence of the judiciary."[221]

It can be argued from the above analysis that the both the HCD and AD in the *Sixteenth Amendment Case* drew a clear connection between the parliamentary method of impeachment of judges of the SC sought to be introduced by the Sixteenth Amendment, and the undesired consequences of the simultaneous operation of Article 70. Therefore, these observations of the two divisions of the SC cannot be downplayed as obiter. It seems that the judge of the apex court of the nation engaged in a deliberate attempt to downplay the precedential value of a landmark constitutional case in order to shield himself from the wrath of the ruling of BAL.

Second, the HCD has also seemingly proved reluctant in recent times to stand between the individual and the encroachment on his liberty by the executive. In this context reference can be made to the arrest of Shahidul Alam—an internationally celebrated photographer who was arrested on August 5, 2018 and who the HCD subsequently refused to grant him bail on several occasions.[222]

Alam was arrested by plain-clothes policemen for: (a) documenting the BAL regime's violent suppression of peaceful protests organized by high school students from July 29, 2018 to August 2, 2018 who were demanding safer roads and stringent road safety regulations, through photos and live recorded videos posted on Facebook, and (b) giving an interview to *Al Jazeera* on August 5, 2018, in which he remarked that the student protests reflected deeper popular anger at the "looting of the banks and the gagging of the media," and the

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220 *Id*.

221 *Bangladesh v. Advocate Asaduzzaman Siddiqui* (2017), Civil Appeal No. 6 of 2017 (AD), at 293.

222 *100 Days on from Shahidul Alam's Arrest,* DHAKA TRIB. (Nov. 13, 2018), https://www.dhakatribune.com/bangladesh/court/2018/11/13/100-days-on-from-shaidul-alam-s-arrest.

"extrajudicial killings, disappearings, bribery and corruption" executed by an "unelected government . . . . clinging on by brute force."[223] Subsequently, the regime charged Alam under the draconian Section 57 of the Information and Communication Technology Act, 2006, which had criminalized the publication of "fake, obscene or defaming information in electronic form."[224] If convicted, Alam could face a maximum jail term of fourteen years and a maximum fine of USD 11,920,400.[225]

It is manifestly evident that the regime of BAL was victimizing Alam for merely exercising his constitutionally protected right to freedom of speech and expression to criticize the regime's controversial policies or decisions. Furthermore, when the police produced Alam before the Chief Metropolitan Magistrate's Court, there was clear visible physical evidence that the law enforcement agencies had tortured him as "he was unable to walk by himself."[226] In fact, he described to the court the manner in which he was tortured, thus: "I was hit [in custody]. [They] washed my blood-stained Punjabi [a traditional Bangladeshi attire] and then made me wear it again."[227] Notwithstanding the infringement of Alam's fundamental rights, including the right not to be "subjected to torture or to cruel, inhuman, or degrading

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223 Paul Barth, *Bangladesh Prevents Freedom of Opinion*, FAIR OBSERVER (Aug. 6, 2018), https://www.fairobserver.com/region/central_south_asia/bangladesh-shahidul-alam-arrest-free-press-latest-asian-news-this-week-32380/; *Bangladeshi Photographer Shahidul Alam Released from Prison*, GUARDIAN (Nov. 20, 2018), https://www.theguardian.com/world/2018/nov/20/bangladeshi-activist-shahidul-alam-released-from-prison.

224 Information & Communication Technology Act, 2006, § 57, amended by Information & Communication Technology (Amend.) Act, 2013, No. 42 of 2013, THE BANGLADESH GAZETTE EXTRAORDINARY (Oct. 9, 2013) (Bangl.). Section 57 became a tool for the BAL regime to put down its critics in contravention of the fundamental rights guaranteed by the Constitution. This controversial provision was ultimately repealed through the enactment of the Digital Security Act 2018. *See* Digital Security Act 2018, No. 46 of 2018, § 61, THE BANGLADESH GAZETTE EXTRAORDINARY (Oct. 8, 2018) (Bangl.).

225 Information & Communication Technology Act, 2006, § 57, amended by Information & Communication Technology (Amendment) Act, 2013, No. 42 of 2013, THE BANGLADESH GAZETTE EXTRAORDINARY (Oct. 9, 2013) (Bangl.).

226 Billy Perrigo, *What the Arrest of Photographer Shahidul Alam Means for Press Freedom in Bangladesh*, TIME (Aug. 7, 2018), http://time.com/5359850/bangladesh-photographer-arrest-shahidul-alam-protests.

227 *Shahidul on seven-day remand*, NEWAGE (Aug. 7, 2018), http://www.newagebd.net/article/47782/shahidul-on-seven-day-remand.

punishment or treatment,"[228] the lower court not only refused to grant him bail, but also placed him on a seven-day remand.[229]

However, the HCD also refused to thwart the BAL regime's arbitrary encroachment on the fundamental human rights of Alam in dereliction of its constitutional mandate.[230] Furthermore, the HCD in following in the footsteps of the lower court refused to grant Alam bail on four separate occasions,[231] which resulted in him spending 107 days in prison.[232] It should be stressed here that such refusal to grant bail, stands in stark contrast to the HCD's previous tradition of offering efficacious remedy to petitioners to further "the cause of justice."[233] For instance, during the last declared state of emergency in January 2007 in Bangladesh, when the military-backed government of the day ousted the jurisdiction of the courts to release individuals arbitrarily detained by the government under the Emergency Power Rules,[234] the HCD, notwithstanding such ouster, proceeded to order the release of many detainees in exercise of its inherent power to grant bail under s 498 of the Code of Criminal Procedure (CrPc), 1898.[235] The HCD observed that its inherent jurisdiction to grant bail to secure the release of individuals under s 498 of the CrPc could not be stripped even during a state of emergency by any subordinate law.[236]

It is, indeed, striking that the HCD in departing from the practices followed by courts elsewhere of adopting a highly deferential approach when called on to examine actions taken by the government during states of emergency,[237] did not shy away from holding the executive accountable. Yet, during ordinary times, the superior judiciary due to the BAL regime's hostility towards it, has arguably proved to be extremely deferential.

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228 BANGL. CONST. art. 35(5).

229 *100 Days on from Shahidul Alam's Arrest, supra* note 223.

230 BANGL. CONST. art. 102(1) (stipulating that "The High Court Division on the application of any person aggrieved, may give such directions or orders to any person or authority, including any person performing any function in connection with the affairs of the Republic, as may be appropriate for the enforcement of any the fundamental rights conferred by Part III of this Constitution.").

231 Shafiqul Alam, *Bangladesh Photographer Freed After Months in Detention*, AGENCE FR. PRESSE (Nov. 20, 2018), https://www.yahoo.com/news/bangladesh-photographer-freed-months-detention-161543306.html?soc_src=community&soc_trk=tw.

232 *Id*.

233 *AKM Reazul Islam v. State* [2008] 13 BLC (HCD) 111, 119.

234 BARI, *supra* note 1, at 208-09.

235 *Id*. at 209-10.

236 *Moyez Uddin Sikder v. State,* 36 CLC (HCD) [3518] 287, 297 (2007) (Bangl.).

237 BARI, *supra* note 1, at 110, 136-41.

In light of the above discussion, it is evident that the measures adopted in the aftermath of the decision of Justice Sinha in the *Sixteenth Amendment Case*, have enabled the BAL regime to ensure the subservience of the judiciary, thereby realizing its aspiration of becoming "the unlimited master of the state."[238]

VIII. CONCLUSION AND RECOMMENDATIONS

The foregoing discussion reveals that the framers recognized the principle of the independence of the judiciary as a cornerstone in the scheme of the Constitution of Bangladesh. In fact, the principle is one of the basic pillars upon which the nation's constitutional edifice is built. Since security of the tenure of the judges is a key ingredient for maintaining judicial independence, the Martial Law regime of General Zia in April 1977, took the salutary step of incorporating a transparent procedure in the Constitution for the removal of the judges of the SC.[239] This procedure invested the Supreme Judicial Council—composed of the senior-most judges of the AD of the SC—with the responsibility to maintain the independence of the judiciary by protecting the judges of the SC from arbitrarily being dismissed at the whim of either the executive or the legislature.[240]

However, the BAL, after rendering the Parliament toothless, following the sham general election of 2014, has embarked upon the journey to institute a tyrannical regime.[241] Since an independent judiciary can act as a bulwark against tyranny, the regime sought to exert its supremacy over the Judiciary by dispensing with the above transparent constitutional method of the removal of judges through the enactment of the Sixteenth Amendment in September 2014.[242] This amendment, instead, entrusted the Parliament with the power to remove judges of the SC.[243] Although the SC restored the constitution provisions concerning the Supreme Judicial Council by invalidating the Sixteenth Amendment for altering one of the basic structures of the Constitution, namely, the independence of judiciary, the BAL regime has shown no signs of retreating from its effort to undermine the independence of the judiciary.[244]

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238 HAROLD JOSEPH LASKI, GRAMMAR OF POLITICS 542 (2015).
239 *See supra* Part III.B.
240 *Id*.
241 *See supra* Parts V-VII.
242 *See supra* Part V.
243 BANGL. CONST. amend. XVI § 2(2).
244 *See supra* Parts VI-VII.

First, in retaliation for Chief Justice Sinha's fearless judgment in the *Sixteenth Amendment Case,* which derailed the BAL government's plan to rob the judiciary of its independence, the regime not only forced him out of the highest judicial office but also the country.[245] Owing to well-founded fear of persecution in Bangladesh, Justice Sinha has been living in exile in Canada. Second, following Justice Sinha's resignation, the regime appointed its preferred candidate, Justice Hossain, as the Chief Justice in supersession of the senior most judge of the AD—Justice Miah.[246] This appointment was made with the expectation that Justice Hossain would reverse the decision in the *Sixteenth Amendment Case* pursuant to a review petition filed by the Government in December 2017, notwithstanding the fact that he was part of the AD which unanimously declared the amendment ultra vires the Constitution.[247]

Although Justice Hossain has not yet formally reversed the decision in the *Sixteenth Amendment Case*, he has indirectly executed the plan of the government. As he has validated the regime's ploy of casting doubts on the automatic restoration of the constitutional provisions concerning the Supreme Judicial Council by adopting an arbitrary and unconstitutional method of initiating disciplinary action against judges accused of misconduct in consultation with the executive.[248] Through these maneuverers, the regime has instilled fear of adverse consequences in the minds of the judges of the SC, thereby substantially impeding their ability to impartially discharge their duties, as is evident from the recent decisions of the HCD discussed earlier in Part VII.[249]

Thus, it is evident that by requiring the judiciary to act in accordance with its policies, the BAL regime has not only purposefully demolished one of the structural pillars on which the constitutional edifice is built but has also arguably undermined its credibility in the eyes of the citizens as an impartial forum for the resolution of their disputes.

Accordingly, it is necessary to adopt concrete measures for upholding the independence of the judiciary. First, it is striking that despite the passing of more than three years, the AD has not disposed of the review petition filed by the regime seeking the reversal of the

245 *See supra* Part VI.
246 *See supra* Part VII.
247 *Id*.
248 *Id*.
249 *Id*.

decision in the *Sixteenth Amendment Case*. Since the decision in the *Sixteenth Amendment Case*, as pointed out earlier in Part VII, does not manifest any "apparent and patent"[250] error which can jeopardize its reasonableness, it is imperative that the AD dismisses the review petition without any further delay. For doing so, as argued previously, would remove the impediment, as conveniently claimed by the BAL, to the restoration of the constitutional provisions concerning removal of the judges of the SC on the recommendation of the Supreme Judicial Council.

Second, the BAL should realize that impairing the independence of the judiciary in order to ensure the survival of its absolutist project is fundamentally contradictory to the democratic principles on which the nation was founded, as is evident from the third preamble paragraph of the Constitution:

> [I]t shall be a fundamental aim of the State to realise through the democratic process a . . . society . . . free from exploitation—a society in which the rule of law, fundamental human rights and freedom . . . will be secured for all citizens.[251]

The adoption of the above measures would enable the judges to decide cases on their legal and factual merits free from political control, thereby ensuring the observance of the rule of law and restoring in the process the SC's credibility in the eyes of the litigants. As Sir Gerard Brennan, the former Chief Justice of Australia, aptly observed:

> The reason why judicial independence is of such public importance is that a free society exists only so long as it is governed by the rule of law— the rule which binds the governors and the governed, administered impartially and treating equally all those who seek its remedies or against whom its remedies are sought. However vaguely it may be perceived, however unarticulated may be the thought, there is an aspiration in the hearts of all men and women for the rule of law. That aspiration depends for its fulfilment on the competent and impartial application of the law by judges. In order to

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250 *Abdul Quader Mollah v. The Chief Prosecutor*, Criminal Review Petition Nos. 17-18, 22 (Int'l Crim. Trib., Dhaka, 2013).

251 BANGL. CONST. pmbl.

> discharge that responsibility, it is essential that judges be, and be seen to be, independent.[252]

252 *Judicial Independence, The Australia Judicial Conference,* UNIVERSITY HOUSE, AUSTRALIAN NATIONAL UNIVERSITY (Nov. 2, 1996), https://www.hcourt.gov.au/assets/publications/speeches/former-justices/brennanj/brennanj_ajc.htm (Judicial Independence).