ADVOCATE ASADUZZAMAN SIDDIQUI V. *BANGLADESH*: BANGLADESH'S DILEMMA WITH JUDGES' IMPEACHMENT

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ABSTRACT

Like the major constitutional systems of the world, Bangladesh had a parliamentary removal process for the judges of the highest court. The system was however changed by the military rulers of late 1970s. Very recently, the parliament of Bangladesh attempted to revive the original system and the Sixteenth Amendment to the Constitution of Bangladesh, was passed in 2014. The case at hand, Asaduzzaman Siddiqui v. Bangladesh is a challenge to this Amendment. This case comment analyzes the arguments and reasoning of the case and argues that the judges and counsels concerned have wasted a chance to analyze this Amendment from its proper perspective. Therefore, a very high profile constitutional litigation ended in adding virtually nothing to the constitutional jurisprudence of Bangladesh.

INTRODUCTION

The executive, legislature and judiciary constitute the principle organs of a modern body politic. Constitutions thrive to demarcate each organ's place and limits through creative articulation of separation of power, and checks and balances. Keeping the democratic sovereignty of the people as a foundation, the three organs continue to struggle and co-operate with each other in managing the affairs of State. In the overall framework, the elected executive remains answerable to the legislature, and the legislature to the people. The judiciary, on the other hand seeks to ensure the

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due observance of the law of the land – the Constitution by the executive and legislature. Participation of the legislature in judges' appointment and removal from the higher judiciary is a well-established trend across the world's leading constitutional system; the judiciary being an unelected organ giving a further justification for participation of the executive and legislature. In the U.K., judges are removed by the Crown after both the Houses pass a resolution indicting him for corruption or offences involving moral turpitude.[1] In the U.S., judges of the Supreme Court are removed through the combined efforts of House of Representatives and the Senate.[2] The Indian Parliament also enjoys this privilege.[3] The Constitution of Bangladesh (hereinafter referred to as "the Constitution") originally provided for parliamentary removal of a Supreme Court judge found guilty of 'gross misconduct' and physical or mental incapacity to perform the functions of his/her office.[4]

This provision was later amended by the Martial Law Proclamation in 1977.[5] The new system established a Supreme Judicial Council (hereinafter "the Council") comprising the Chief Justice of Bangladesh and the two other senior judges in the Appellate Division of the Supreme Court.[6] Under the new system, the President would write to the Chief Justice to initiate an investigation by the Council into any allegation communicated to him against a judge from any reliable source. Even the Council itself may communicate to the President any such information or allegation of misconduct. Upon receipt of such information or allegation, the President would need to satisfy himself that he has reasons to 'apprehend' that a judge is physically or mentally incapacitated or has committed gross misconduct.[7] Until and unless the President was so satisfied and he formally authorised the Council, no investigation would start. If, after the investigation,

[1] The Act of Settlement, 1701, The Supreme Court Act. 1981. Sec. 11(3)

[2] THE CONSTITUTION OF THE UNITED STATES OF AMERICA, art. I, Sec. 3, Cl.6 and 7

[3] THE CONSTITUTION OF INDIA. Jan. 26.1950, art.124(4), The Judges (Inquiry) Act, 1968 and The Judges (Inquiry) Rules, 1969

[4] THE CONSTITUTION OF THE PEOPLE'S REPUBLIC OF BANGLADESH, Nov. 4, 1972, art. 96(3) (Bang.).)

[5] The Proclamations (Amendment) Order, 1977 (Proclamations Order No. I of 1977)

[6] THE CONSTITUTION OF THE PEOPLE'S REPUBLIC OF BANGLADESH, Nov. 4, 1972, art. 96(3) (Bang.).

[7] *Id.*, art. 96(5).

the Council found the allegation proved and recommended that the judge concerned be removed, it was provided that the President 'shall' by order remove the judge from office.[8]

Tailored to suit the temper of a military run presidential government, the Council system raised significant concerns over the efficiency and integrity of the whole process. Experiences also indicate that the executive being the dominant arbiter of things, the Council remained grossly dysfunctional and ineffective over the years.[9] The ineffectiveness may be attributed primarily to the successive political executives' reluctance to trigger the Council proceedings against judges appointed by the same government.[10] The ineffectiveness is further coupled with the reluctance shown by the executive in instances where there had been apprehension that the Supreme Court judges would favor their colleagues during the investigation process.[11] However, the system had been used once for the removal of a High Court Judge.[12]

[8] ,*Id*.,art.96(6).

[9] S.M. Masum Billah, *Faith, hope and promise*, Dhaka Tribune, Aug. 28, 2014; Anisur Rahman, *16th Amendment of the constitution: Another view*, The Daily Star, Sep.23, 2014.

[10] Justice Latifur Rahman of the High Court Division was allowed to resign and silently leave the country on the face of a substantiated allegation of collision with a former president in relation to a corruption allegation pending against him. Editors of the newspapers covering the scandal were however punished for contempt of court (State v. Chief Editor, Manabjamin, 57 DLR (2005) 359). On another occasion, Supreme Judicial Council was not triggered against Justice Faisal Mahmud Faizee against whom there was a well-founded allegation of forging his LL.B. certificate. In this occasion as well, the Editors of the newspaper covering the scandal was punished for contempt of court (*Md. Faiz* v. *Ekramul Haque Bulbul and others* 57 DLR 670). On a third occasion, an allegation of misconduct against the sitting Chief Justice by one of his colleague in the Appellate Division Justice Shamsuddin Haider Manik was not paid heed to (http://bdnews24.com/bangladesh/2015/09/13/justice-shamsuddin-choudhury-seeks-chief-justice-sk-sinhas-removal; Accessed on June 1, 2017)

[11] Several of the Supreme Court judges were invited to "tea" in the presidential palace during the military backed caretaker government of 2007. Some of them actually resigned after the tea and two of them, including the current Chief Justice Mr. Surendra Kumar Sinha, declined to resign (http://zeenews.india.com/news/south-asia/ex-bangladesh-president-tried-to-remove-judges_547820.html?pfrom=article-next-story; Accessed on: May 30, 2017).

[12] Mr Shahidur Rahman, a High Court Division Judge, was removed by the President on recommendation of the Supreme Judicial Council in 2004. This incident was triggered by a litigant of the Supreme Court lodging a complaint to the Bar Council against Mr Shahidur Rahman for taking bribe to secure a favorable judgment which he ultimately failed to secure. President of the Bar Council then wrote to the Chief Justice and the matter got immediate attention of media. The decision to trigger the Council process too was motivated by the serious political repercussions it created for the ruling party (*See* – Anisur Rahman , Citizens' concern over appointment of judge in Supreme Court)

Interestingly, the judges in the higher judiciary remained self-content with this system as the actual investigation of an allegation and recommendation of the removal of a judge rested with the court itself – the Chief Justice and two other of his senior colleagues. This perhaps was the most plausible explanation for the Appellate Division acceding to this change in the original Article 96 of the Constitution, though almost all other changes brought by the military regime in the Constitution were invalidated through the celebrated Fifth Amendment Judgment of 2009. The Appellate Division found the Council system more transparent and pro-judiciary than the original one involving the Parliament.[13] The 15th Amendment of 2011, which brought almost the whole of the original Constitution back, left the Council system intact.[14] The Parliament, however, changed its mind shortly. Accordingly, parliamentary involvement in the judges' removal procedure was resurrected through the 16th Amendment of 2014.[15]

Opinion on the parliamentary removal of judges is divided in Bangladesh. Some commentators have argued that parliamentary removal of judges is more in line with the doctrine of separation of power and checks and balances.[16] However, others have emphasized that the local specificities of Bangladesh coupled with the members of parliament being enchained within strict party

[13] Khandker Dlewar Hossainv. Bangladesh Italian Marble Works Ltd, 15 MLR (AD) 249-368: "This substituted provisions being more transparent procedure than that of the earlier ones and also safeguarding independence of judiciary, are to be condoned" at p 177 of the Full Text Available at http://www.dwatch-bd.org/5th%20Amendment.pdf (Accessed on June 2, 2017)

[14] Bang. Const., amend. XV, § 31.

[15] Bang. Const., amend XVI, 2014 has revived the original Article 96. Article 96 as it stands currently is:

> "96. (1) Subject to the other provisions of this Article, a Judge shall hold office until he attains the age of sixty-seven years.
>
> (2) A Judge shall not be removed from his office except by an order of the President passed pursuant to a resolution of Parliament supported by a majority of not less than two-thirds of the total number of Members of Parliament, on the ground of proved misbehaviour or incapacity.
>
> (3) Parliament may by law regulate the procedure in relation to a resolution under clause (2) and for investigation and proof of the misbehaviour or incapacity of a Judge.
>
> (4) A Judge may resign his office by writing under his hand addressed to the President."

The Sixteenth Amendment Bill is available online at: http://www.loc.gov/law/foreign-news/article/bangladesh-sixteenth-amendment-to-constitution-empowers-parliament-to-impeach-justices/ (Accessed on April 30, 2017)

[16] Anisur Rahman, *16th Amendment of the constitution: Another view*, THE DAILY STAR, Sep. 23, 2014.

affiliation pursuant to Article 70 of the Constitution,[17] do not give rise to an ideal position to show adequate respect to the independence of judiciary.[18] The Supreme Court's recent invalidation of the 16th Amendment Act in *Advocate Asaduzzaman Siddiqui* v. *Bangladesh* resides primarily on this apprehension.[19]

THE SIXTEENTH AMENDMENT CASE

Nine practicing advocates of the Supreme Court, affiliated with a NGO named Human Rights and Peace for Bangladesh (HRPB), filed a writ petition before the High Court Division of the Supreme Court challenging the constitutionality of 16th Amendment. The High Court Division declared the amendment unconstitutional[20] and the Appellate Division upheld the same.[21]While the constitutional challenge provided significant scope for the lawyers and judges to re-examine the entire fabric of the constitutional system of Bangladesh, the line of submission and reasoning adopted by the petitioners, respondents, *amicus curie,* the majority and dissenting opinion were disappointing. A thorough reading of the judgments of the High Court Division and Appellate Division in this case reveals that both the bar and bench failed to rise up to the occasion. Most of the arguments were based on a purely literal understanding of key constitutional principles, or were rather polemic, and insufficiently backed by sound constitutional analysis and reasoning.

[17] Article 70, popularly known as the anti-defection clause of the constitution of Bangladesh, restricts the parliament members voting rights in the House by requiring the vacation of a member's seat who would decide to go against the party decision.

[18] Md Yasin Khan Chowdhury, *Removal of Judges under 16th Amendment: A Euphemism to Curb on Judiciary*, 3, DIU Journal of Humanities and Social Science, 89, 89 – 102, (July 2015)

[19] *Bangladesh High Court scraps 16th amendment to constitution*, THE DAILY STAR, May 06, 2016.

[20] *Advocate Asaduzzaman Siddiqui* v. *Bangladesh* (Writ Petition No. 9989/2014). Full text of the High Court Division judgment is available at: http://www.supremecourt.gov.bd/resources/documents/783957_WP9989of2014_Final.pdf (Accessed on - December 28, 2016). Pages referred to in subsequent footnotes correspond to the page number of the High Court Division judgment downloaded from the Supreme Court website cited here.

[21] The case reached the Appellate Division as *Bangladesh v. Advocate Asaduzzaman Siddiqui* (Civil Appeal No. 06/2017). Full text of the Appellate Division judgment is available at: http://www.supremecourt.gov.bd/resources/documents/1082040_C.A.6of2017_Final_3.8.2017.pdf (Accessed on - August 10, 2017) Pages referred to in subsequent footnotes correspond to the page number of the Appellate Division judgment downloaded from the Supreme Court website cited here.

A. Independence of Judiciary and Separation of Powers as Basic Structures of the Constitution

In Bangladesh, the doctrine of Basic Structure is a widely used tool for litigants as well as courts. Relying on Articles 7, 7B and 22 of the Constitution,[22] it was argued that the Amendment would lead to legislative intervention in judicial business, thereby destroying the basic structure components of judicial independence and separation of power.[23] While these two constitutional precepts were overtly relied upon in the judgment, the doctrine of check and balance was neither argued by the petitioner nor the *amici curiae*. Therefore, the majority opinion at the High Court Division left aside a very important doctrine. While Article 22 of the Constitution deals with separation of the judiciary from the executive, an *amicus curie* interpreted it as contemplating a judiciary free from the "interference" of the other two organs of the State.[24] Neither the petitioner, nor the *amicus curie* and not even the majority, attempted an interpretation of "interference" *vis a vis* "check and balance". Though the Attorney General Mahbubey Alam explained why and how the parliamentary removal process will not be an "interference" rather an institutional participation in the overall accountability structure,[25] the majority view did not accommodate this. Rather the majority opinion found "no earthly reason to disagree"[26] with the petitioners' views.

Further, the lead counsel of the petitioner's side, Advocate Manzill Murshid, took a strict view of separation of executive, legislative and judicial functions. Unaccompanied by any substantial analysis of the constitutional scheme of separation of power and checks and balances, Mr. Murshid claimed that the Constitution contemplates a watertight separation between Executive, Legislature and Judiciary, and investigation into judges was a power of judicial nature

[22] Article 7 of the Constitution is about the supremacy of the Constitution and Article 7B is about certain provisions (including Article 22 of the Constitution)being unamendable. Article 22 of the Constitution reads as: "The State shall ensure the separation of the judiciary from the executive organs of the State".

[23] Manzill Murshid, *supra note* 20, 24-25.

[24] *Ibid,* Dr. Kamal Hossain at 39.

[25] *Ibid,* Attorney General Advocate Mahbubey Alam at 28.

[26] *Ibid,* Justice Moyeenul Islam Chowdhury at 130.

unsuitable for parliamentary exercise.[27] While the Constitution clearly rejects a watertight separation of power[28] the majority agreed with Mr. Murshid, without highlighting any specific article of the constitution that contemplates such a watertight separation.[29]

At the Appellate Division, Chief Justice Surendra Kumar Sinha endorsed the majority view of the High Court Division by re-stating that "Under the Constitution, the higher judiciary is entirely separated from the Executive and Legislature and is absolutely independent."[30] Interestingly, an unusual dimension of the doctrine was considered in the High Court Division when Justice Moyeenul Islam Chowdhury, posed a question regarding the 16th Amendment affecting the independence of judiciary, component of the basic structure of the Constitution, "in public perception?" According to him:

> .. [A] billion-dollar question has arisen: whether the Sixteenth Amendment has infringed upon the independence of the Judiciary in public perception? My answer is obviously in the affirmative. In public perception, the independence of the Judiciary has been curbed by the Sixteenth Amendment. We must attach topmost importance to public perception when it comes to the question of independence of the Judiciary. If

[27] *Ibid*, Manzill Murshid, at 24. Advocate Murshid argued, "[T]he Constitution [of Bangladesh] does not allow or contemplate any judicial role by the Parliament and the role of each organ of the State is clearly defined and carefully kept separate under the Constitution to maintain its harmony and integrity and to maximize the effectiveness of the functionality of the 3(three) organs of the State, that is to say, the Executive, the Legislature and the Judiciary and the assumption of the judicial role by the Parliament in the matter of removal of the Judges of the Supreme Court derogates from the theory of separation of powers."

[28] THE CONSTITUTION OF THE PEOPLE'S REPUBLIC OF BANGLADESH,Nov. 4, 1972Arts. 62(2), 78(2), 93(1), 107, 115, 133 (Bang.): would confirm that installing a Westministerial parliamentary form of government Bangladesh Constitution invites a fusion of power rather than a watertight separation propagated by Mr Manzill Murshid. Advocate Mahmudul Islam, the leading constitutional authority of Bangladesh has termed the Bangladeshi scheme of separation of powers as one of "fusion of power". To him, "What the constitution has done can very well be described as "assignment"; assignment of powers of the Republic to the three organs of the Government and it provides separation of power in the sense that no one organ can transgress the limit set by the Constitution or encroach upon the powers assigned to the other organs." (MAHMUDUL ISLAM, CONSTITUTIONAL LAW OF BANGLADESH, 65, (2nd Ed, Mullick Brothers, Dhaka, 2003)).

[29] Justice Moyeenul Islam Chowdhury, *supra note* 20, at 131.

[30] Justice Surendra Kumar Sinha, *supra note 21* at 239

> according to public perception, the Judiciary is not independent, then it cannot be sustained at all.[31]

While "public perception" is hard to determine and is never a logical determiner of constitutionality, it is even harder for a judge on the Bench enter an assessment of public perception on a pure legal question.[32] Interestingly, Justice Moyeenul Islam Chowdhury concedes at a later stage that courts "do not administer justice by plebiscite."[33]

B. Questions into the suitability and desirability of parliamentary involvement

The second question in the case was whether Parliament's participation in the judges' removal would constitute an infringement of judicial independence. Seen in this light, the desirability and permissibility of Parliament's institutional participation in judges' removal process was expected to be questioned, supported or tested by the parties and the judges. The case in hand, however, ended in some disappointingly misdirected arguments and reasoning.

Firstly, Dr. Kamal Hossain, an important *amicus curie* in the case has argued that since Parliament is not entitled to reduce the salaries of the judges as per Articles 88 and 89 of the Constitution, it is also not entitled to remove them from their office.[34] Like India, Articles 88 and 89 of the Constitution, consider the salaries and financial benefits of the higher court judges during their tenure, a charge upon the Consolidated Fund and the Parliament is prohibited from changing it to the judges' disadvantage. However, Dr. Hossain failed to explain how this could preclude a parliamentary participation in the removal of a judge who is facing an allegation of misconduct and gross violation of the Constitution. Without much inquiry into the contextual and situation difference between these two cases, the majority opinion in the High Court Division felt

[31] *Supra note* 20, p 139.

[32] *Bangladesh Italian Marble Works Limited v. Bangladesh* 2006 (Special Issue) BLT (HCD) 1 at p 204.

[33] GEOFFREY RIVLIN, UNDERSTANDING THE LAW 84 (Oxford, 6th ed. 2012).

[34] Dr Kamal Hossain, *supra note* 20, at 43.

"at one with" Dr Hossain.[35] In the Appellate Division, Barrister Fida M Kamal took up the argument in a similar fashion and the Chief Justice endorsed the point.[36]

Secondly, Dr. Hossain argued that transfer of the removal power from the Council to the parliament would constitute a "disadvantageous" change in the terms of service of the sitting judges and therefore violate the Article 147(3) of the Constitution.[37] This too was "palpably clear" to the majority opinion in the High Court Division.[38] In the Appellate Division, Chief Justice Surendra Kumar Sinha adopted a similar reasoning.[39] Interestingly, neither Dr. Hossain nor the majority opinion in the High Court Division clarified or explained in what sense a change in the removal procedure of a judge would constitute a disadvantageous variation in the terms and condition of his/her service. Had there been any disadvantageous change in the proposed law in relation to the grounds of removal, right of hearing, self-defence, salaries, amenities, privileges and retirement benefits etc of the judges concerned, there might have been a possibility of arguing along these lines. It remains arguable as to whether a mere change of procedure is harmful if its substantive entitlements are kept intact.[40] Apart from a generalized mistrust in the Parliament as an institution "poking its nose"[41] into the judges' removal process, there seems to be no other substantive harm contemplated even by the petitioners and the *amicus curie*.

[35] *Ibid,* Justice Moyeenul Islam at 121.

[36] Barrister Fida M Kamal, *supra note* 21, at 321

[37] THE CONSTITUTION OF THE PEOPLE'S REPUBLIC OF BANGLADESH,Nov. 4, 1972art. 147(3) Bang.: the remuneration, privileges and other terms and conditions of service of a person holding or acting in any office to which this Article applies shall not be varied to the disadvantage of any such person during his term of office.

[38] Justice Moyeenul Islam Chwodhury, *supra note* 20, at 122.

[39] Justice Surendra Kumar Sinha, *supra note* 21, at 491.

[40]*Muhibur Rhaman Manik* v *Bangladesh & ors* 23 BLD (HCD) 264 (Gist of the decision is that one does not incur any constitutionally objectionable harm merely for a change in the forum dealing with his case, unless and until the guarantees of adequate defence and procedural fairness in maintained (Para 15 of the judgment)). See also - *Sheikh Hasina v Bangladesh* (2008) 60 DLR (AD) 90 (Gist of the decision is that one is not harmed by mere change in the procedure of dealing with an accusation or trial, if the substantive guarantees of fundamental rights and procedural fairness is maintained by the change).

[41] Justice Moyeenul Islam Chowdhury, *supra note* 20, at 144.

Thirdly, as regards the parliament's alleged unsuitability for participation in judges' removal process, the petitioners, most of *amici curiae* and the majority judges in the High Court Division have drawn heavily upon 'experience rather than logic'.[42] The experiences as emphasized are that around 70 percent of the members of Parliament are businessmen, they are unmindful of their legislative responsibilities,[43] quality of their legislative performance is of 'low standard'[44], a lot of them have criminal records,[45] they are severely restrained by Article 70 of the Constitution and partisan directives will rule the show.[46] The 'experience' therefore leads the majority and others to the conclusion that the 16th Amendment would cause a violent blow to the independence of judiciary and separation of power –the two important aspects of the basic structure of the constitution.[47]

Likewise, the entire edifice of the Appellate Division judgment is based on exactly the same line of perception as regards Article 70:

> "We find no infirmity in the view taken by the High Court Division on construction of article 70; and that in view of article 70, the members of Parliament must toe the party line in case of removal of any Judges of the Supreme Court. Consequently, the Judges will be left at the mercy of the party high command. We find nothing wrong in taking the above view."[48]

It appears that 'experience' based arguments like the above would not stand the test of appropriate and sound legal reasoning expected of any ordinary constitutionality challenge. Primarily, Bangladesh does not yet have any single 'experience' of Parliament removing a Supreme Court judge because of a corrupt motive. Secondly, if we assume the "experience test"

[42] *Ibid,* Barrister M Amirul Islam at 45.

[43] *Ibid.*

[44] *Ibid,* Justice Moyeenul Islam Chowdhury at 146.

[45] *Ibid,* Barrister Ajmalul Hossain at 50.

[46] *Ibid,* Dr Kamal Hossain at 39 and Justice Moyeenul Islam Chowdhury at124.

[47] *Ibid,* Manzill Murshid at 23.

[48] Justice Surendra Kumar Sinha, *supra note* 21. at 281-82

as adopted to resemble something such as the American "living constitutionalism"[49] discourse, it leads us nowhere. In the U.S. constitutional jurisprudence, living constitutionalism or loose constructionism refers to an interpretative tendency where the court takes a pragmatist approach to constitutional interpretation and claims that sometimes adhering strictly to the original meaning would be unacceptable as a matter of policy. These loose constructionists claim that drastic changes in the socio-legal ecology would often call for an evolving interpretation of the fundamental law of the land.[50] To this end, they benefit from the broadly and flexibly drafted texts of the Constitution to achieve the desired outcome.[51] Understandably that is not what the *amicus curie* and majority opinion were trying to achieve here in *Asaduzzaman* case. They were, rather, nullifying a system clearly and unequivocally endorsed and adopted by the framers of the original the Constitution as being inconsistent with the original Constitution itself (!) Thirdly, the 'experience test' as used earlier by the Supreme Court of Bangladesh itself in the Thirteenth Amendment case[52] is contextually different, and hence unsuitable to be applied in this case. While nullifying the caretaker government system as introduced through the Thirteenth Amendment, the then Chief Justice A.B.M Khairul Hoque relied heavily on the unpleasant "experiences" the system caused to the judiciary.[53] Some of the retired Chief Justices leading an election time government led to extreme politicisation of the appointment of Supreme Court judges, their elevation to Appellate Division and the ultimate selection of the Chief Justices. Justice Hoque and his colleagues, however, based their decision principally on the undemocratic

[49] Jack M Balkin, *Alive and Kicking: Why no one truly believes in a dead Constitution*, (Aug. 29, 2005); http://www.slate.com/articles/news_and_politics/jurisprudence/2005/08/alive_and_kicking.html (last visited June 28, 2017).

[50] *Missouri v. Holland* 252 U.S. 416 (1920) at p 433; Justice Holmes wrote: "[W]hen we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago. The treaty in question does not contravene any prohibitory words to be found in the Constitution. The only question is whether [252 U.S. 416, 434] it is forbidden by some invisible radiation from the general terms of the Tenth Amendment. We must consider what this country has become in deciding what that amendment has reserved."

[51] *Trop v. Dulles*, 356 U.S. 86 (1958) at p 101.

[52] Abdul Mannan Khan v. Bangladesh,, 26 DLR (AD) 44.

[53] *Ibid,* A.B.M. Khairul Hoque at 288 (The judgment is in *Bangla*).

nature of the caretaker government and its pervasive attack on several basic structures of the original Constittution.[54] The bitter experiences with appointment in the judiciary were rather used as corroborative facts substantiating their basic structure arguments. Unlike the Thirteenth Amendment case, the later experiences unrelated to the specific question in hand (the process of removal of judge itself) are sought to be used as nullifying tools in this case. It is our perception that the focal point of the case lies somewhere else.

If one seeks to test the constitutionality of a procedural device related to an institution like the Parliament, one must talk and argue from an institutional point of view. Judging the character traits of individuals comprising the institution (here the members of parliament) cannot be considered ideal judicial reasoning. When constitutional law academicians, lawyers and judges refer to constitutional institutions they usually refer to the relevant institutional dynamics, process and safeguards related to that. Therefore, the question for determination in this case was whether the Parliament as an institution was constitutionally and legally capable of possessing the power, which it was seeking to have. The question here was not how good or bad the individual parliamentarians were. Quite disturbingly, this was the approach both the High Court Division and Appellate Division were overwhelmed with. The Appellate Division was particularly tough in the rejecting an institutional approach. Posing a big question mark over the caliber of the parliamentarians[55] the Appellate Division held:

> There is no chance of resting the matter in the 'safe' hands of purely institutional virtuosity. The working of democratic institutions, like all other institutions, depends on the activities of human agents in utilizing opportunities for reasonable realisation....[56].

A important point for consideration in this case was overlooked by the High Court Division and counsels of both the sides. The doctrine of popular sovereignty that constitutes the basis of the democratic constitutionalism was not tested for or against either of the propositions. The

[54] *Ibid,* pp 291-295.

[55] Justice Surendra Kumar Sinha, *supra note* 21 at 223 (Before assuming the powers the members of Parliament should have considered as to whether they are capable of dealing with such responsibility.)

[56] *Ibid,* at 229

Preamble, which has been identified as the "Pole Star" of the constitutional system of Bangladesh,[57] coupled with Article 7 of the Constitution, which has been considered the foundation of all the basic structures,[58] places the democratic sovereignty of the people on top of the whole body politic. In Bangladesh, it is considered that there is neither unfettered parliamentary sovereign nor a judicial supremacy. The essence of the constitutional structure is that of a limited government – executive, legislative and judicial power limited by the appropriate constitutional norms. While the Supreme Court, as the perceived "guardian of the Constitution"[59], claims a right to circumscribe the exercise of executive and legislative powers, it appears a bit unprincipled for the Supreme Court to be reservationist in its own case and refuse to be subject to popular scrutiny ensured through the primary representative body of the Republic – the Parliament.

Though the government tried to press the point before the Appellate Division, Chief Justice Surendra Kumar Sinha drove the argument to a completely untenable position. Justice Sinha framed the question from a wholly misdirected point. He asked whether the representatives of the people could exercise their power to destroy the independence of judiciary, as the Basic Structure of the Constitution,[60] whereas the question for determination was whether the representatives of the people could constitutionally have a say in the judges' removal process. Justice Sinha framed the issue as if it was whether the representatives of the people could violate the constitution in the peoples' name. While answer to Justice Sinha's issue is in the negative, it does not necessarily mean that answer to the actual issue pressed by the government would also be in the negative. Justice Sinha thereby bypassed a substantially important argument placed before the Appellate Division.

Also in our opinion, the arguments relating to Article 70 of the Constitution lack relevance in this case. Article 70 of the Constitution being placed in the original Constitution itself, it is now

[57] *Anwar Hossain Chowdhury* v. *Bangladesh,* 1989 BLD (Spl) 1 at para 443 per Justice Habibur Rahman.

[58] *Khandker Dlewar Hossain* v. *Bangladesh Italian Marble Works Ltd,* (2010) 15 MLR (AD) 249;*Siddique Ahmed* v *Bangladesh,* (2013) 65 DLR (AD) 8.

[59] *Jamil Huq* v. *Bangladesh,* 34 DLR (AD) 125.

[60] Justice Surendra Kumar Sinha, *supra note* 21. at 482-82.

inconsistent for Dr. Hossain, the principle author of the Constitution, to argue that the framers of the original Constitution provided for parliamentary removal on the 'premise' that the MPs will exercise their power free from party directives.[61] Moreover, if MPs' mechanically obeying their party decision is a serious defect, then the similar problem lies with the Supreme Judicial Council as well. There the initiation of removal procedure and finally the actual decision to remove the judge concerned is in the hands of the President who, as per Article 48(3) of the Constitution, is more strictly bound by the party chief – the Prime Minister. While the evident mischief of the Prime Minister's upper hand in the Supreme Judicial Council process ensured by Article 48(3) of the Constitution was not considered at all, the perceived mischief of Article 70 of the Constitution in the parliamentary removal process received substantial attention in the judgment. Further, operation of the Article 70 of the Constitution could have been easily avoided in cases of removal of judges by adopting some procedural devices like secret ballot voting and prohibition of official announcement of any party's decision on a judge's removal incident. This could have been achieved by the proposed subordinate law.[62] In our opinion, the Supreme Court could have upheld the constitutionality of 16th Amendment and, at the same time, issued suitable directives on any such or other procedural devices that could be adopted in the subordinate law contemplated by Article 96(3) of the Constitution. Given the history of the 12-point directives in *Masder Hossain* case,[63] issuing directives or judicious opinions in this fashion is not quite unusual in our jurisdiction. Attorney General Mahbubey Alam urged the court to wait to see how the power is actually going to be used as per the proposed subordinate law. The author judge in the High Court Division Justice Moyeenul Islam Chowdhury, however, was convinced that waiting for the subordinate law was not necessary. The 16th Amendment 'in itself' was violative of the basic structure of independence of judiciary and separation of power.[64] It kept the

[61] Dr Kamal Hossain, *supra note* 20, at 43.

[62] A draft law on investigation of an alleged misconduct or incapacity cleared by the Cabinet and waiting to be laid before the parliament was placed before the Court. The law provided for a 10 member investigation committee into the allegation on receipt of whose report the floor will vote on the ultimate removal.

[63] *Secretary, Ministry of Finance* v. *Masdar Hossain*, 52 DLR (AD) 82. In this case the Supreme Court of Bangladesh issued 12 point directives upon the government of Bangladesh as regard the way in which rules may be framed to assure separation of subordinate judiciary from the executive without amending the constitution itself.

[64] *Supra* note 20, Justice Moyeenul Islam Chowdhury at 67.

President's responsibility of removing the judges intact but made it subject to a parliamentary super majority decision. However, whether it has deprived the Appellate Division judges of their role in the investigation of an allegation against any of their colleagues or not is uncertain. Though the draft Bill[65] that was presented before the High Court Division conveyed such an indication, it was a mere draft and as afore-mentioned; the High Court Division could very well pass some comments on that draft.[66] Justice Moyeenul Islam Chowdhury, however, did not opt to suggest any modification there. Rather he was focusing on the 16th Amendment "in itself". To him, the draft Bill was only "corroboration" of the 16th Amendment's unconstitutionality.[67]

Unfortunately, the Appellate Division also refused to think differently from Justice Moyeenul Islam of the High Court Division. Justice Surendra Kumar Sinha, in fact, mocked the argument by terming it "absolutely bereft of any logic and legal substance".[68] Appellate Division was of the opinion that waiting for a subordinate law pursuant to a "void Act would be like the phrase *"the doctor came after the patient had died".*"[69]

Fourthly, the petitioner, *amici curiae* and the majority opinion in the High Court Division appeared to rely heavily on some hypothetical "could be" considerations most of which were loosely tailored and not based on appreciation of the over-all body politic and accountability structure. Mr. Monjil Murshid feared that Parliament may harass innocent judges or the judges may be left at the mercy of Parliament.[70] Dr. Hossain feared that the removal process may be

[65] The Supreme Court Judges Misconduct and Incapacity (Inquiry and Proof) Act, (2016) (Proposed), as cleared by the Cabinet opted for the formation of a 10 member investigation panel into the allegation of misconduct. The author judge, Moyeenul Islam Chowdhury has found the non inclusion of Supreme Court judges in the panel "very stunning, mind-boggling and astounding"" (*Supra* note 20 ,at 143).

[66] In this regard, the 2016 opinion of the Law Commission and the Draft Law prescribed by the Commission (The Supreme Court Judges Misconduct and Incapacity (Inquiry and Determination of Liability) Act, 2016) could have been given detailed attention and the court could have suggested necessary amendments and adjustments into the proposed law.

[67] Justice Moyeenul Islam Chowdhury, *supra note* 20,at 143.

[68] Justice Surendra Kumar Sinha, *supra note* 21. at 478

[69] *Ibid,* at 479

[70] *Ibid,* Manzill Murshid at 32.

influenced by "political clout and pressure."[71] Likewise, the author judge of the majority view assumed that the members of Parliaments may try to bring judges into parliamentary discussion on a retaliatory motive and character-assassinate the higher court judges.[72] Going one step further, the Appellate Division attempted a large list of possible parliamentary abuses that may threaten the highest court if the amendment is not struck down immediately.[73]

If we accept, for the sake of argument, that the Parliament will harass and vilify a Supreme Court judge on a given case, how likely it is that they would be able to do so on a consistent basis? From an institutional point of view, the parliament and parliamentarian being more exposed and vulnerable to public deliberation and criticism,[74] fear of gross abuse of legislative process to harass the judges' on light excuses appears to be a far-fetched one.

C. A Modestly Comparative Appraoch

Another striking feature of the majority judgment is the relatively modest comparative analysis of the parliamentary removal vis-à-vis the Council system. The focus has been on the numerical superiority of the Council system over the parliamentary removal system. The bottom line of the analysis of the majority judges is that around 63 per cent of the former British colonies have either the system of independent body free from parliamentary and executive influence or the system of ad hoc or permanent disciplinary council for removal of judges. Countires like Bahamas, Barbados, Botswana, Fiji, Jamaica, Ghana, Guyana, Kenya, Lesotho, Malaysia, Mauritius, Papua New Guinea are included in this category.[75] Parliamentary removal on the

[71] *Ibid,* Justice Moyeenul Islam Chowdhury quoting Dr Kamal Hossain at 123.

[72] *Ibid,* Justice Moyeenul Islam Chowdhury at 126 and 132.

[73] *Supra note* 21, at 473-74

[74] *Kudrat-E-Elahi Panir v. Bangladesh,* 44 DLR (1992) (AD) 347: Justice Mustafa Kamal emphasized the vulnerability of parliament to popular criticism as a check on a possible abuse of its process in "…[S]uppose Parliament is struck with a madness, is the High Court Division in exercise of its writ jurisdiction only light at the end of the tunnel? What public opinion, political parties and election do if Parliament goes berserk?"

[75] *Supra note* 20, 76.

other hand is preferred in only 33 percent of the common law jurisdictions which include Australia (federal), Bangladesh, Canada, India, South Africa, Sri Lanka, and the United Kingdom.[76] Relying on this numerical superiority of the favored system, Justice Moyeenul Islam Chowdhury in the High Court Divison has drawn a conclusion that the parliamentary removal mechanism has not been preferred by the majority Commonwealth jurisdictions "obviously for upholding the separation of powers among the 3(three) organs of the State and for complete independence of the Judiciary from the other two organs of the State."[77]

The fallacy of this blind numerical approach to an important constitutional and sturctural issue related to the original fabric of the Constitution [78]is that the majority opinion of the High Court Division has failed to appreciate the contextual unsuitability of the Council system introduced by a martial law based presidential system installed in late 1970s with the Westminister parliamentary system of government installed by the original revolution of 1971 and resurrected by a subsequent mass upcharge in early 1990s. The conclusion drawn upon a grossly insufficient analysis into the question of familiarity and unfamiliarity of the constitutional systems of the apparent majority (63 percent) of ex-British colonies to the constitutional system of Bangladesh has made the judgment a modestly comparative one. On the other hand, the deeply rooted familiarity of Bangladeshi system with the constitutional systems of India and Britain (though belonging to minority 33 percet) was simply bypassed. If the constitutional scheme of Bangladesh is highly simliar to that of India and also if the doctrine of basic structure happens to be the cornerstone of both the jurisdictions, then how could a parliamentary removal system violate the basic structure in Bangladesh, while it does not do the same in India?

[76] *Ibid*, at 75.

[77] *Ibid*, at 76.

[78] (*Supra note* 17, at 16-17), There has been an argument that the Parliamentary removal system being part of the original constitutional structure of the constitution, amendments restoring a original provision would be beyond judicial review. Since the Supreme Court does not reserve a right to declare the original constitution invalid, it may not adjudge the constitutionality of an amendment that seeks to restore an original set up the majority opinion however bypassed the argument altogether.

The Appellate Division confined its version of comparative study within the statistical figures presented in the High Court opinion.[79] It however attempted some analysis into the removal systems of India, USA and UK only to come to conclusion that a solution must be searched within "our constitutional scheme":

> "Mechanisms of other countries, which destroys the constitutional scheme of independence of the judiciary and separation of power as engrained in our Constitution, cannot be accepted simply because it is prevalent in some other countries.[80]"

D. Judicial Entrenchment of constitutional provisions?

A so far unheard argument was made in relation to the 5th Amendment judgment in the *Bangladesh Italian Marble Works v. Bangladesh*.[81] It was claimed by the petitioner, and accepted by the majority opinion at the High Court Division,[82] that condonation of the Supreme Judicial Council system by the Court in the 5th Amendment judgment has made the system permanently entrenched and the Parliament is not entitled to amend or change it a fresh. Mr. Murshed relied on an Indian case,[83] which was not related to an electoral law amendment, and actually a constitutional amendment, to argue that the Parliament cannot nullify a decision of the Supreme Court by subsequent legislation to the contrary.[84] The gist of the argument is that if the Parliament wishes to reenact an invalidated law, it must remove the unconstitutionality found by the Court and then go for a new enactment that does not contain the unconstitutional element. In

[79] *Supra note* 21, at 164-166.

[80] *Ibid*, at 4

[81] *Khandker Dlewar Hossain* v. *Bangladesh Italian Marble Works Ltd*, 15 MLR (AD) 249.

[82] Justice Moyeenul Islam Chowdhury, *supra note* 20, at 142, 148.

[83] *People's Union For Civil Liberties v. Union of India*, (2003) 4 SCC 399.

[84] *Supra note* 20, 26-27.

the Appellate Division, Chief Justice Surendra Kumar Sinha[85] and Justice Syed Mahmud Hossain[86] endorsed the view without any further explanation.

It is perhaps for the first time we see that a statutory principle is pressed as a constitutional principle. Under this new formulation, the judiciary now will not only decide what are the basic structures within the Constitution, but also determine what should or should not be in the Constitution itself. Once the judiciary adjudges a constitutional amendment as valid or condones any change therein, it becomes permanently entrenched with no possibility of further amendment in any circumstances in the days ahead.

Quite curiously, the caretaker government system was introduced by the Parliament after a judgment of the High Court Division declaring the unsuitability of the concept of caretaker government "within the four corners" of the Constitution.[87] The 13th Amendment was declared constitutional in a subsequent case[88] and it was declared unconstitutional in yet another subsequent case.[89] Does the court amend the Constitution every time it delivers a judgment? Does such judicial amendment become permanently entrenched in the Constitution? Neither 'experience' nor 'logic' confirms such a stiff proposition.

CONCLUDING REMARKS

From an overall analysis of the majority judgment in the 16th Amendment case, it is apparent that a generalized mistrust in the political forces and politicians and also the reservationist tendencies of the judicial folk and reluctance to move out of the judges' natural comfort zone, have dominated the arguments and reasoning of the verdict. All of the petitioners, *amicus curies* and, to some extent, the majority in the High Court Division and the Full Bench of the Appellate Division failed to overcome the populist tendencies in legal reasoning and to take an institutional

[85] *Supra note* 21, 499

[86] *Ibid*, at 547

[87] Syed Muhammad Mashiur Rahman v Bangladesh, [1997] BLD 55(Bangl.).

[88] Anwar Hossain Khan vs. Speaker Jatiya Sangsad, [1995] 47 DLR 42 (Bangl.), ¶ 36.

[89] M. Saleem Ullah v Bangladesh, [2005] 57 DLR (HCD) 171 (Bangl.).

approach in the dispute at hand. While the Court could have raised specific objections on the draft Bill submitted before it and suggested the obligatory inclusion of judicial personnel in the investigating body and process, the 16th Amendment in itself could have been upheld.

Any commonsense appraisal of the issue will support the proposition that a system of judicial participation in the investigation of allegations, peoples' representatives voting on a possible removal and the Prime Minister finally removing a Supreme Court judge via the President is much better, fair and transparent than a system that only involves the President, Prime Minister and Supreme Court judges themselves. No amount of basic structure arguments can sufficiently dislodge this proposition. Let us not forget that only one judge was actually removed by the Supreme Judicial Council since its inception. We have instances of controversial judges successfully avoiding the Supreme Judicial Council in the past. As said at the beginning, while some were permitted to silently leave the country, some others were simply invited to "tea" in the presidential palace and forced to resign. These we think are enough lessons for us to learn that a removal process whose beginning and ending lies with the sole discretion of the political executive is more "influenced by political clout and pressure" than a removal process that involves public deliberation in the open floor of the House.

One of the unfortunate features of this case is that the dissenting opinion in the High Court Division is more disappointing than the majority one. In the voluminous 125 page judgment, the dissenting judge Mr. Ashraful Kamal did not touch any single argument of the parties and *amicus curies*. He had only to hold that the Supreme Judicial Council system being introduced by a military ruler was illegal and therefore 16th Amendment is constitutional[90] and secondly, the original formulation of Article 96 of the Constitution (involving parliamentary removal system) was in line with independence of judiciary and hence constitutes a basic structure of the constitution.[91] Apart from these two simple points, the dissenting judges colossally wasted an opportunity of coming out with powerful rebuttal of the majority opinion and providing the Appellate Division with some tools to work with in the appeal.

[90] Justice Ashraful Kamal, *supra* note 20, at 287.

[91] *Id.* ¶289.

While the Appellate Division has decisively invalidated the Sixteenth Amendment, the exact status of the Amendment in the Constitution remains somewhat obscure. Inspite of sealing the debate, the verdict has reopened a fiercely debated but unresolved constitutional question as to how to execute the highest court verdict. On two earlier occasions, 8th Amendment (1989) and 13th Amendment judgements (2011), the Ministry of Law and Justice simply went for a reprint of the Constitution, without the amendments that have been invalidated by the Appellate Division.[92] A substantial number of experts however questioned the desirability of such a course of action and emphasised the requirement of parliamentary intervention in making the change effective. The Chief Justice Surendra Kumar Sinha, however, called for a meeting of the "reinstated" Supreme Judicial Council within two days of the publication of the full text verdict and adopted a 39 point Code of Conduct for the higher court judges.[93] In reaction, the offended law makers are vehemently refusing to incorporate the Appellate Division verdict in the Constitution and some are arguing for reenactment of the 16th Amendment.[94] Given the situation, it appears that the 16th Amendment, though remains in the Constitution in ink and pen, currently stands ineffective. Though the Chief Justice has "reinstated" the Supreme Judicial Council, it is not in the Constitution either. It would effectively mean that Bangladesh is currently facing a serious dilemma on judges' removal. On the bottom line, which of the two systems would ultimately prevail depends on how far the Parliament and the Supreme Court of Bangladesh would be willing to negotiate their stance.

[92] M Jashim Ali Chowdhury, *Dilemma of Constitution Reprint*, The Daily New Age, Dhaka. April 15, 2011. Aailable Online: http://mjashimalichowdhury.blogspot.com/2011/06/dilemma-of-constitution-reprint-m.html (Accessed August 10, 2017)

[93] Supreme Judicial Council reinstated, SC judges get their own code of conduct, The Dhaka Tribune, Dhaka, August 03, 2017, http://www.dhakatribune.com/bangladesh/court/2017/08/03/supreme-judicial-council-reinstated-sc-judges-get-code-conduct/)Accessed on August 11, 2017)

[94] JS Will Again Pass 16th Amendment, The New Nation, Dhaka. August 5, 2017 http://thedailynewnation.com/news/143137/js-will-again-pass-16th-amendment.html (Accessed on August 10, 2017)