

Judging the Judges: The Role of Parliament in the Removal of Judges and Its Impact on the Judicial Independence

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Abstract: The continuing debate in Bangladesh about chilling judicial independence gets new height soon after the Parliament amended the provisions of the Constitution relating to removal of Supreme Court Judges. Many jurists and other concerned have already expressed their fright in that issue. This article is an endeavour to amplify the acumen of the reader with regard to the inevitability of such an amendment and its impact on the judiciary. Is the judicial independence at stake? Can parliamentarians be eligible to grip such a massive authority? If we have answer to those questions, then depending on those answers we can say whether this amendment is for public interest and done in good faith or not. Again, judging a newly introduced procedure or to comment on that is not a very easy task to complete as we have no previous examples or findings on that particular issue to compare; so as for this amendment. Moreover, as the Act regarding the process of investigation and other requirements to remove a Judge from office is yet to be enacted; though the amendment has been passed by the Parliament, a legal lacuna still exists there. Unfortunately, we have to stride in the vagueness till the enactment of that legislation.

Key Words: *constitution, judicial independence, tenure of judges, judicial accountability, impeachment by Parliament.*

Introduction

The Constitution of the People's Republic of Bangladesh, 1972, as the solemn expression of the will of the people, is the supreme law of the Republic.² It contains the fundamental principles of the State policy, the fundamental rights of the people, and the allocation of functions among the executive, legislature and judiciary, as well as the provisions governing the principal functions of the constitutional institutions of the State. Since its adoption, it has been amended for sixteenth time and among

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² The Constitution of the People's Republic of Bangladesh, 1972, Art. 7(2).

those the Constitution Fifth, Seventh, Eighth (partly; only the provision regarding Art. 100) and Thirteenth amendment Act have been declared illegal and unconstitutional by the Supreme Court of Bangladesh. The most recent amendment³, passed by the Parliament⁴ is further to amend Art. 96, which primarily deals with the provisions regarding tenure of office of Judges⁵ and their removal process from the office. Prior to that amendment, to remove a Judge of the Supreme Court from her/his office, it required an order of the President upon satisfactory inquiry reports of the Supreme Judicial Council (SJC). However, by that very amendment, instead of inquiry report by SJC, the order of the President shall be passed pursuant to a resolution of Parliament on the ground of proved misbehaviour or incapacity.

Elsewhere in the periphery, if we contemplate different jurisdictions of countries with strong democratic culture, for instance the United Kingdom, until the end of the 17th century; Judges in England were appointed, suspended and dismissed at the pleasure of the Crown.⁶ Using these powers, a number of Judges were removed by the Stuart monarchs.⁷ The Act of Settlement, 1701 established the notion of judicial tenure, whereby Judges held office 'during good behavior' and could only be removed by the Crown on an address by both Houses of Parliament.⁸ Again, in the Australian jurisdictions, particularly in New South Wales, judicial officers may be removed from office under the provisions of the Constitution Act, 1902 and the Judicial Officers Act, 1986, by a resolution of both Houses of

³ The Constitution (Sixteenth Amendment) Act, 2014(Act no. XIII of 2014).

⁴ Constitutionally known as 'the House of the Nation'.

⁵ Art. 152(1) of the Constitution defines 'judge' means a judge of a division of the Supreme Court.

⁶ Crawford J., Opeskin B., *Australian Courts of Law* (Oxford University Press, 4th ed, 2004) 65.

⁷ Lord Justice Brooke, 'Judicial Independence – Its History in England and Wales' [1997] Judicial Commission of New South Wales, 'Fragile Bastion: Judicial Independence in the Nineties and Beyond' Judicial Commission of New South Wales, 97.

⁸ *Ibid* 5.

Parliament, that an address requesting the judicial officer's removal be adopted and presented to the Governor.⁹

This paper begins with a brief overview and considerable aspects behind the sixteenth amendment of the Constitution, newly introduced provisions for the removal of Judges from their office and then explores several issues relating to the role of the Parliament in the removal process, including the lack of clarity over the meaning of 'misbehavior' and 'incapacity'. In this paper, the judicial independence, democracy and public confidence in the judicial system will be discussed. With that, the impact of such an amendment to the judiciary as a whole will also be demonstrated for reader's enhanced understanding.

Overview and Considerable Aspects behind the Sixteenth Amendment

To uphold the overall spirit and structure, it is necessary further to amend the Constitution for revival of Art. 96 and thus the Constitution (Sixteenth Amendment) Act, 2014¹⁰ has been passed by the Parliament.¹¹

After its inauguration, the tenth Parliament, to reinstate the power to remove a judge of the superior Court, passed the Bill introduced by the Minister for Law, Justice and Parliamentary Affairs. To comprehend the essence of that Bill, Art. 7 of the Constitution should be interpreted in a liberal approach. In accordance with that Article, all powers in the Republic belong to the people and their exercise on behalf of the people shall only be affected and authorized under the Constitution. Relying on that reflection, the Constitution enacted in 1972 has provisions relating to impeachment of the President, the Head of the State (Art. 52), resignation of the Prime Minister for ceasing to retain the support of a majority of the members of Parliament (Art. 57), removal of the Speaker by a resolution supported by the votes of a majority of all members of Parliament (Art. 74) and removal of a Judge of the Supreme Court pursuant to a resolution of

⁹ Odgers, J. R., *Odgers' Australian Senate Practice* (Canberra Dept. of the Senate, 13th ed, 2012) 510.

¹⁰ Act no. XIII of 2014

¹¹ The Constitution (Sixteenth Amendment) Bill, 2014

Parliament supported by a majority not less than two-thirds of the total number of members of Parliament (Art. 96).

Though the provisions relating to impeachment, resignation or removal, respectively, of the President, the Prime Minister or the Speaker still remains unchanged; the military ruler by unconstitutional means of Martial Law proclamation¹² conferred the power of removal of a Judge of the Supreme Court on ground of her/his misbehavior or incapacity to the Supreme Judicial Council consisting of the Chief Justice and the two next senior Judges, which is undoubtedly against the spirit of Art. 7. In most of the democratic countries in the world the principle of the accountability of the Judges of the superior Court, like other organs of the State, lies in the Parliament consisting of the elected representatives of the people.

In the foregoing circumstances, to reinstate the spirit of the Constitution, a Bill was introduced in the House of the Nation to revive the provisions of Art. 96 of the Constitution enacted in 1972 for removal of a Judge by Parliament. By doing so, the basic structure of the Constitution relating to the accountability of Judges of the Supreme Court to elected representatives of the people along with enhancement of the people's reliance to the independent judiciary has been ensured.

Newly Introduced Provisions of Article 96

In the Constitution, the then prevailing Art. 96 (except Sub Art. 1) have been replaced by the new one. It states:

(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 misbehavior or incapacity.

¹² The Second Proclamation (Fifteenth Amendment) Order, 1978, Second Schedule

(3) Parliament may by law regulate the procedure in relation to a resolution under clause (2) and for investigation and proof of the misbehavior or incapacity of a Judge.

(4) A Judge may resign his office by writing under his hand addressed to the President.

Issues Relating to Removal of Judges by Parliament

Supervision of the judiciary poses a unique problem which may be expressed as a tension between the need for judicial independence on the one hand, and judicial legitimacy on the other. While it is the democratic function of the legislature and the executive to effectuate the will of the majority as it changes from time to time, it is the unique responsibility of the judiciary to resist majority will in so far as it deviates from established principles of legal decision. Judges must give effect to even the most unpopular of statutes and must deal equally with even the most despised of defendants. They must uphold the rule of law, which requires that a majority supported government as well as its citizens are answerable according to pre-established rules of general applicability. Indeed, the entire theory of Bangladeshi constitutionalism, of which judges are the primary guardians, is that a mere majority cannot be permitted unlimited license to accomplish whatever it pleases. All of these considerations have led Bangladeshi constitutional theorists, from the very beginning, to envisage the inevitability for judicial independence from majority pressures, whether applied by the people directly through the electoral process, or indirectly, through their elected officials.

But the need for this independence creates a strong tension. All democratic institutions must ultimately be legitimated by public acceptance. Respect for and obedience to law cannot be expected unless the exercise of judicial power is accepted as legitimate. Since the judiciary must often function to defeat majority will in individual cases, it is all the more important that the institution apply general rules impartially. If the public is to believe in the impartiality and generality of the judicial process as a process, absolute confidence must exist in the honesty and rationality of individual judges. On this confidence, the legitimacy of the

entire institution rests. The problem of judicial supervision is thus to maintain confidence in the honesty and rationality of judges while safe-guarding to the greatest extent possible their independence from external pressures. Considerations of both minimum standards of conduct and optimal procedures for their enforcement are necessary if a balanced solution is to be achieved.

The removal by Parliament may properly be invoked in some specific cases. For instance, it may be invoked for senility, insanity, imbecility, paresis, or for wilful neglect of duty, inefficiency, gross incompetency, intemperance, or for any persistent tyrannical, malicious or detestable conduct.¹³ Impeachment is wholly inadequate for practical purposes as it can only be invoked for the most serious crimes, and so many obstacles lie in the way of an impeachment proceeding that the people will bear with an unworthy, an unjust or unfit judge rather than invoke this extreme and drastic remedy.¹⁴ Impeachment is too severe a remedy in certain cases, and is impracticable for offenses justifying removal but not deserving impeachment, which latter power should only be invoked for actual personal corruption or serious criminal conduct, and even in such cases the recall is a more benign remedy.¹⁵

With regard to the latest amendment, opposing the move to restore Parliament's authority to impeach Supreme Court Judges, former Chief Justice Mustafa Kamal assumed that it would undermine the dignity of lawmakers. He said:

It is defamatory and frustrating ... You will certainly not enjoy doing this work ... You can do nothing if parliament is empowered with this authority. The Indian parliament has the power ... how many judges have been impeached by the Indian parliament over the past 60-70 years ... Please, strengthen the Supreme Judicial Council. Try to provide it with investigative mechanisms.¹⁶

¹³ Robert L. Owen, 'The Recall of Judges' [1912] 21(8) Yale Law Journal 655, 656.

¹⁴ Ibid 655.

¹⁵ Ibid 11.

¹⁶ Shakhawat, 'Remarks of some judges and jurists on parliament's authority to impeach Supreme Court judges', The Daily Star (Dhaka), 19 August 2014, 1.

Mr. Mahmudul Islam, a prominent lawyer, thinks that there are flaws and ineffectiveness of the Supreme Judicial Council but opposed giving parliament the power to impeach judges. He states:

Pardon me; we are panicking about leaving the fate of judges and others to parliament in the present situation. If we go back to the past provision, then I will say, independence of the judiciary will be at stake.¹⁷

Mr. Ajmalul Hossain QC, a senior Advocate of the Supreme Court, opined in favor of the parliamentary process of impeachment. He added:

In my view, it will be more effective of a check and balance if the authority goes to parliament ... then there will be a pressure on them [judges].¹⁸ (Emphasis original)

Barrister Rafiqul Haque, eminent lawyer of the Supreme Court, viewed that:

It [the amendment] would lead the Judges to give more partial judgments than before. There is absolutely no harm if the removal process lies with the Parliament but today's parliamentarians cannot do justice with a Judge's destiny as long as they are guided by Art. 70 and ruled under dictatorial democracy.¹⁹ (Emphasis added)

Opposing the amendment, eminent lawyer of the Supreme Court, Dr. Shahdeen Malik, opined that:

This amendment will diminish people's confidence in the judiciary. The people will feel that the judiciary is being controlled by the government and people will lose respect for the law. Also, presently there is a two thirds majority in parliament. In future it may not be so. In that case, it will

¹⁷ Ibid.

¹⁸ Ibid.

¹⁹ Interview with Barrister Rafiqul Haque, former Attorney-General for Bangladesh (Dhaka, 20 March 2016).

not be possible to take action against any judge and a stalemate will be created.²⁰

With regard to the voting procedure, Dr. Md. Rizwanul Islam, an ardent academician, viewed that:

It is well known that because of the provisions in Article 70 of the Constitution on voting in the Parliament, the MPs are barred from voting against party decisions...wholesale abolition of Article 70 is a complex issue...Instead...in case of voting on an impeachment motion of a judge, the MPs would be allowed to cast...vote according to their conscience rather than on party lines...This can also be a test case for further amendment or complete abolition of Article 70 in future.²¹

Impeachment by Parliament, of course, also presents a risk that professional politicians will not be able to resist the temptation to abuse their power despite a structure designed to discourage that kind of abuse. The framers of current amendment apparently thought that risk minimal. The historic fact that we have had no impeachments of Judges in more than 40 years when there has been no procedural protection against politicized impeachments (as SJC requires the permission to sit) should support the framers' confidence in the good judgment of legislators. Perhaps respect for the framers also suggests that, before trying to evade what is at least a strong constitutional preference for impeachment, an attempt should be made to make it work.

Moreover, to understand the recently passed sixteenth amendment, we need to ask simple questions; to whom is judiciary to be accountable? Do we not want judiciary accountable to the people as other institutions are? People usually talk about independence of Judges but they seldom talk about their accountability. At times it is due to our limited

²⁰ Staff Correspondent, 'Parliament to have power to impeach judges', The Daily Prothom Alo (Online), 19 August 2014, <http://en.prothom-alo.com/bangladesh/news/52204/Parliament-to-have-power-to-impeach-judges>.

²¹ Rizwanul Islam, 'Impeachment of Judges: A suggestion', The Daily Star (Dhaka), 27 August 2014, 7.

understanding of the judicial course of actions that prevents us from questioning exactly how accountable a Judge should be.

A court, including the Supreme Court, has been considered by many of us as a symbol of the sovereign (Justice) as it was during the colonial time. Therefore, a practice of bowing while entering a court, which was rather a colonial practice to show loyalty to the sovereign i.e. the King or the Queen, has remained. We, perhaps, have not noticed that a crucial change has taken place by this time. We have established an independent State and have adopted a Constitution for ourselves. We, the people of Bangladesh, are no longer subject; rather we have become sovereign.

In a democracy, judiciary is therefore an organization created by the members of that political society to assist, in implementing the primary rules (constitutional safeguards) adopted by that society. In that sense, a court can be considered as an umpire between the State (government) and the citizen. The role of a court is to look at whether the State (government) is crossing/misusing its power given by the people. Thus, judiciary is like other institutions of the State, engaging with a special task. It is between citizen and State. A question may pertinently arise whether the judiciary is accountable to anyone. One may consider the judiciary like any other organs of the State. Since all organs of the state are accountable to the people i.e. the sovereign so is the judiciary.

Therefore, removal of a Judge for ‘misbehavior’ or ‘incapacity’ on the recommendation of the Parliament will be more democratic. A misconception has arisen that the amendment enables the Parliament to remove a Judge from service. Actually, Parliament will recommend to the President; actual authority to remove a Judge remains in the hands of the President as it was before. Only the process of investigation and recommendation has been placed in the hands of the Parliament.

It is well known that in the present form of government the President can exercise his authority freely only on two occasions: in appointing the Prime Minister and the Chief Justice of the Supreme Court. In all other cases he has to act according to the

'advice' of the Prime Minister. Consequently, the formation of the Supreme Judicial Council (SJC) actually was determined under authority of the Prime Minister, the chief executive. Here lies the paradox. Therefore, placing it in the Parliament will be more democratic than it was before. It is also close to the idea of separating judiciary from executive.

What Constitutes 'Misbehavior' or 'Incapacity'?

A Judge may only be removed from office on the grounds of proven misbehavior or incapacity. However, uncertainty exists as to the definition of 'misbehavior' or 'incapacity'. Without a strict definition as to what constitutes either misbehavior or incapacity, there is significant scope for personal interpretations of these terms. This lack of clarity as to the meaning of 'misbehavior' or 'incapacity' has been acknowledged by Sir Anthony Mason, former Chief Justice of the High Court of Australia, who noted in his writing that although the Houses of Parliament can only remove a judicial officer on the grounds of misbehavior or incapacity, 'there are unresolved problems affecting the application of this part of the section. To whose satisfaction is misbehavior to be proved and according to what standard is it to be proved? Likewise, with incapacity'²². Further, as outlined in Odgers' Australian Senate Practice, this restricted interpretation of 'misbehavior' is reflective of a 'line of authoritative statements' which indicates that:

Under the common law misbehavior in respect of an office held during good behavior meant misbehavior in relation to the performance of the duties of that office, such as neglect or refusal to perform those duties, and conviction for infamous offences not connected with the duties of the office.²³

Nevertheless, if the meaning of 'misbehavior' and 'incapacity' are to be left to the determination of individual members of Parliament, it inevitably follows that there is likely to be

²² Sir A. Mason AC KBE, 'The Appointment and Removal of Judges' [1997] 24 in 'Fragile Bastion: Judicial Independence in the Nineties and Beyond' Judicial Commission of New South Wales.

²³ Ibid 8, 513.

significant variance in interpretation. Whilst public interest in the removal process is inevitable, there is potential for the individual decision making processes of members to be impacted by the external influences. However, given that members of Parliament are representatives of their constituencies, it could be argued that robust public interest in these matters will cause members to afford a more rigorous and careful examination of the relevant issues. Public debate on the matter also allows members to take contemporary community standards into consideration when making their decision. Without representations from community groups or discussion in the media on this matter, members would be less well equipped to make a decision that accurately reflects community expectations and standards.

It is important to note that there is no necessary correlation between the level of public confidence in a Judge and that Judge's honesty in fact. If one's sole interest were in the perceived legitimacy of the system, inquiry could focus exclusively on reputation. Judges with good reputations might be retained even if dishonest in fact; judges with bad reputations might be dismissed even if honest in fact. But when other considerations are introduced into the calculus such as the need to deter judicial wrong-doing, regardless of its public visibility, and the desire to protect the innocent target of unfounded accusations, the relevant inquiry will shift from general reputation to specific charges of misconduct. This shift in focus succeeds in safeguarding legitimacy to the extent that reputation coincides with actual honesty. In the judicial context, honesty means impartiality in the decision making process.²⁴ In other words, judicial honesty is exclusively a subjective question of motivation, presenting special problems of proof. Proof of past biased decision does not establish the certainty of future bias. The question is always one of probability; most often proof of misconduct does no more than affect what might be termed a rational man's assessment of the Judge's propensity for impartiality. The problem, then, is to establish a set of standards

²⁴ Rifkind Cf., 'The Public Concern in a Judge's Life' (Paper presented at Conference On Judicial Ethics, University of Chicago Law School, 1964) 26 (Conference Ser. No. I9, I964).

which prohibits behavior significantly increasing this 'rationalistic probability' of bias.

Judicial Independence, Democracy and Public Confidence in the Judicial System

A judiciary that is insulated from legislative and executive influence as well as from other private interests is not only the fundamental principle of the rule of law but also the central precondition for good governance and consolidation of democracy.²⁵ Independent courts serve as an effective mechanism that controls and constrains the operation and power of the legislature and executive. Independent judges, for instance, have the power to punish political authorities who abuse or misuse their position.

On the other hand, through judicial review independent courts can declare legislative acts or government policies unconstitutional. Being insulated from electoral accountability and other political interferences, an independent judiciary may also produce counter-majoritarian decisions. Intense political competition would not inevitably lead to high levels of judicial independence across all democratic countries. Thus we should not expect a similar impact of political competition both in advanced and developing democracies. By advanced democracies I mean regimes where democratic values are fully consolidated and political processes are successfully institutionalized. In these types of regimes democracy and its rules are perceived to be 'the only game in town'.²⁶ Citizens and leaders conclude that no alternative form of regime has subjective validity. The party system is stable and the political parties have strong networks of grassroots organizations. Democratic values are highly internalized by the citizens. Individual rights and civil liberties are protected by the rule of law. Developing democracies, however, are regimes that meet the procedural minima for

²⁵ Aylin Aydin, 'Judicial Independence across Democratic Regimes: Understanding the Varying Impact of Political Competition', [2013] 47(1) Law and Society Review 105, 105.

²⁶ Linz, Juan, and Alfred Stepan, *Problems of Democratic Transition and Consolidation: Southern Europe, South America, and Post-Communist Europe* (Johns Hopkins University Press, 1996) 278.

democracy but lack consolidation of democratic values and institutionalization of political processes. The weakness in protecting individual rights and civil liberties threatens the very existence of public opposition. Media is often controlled by the state and strongly supports the regime. The party system is underdeveloped and volatile. With high volatility, the entry barriers to new parties are lower, and the likelihood that personalistic politicians become the head of government is higher.²⁷

In line with these differences between advanced and developing democracies, it seems logical to presume that the incumbents' cost-benefit analysis of offering independent courts might be different. Especially in developing democracies which are characterized by high levels of corruption, weak party systems and high electoral volatility. The immediate short-term benefits that incumbents may obtain from interfering in judicial decisions may be higher than the long-term benefits that may be gained from high levels of judicial independence. Given the fact that in developing democracies citizens have lower levels of confidence in the judiciary; the media is highly controlled by the government; citizens have limited awareness and willingness to participate in politics; and that the political and civil rights of the citizens are not efficiently institutionalized, the power holders may be less fearful of public reaction than their associates in advanced democracies. For the politicians who aim to offer a dependent judiciary, this situation may lower the costs of intrusive behaviours. Hence, in the context of developing democracies when political competition is highly intense, the incumbents may be more inclined to interfere in judicial decision making.

Although the literature on judicial independence is characterized by various conceptual debates about the meaning of judicial independence, a judge is independent when, '...he does not face undue external or internal pressure (as say from hierarchical

²⁷ Mainwaring, S., Zoco E., *Political Sequences and the Stabilization of Interparty Competition: Electoral Volatility in Old and New Democracies* (Party Politics, 13th ed, 2007) 155.

superiors) to resolve cases in particular ways'²⁸. (Emphasis added)

On this account, a Judge is independent when she/he can take decisions based on her/his own preferences and interpretation of law. Thus, judicial independence refers to independence of the judicial system from external political, economic and social influence, and to the ability of individual Judges to make independent decisions based on their own interpretations of law. In line with this meaning of judicial independence, two of its characteristics are evident. The first is 'impartiality' and refers to the idea that Judges will base their decisions on law and facts.²⁹ A second trait of independence is 'political insularity'³⁰ and refers to the condition that Judges should be protected from political interference that might affect their impartiality. While identifying judicial independence, one should recall that the courts do not operate in vacuum. A number of exogenous factors will influence the Judges' opinions and will have varying impacts on their impartiality and insularity. Although constitutional protections are presented as critical determinants of judicial independence, the independent performance of the courts cannot be achieved unless politicians and political factors construct the appropriate context.

Under a democratic regime the ruling government can only maintain its power through re-election, but intense electoral competition increases the probability of losing its office. Hence, the extent of competition between politicians affects the policy choices of the incumbents. Respecting the independence of the courts may increase the politicians' expected payoff. This logic has led some scholars to think of judicial independence as a form of political insurance that incumbents buy to reduce the cost of being out of office.

²⁸ Rios-Figueroa, Julio and Jeffrey K. Staton, 'Unpacking the Rule of Law: A Review of Judicial Independence Measures' (Paper presented at the Rule of Law Symposium, Conference on Empirical Legal Studies, University of Southern California Gould School of Law, 2009).

²⁹ Shapiro, Martin, 'Courts: A Comparative and Political Analysis' [1983] 31(1) the American Journal of Comparative Law 143, 145.

³⁰ Fiss, Owen M., 'The Limits of Judicial Independence' [1993] 33(13) Faculty Scholarship Series 102,109.

Thus political insurance is perceived by the incumbents as protection from the opposition's attack or preservation of policy stability after future electoral change. On the other hand, independent courts are likely to ensure that legally enacted policies continue to be implemented even after the politicians who put them in place leave the office. The scholars argue that incumbent politicians who pressure the courts will not be able to attract interest groups to support their policy proposals because interest groups would know that the policy will not endure after those politicians leave the office. In developing democracies like Bangladesh, the incumbents who decide to pressure the judiciary, may have less fear of public backlash compared to their counterparts in advanced democracies.

In addition to concerns about the role of 'personal judgment' in the decision to remove a Judge from office, a further issue exists in relation to the incursion of decisions of the parliament on the performance of the judiciary. The role of the parliament in the removal process could be seen to interfere with the independence of the judiciary, while simultaneously assisting to ensure the accountability of the judiciary; Sir Anthony Mason noted the importance of finding the correct balance between independence and accountability:

A failure to strike the right balance between judicial independence and judicial accountability will result in either an unacceptable weakening of judicial independence or inadequate accountability.³¹

The maintenance of public confidence in the judicial system is a core element of a successful judiciary. In Bangladeshi perspective, there are two elements to this confidence. It is critical that public confidence is maintained in the Parliament's role in decision-making regarding the removal of judicial officers. It is similarly critical that public confidence is maintained in the proper functioning of the judiciary. In a journal article on the appointment and removal of Judges, Sir Anthony Mason noted the 'vital' importance of public confidence in the judiciary,

³¹ *McCawley v The King* (1918) 26 CLR 58-59.

arguing that a lack of confidence could undermine the judicial system:

The preservation of public confidence in the impartial and independent administration of justice is a vital element in the judicial function. Loss of confidence in the system whether due to its inefficiency or, more particularly, due to perceptions of a want of independence or impartiality on the part of the judiciary is extremely damaging to the effective working of the justice system.³²

Mr. Richard Ackland, a legal commentator for the Sydney Morning Herald, reflected on the seeming absurdity of having members of parliament judge members of the judiciary:

Having politicians judging judicial officers is a bit like having one branch of the asylum acting as caretakers for another. It seems to be one tiny corner where judges failed to properly nail down their 'independence'.³³

An optimal procedure for judicial removal, like the standards which it enforces, must balance judicial independence against judicial legitimacy. At the same time, however, an optimal removal system must insure legitimacy. Here again, legitimacy turns on the public's understanding. But whether or not judges are capable of judging their own impartially, a system which relies wholly on this mechanism leaves itself open to a natural public uncertainty. It is, moreover, just this sort of uncertainty which the legitimacy of the judicial system cannot tolerate.

Judicial Independence and Its Critics

It is important to recall why the independence of Judges is such a fundamental postulate of our political system. Adjudication based on the noble precept 'equal justice under law' requires impartiality, and impartiality demands freedom from political pressure. This is especially true under a written Constitution like ours, guaranteeing for the ages certain individual rights

³² Ibid 18, 7.

³³ Ackland R., 'High time to put an end to clubby protection', Sydney Morning Herald (Sydney) 17 June 2011, 11.

even against the democratically determined actions of the majority, and in our system of government, in which the courts are the ultimate guarantor of State observance of fundamental rights. As Justice Frankfurter explained, 'Courts are not representative bodies. They are not designed to be a good reflex of a democratic society'³⁴. Our legal tradition emphasizes that an independent judiciary is most essential to the protection of democracy and of individual liberty in dangerous times when, as Judge William Cranch wrote, 'it becomes the duty of the Judiciary calmly to poise the scales of justice, unmoved by the armed power, undisturbed by the clamor of the multitude'³⁵. Yet our history has demonstrated the fragility of this independence; the 'least dangerous branch'³⁶ has often been the most vulnerable. The independence of our judiciary has survived the popular outcry against its most famous as well as its most infamous decisions. But today we must ask whether the role of the courts in our society has so changed that the traditional notion of judicial independence has become outmoded.

The courts have always adjudicated thorny issues in Bangladesh, but until modern times the most well-known and controversial exercises of judicial power were negative actions limiting the scope of government. In recent years, the judiciary has often been an accelerator of governmental activity rather than a brake. Nowadays, both the pettiest details and the broadest concepts of government have come within the judicial ambit. Ideally, the modern Judge should be, in the phrase describing Justice Brandeis, 'a master of both microscope and telescope'³⁷. Moreover, the Judge of today cannot retain his earlier passive judicial role. The extraordinary complexity of modern litigation requires him, if his cases are not to linger for years, to exercise a crucial management function. And when the Judge decides that relief is warranted, he must often command rather than merely prohibit. It is not enough for justice to be declared. The Judge must assure that justice is done. These

³⁴ *Dennis v United States* (1951) 341 U.S. 494-525.

³⁵ Warren C., *The Supreme Court In United States History* (Little, Brown and Co., 1926) 303.

³⁶ Alexander Hamilton, *The Federalist* (J. Cooke Ltd. 9th ed, 1961) 522.

³⁷ Mason A., *Brandeis: A free Man's Life* (William S Hein & Co., 17th ed, 2007) 629.

developments, of course, do not represent a completely new phenomenon. The evolution of substantive rules and rights is not surprising; since the end of the eighteenth century, judges have explicitly taken account of the social and economic ramifications of common law rules.³⁸ The principal procedural novelty is not the quality of a court's involvement in particular cases, but the vast increase in the quantity of cases demanding an active judicial role.³⁹ Formerly they were considered exceptional, but now they seem routine.

Only the 'considered judgment'⁴⁰ of the courts can guarantee our constitutional liberties, and only in an atmosphere of judicial independence can that judgment thrive. As we perceive an increasing breadth to our fundamental, affirmative rights, and so rely increasingly on the courts for their development and protection, the process does not become less judicial. And it is thus more crucial than ever that judicial independence be preserved. The commitment to the rule of law transcends the diversity in style and substance evident in judicial opinions; it is the principal justification for according judges their independence. Therefore, criticism is not only inevitable but healthy; we would not eliminate it even if we could. But the modern Judge, no less than his predecessors, must act independently if he is to perform the function we demand of him, and he must feel secure that such action will not lead to his own downfall.

Feasible Recommendations

Though, this article broadly focuses on the removal of Judges by Parliament in the form of impeachment, the appointment procedure of Judges should also be dealt with cautiously. As the Judges of Supreme Court hold office until a mandatory retirement age, their tenure may be said to be adequately secured. However, the terms 'misbehavior' and 'incapacity' need to be explained in a proper manner in the Act by which a Judge

³⁸ Horwitz, 'The Historical Foundations of Modern Contract Law' [1974] 87 Harvard Law Review 917, 917.

³⁹ Schmitt, Pasterczyk, 'Specific Performance Under the Uniform Commercial Code-Will Liberalism Prevail?' [1976] 26 De Paul Law Review 54, 63-66.

⁴⁰ United States v Butler (1936) 297 U.S. 62-63.

may be impeached. Further, the appointment of additional Judges to the High Court Division is not compatible with security of tenure. Since there is no guarantee of appointment as permanent Judges, additional Judges might exercise judicial powers with a hope for permanent position. This is not consistent with judicial independence and therefore the practice of appointing additional Judges as a regular practice should be discontinued. However, additional Judges may be appointed to meet any temporary necessity, for instance to reduce the backlog of cases.

Although the judicial independence is guaranteed by the Constitution of Bangladesh, there are numerous important issues which have impact on the same. For instance:

The criteria for appointment of Judges are not explicitly available. Only some specific eligibility criteria have been stated in the Constitution. In some cases, principles of seniority and quota are followed, but other criteria or qualities considered in making judicial appointment are not publicly known.

The process of judicial appointment is very much secretive and there is no scope for public scrutiny.

Although the Judges have a fixed tenure of office, in some cases their security of tenure is not adequate. Still vagueness exists with regard to the interpretation of the terms 'misbehavior' and 'incapacity'.

In respect of judicial disciplinary proceedings there is no scope of participation for an ordinary public and it is almost impossible to make a complaint against a Judge by the same.

As the thesis concentrates on the issue of removal of Judges by the Parliament and its impact on the judicial independence, it identifies some solutions based on the arguments advanced throughout the thesis. The following solutions are proposed in order to strengthen the judicial independence and of course to deal with Parliament's power of impeachment. In summary, it is recommended that:

The criteria for appointment of Judges should be made explicit and publicly known.

The mechanisms for judicial appointment should be made transparent and open to public scrutiny.

Appointment of additional Judges of the Supreme Court should not be made as a regular practice. Such appointments may be given to meet urgent necessity, particularly to reduce the backlog of cases or to solve temporary shortage of Judges.

The vagueness with regard to the interpretation of the terms 'misbehavior' and 'incapacity' should be prudently dealt with in the Act of Parliament by which the removal process i. e., impeachment proceedings might be availed.

The impeachment proceeding should only be availed in the event of most extreme cases and should not be misused for personal and/or political purposes.

There should be enough safeguard on the part of a Judge to achieve the utmost judicial independence and while making judicial decisions independently, such proceedings should in no way be a considerable threat to the Judges.

Conclusion

We may recall that the Constitution has defined the three organs of the state as well as determined their powers. However, parliament enjoys more authority than its counterparts since it represents the people. Parliament is basically to make other institutions accountable to the people.

This is the beauty of constitutional democracy. In my view, the present amendment to the constitution is nothing but to go back to the un-amended constitution, which was an excellent treatise of democracy. Nonetheless, the fact is no matter how strong an individual Judge's spine, the threat of punishment is the greatest peril to judicial independence, which would project as dark a shadow casted by political strangers.

Judicial independence, like free expression, is most crucial and most vulnerable in periods of intolerance, when the only hope of protection lies in clear rules setting forth the bright lines that cannot be negotiated.

The press and the judiciary are two very different institutions, but they share one significant characteristic: both contribute to our democracy not because they are responsible to any branch of government, but precisely because, except in the most extreme cases, they are not politically accountable at all and so are able to check the irresponsibility of those in power. Even in the most robust of health, the judiciary lives vulnerably. It must have 'breathing space'⁴¹. We must shelter it against the dangers of a fatal chill.⁴²

Independence has always been crucial for judges to perform their function properly. The question, then, is how the Judge's independence may be protected. In principle, the answer is clear: the Judge must be assured unequivocally that his legal decisions, no matter how unpopular, will not threaten his term of office and that the only indignity he may suffer for error is reversal. In short, he must be certain that disagreeable views will not lead to personal punishment. Judges should be removable only for the most serious offenses, and then only by an especially cautious procedure. It is essential to remember that provisions protecting judicial tenure were 'not created for the benefit of the judges, but for the benefit of the judged'⁴³.

It is more important as that function has expanded while retaining its fundamentally judicial character. The only way to protect judicial independence is to provide Judges secure tenure. This the draftsmen of the Constitution did, allowing removal only for the most serious causes and by the strictest procedures.

To maintain such strictest procedures and fairness, Parliament, should enact the law as provided in Art. 96 (3) of the

⁴¹ *Broadrick v Oklahoma* (1973)413 U.S. 601, 611.

⁴² See Note, 'The Chilling Effect in Constitutional Law' [1969] 69 *Columbia Law Review* 808, 808.

⁴³ Kurland, 'The Constitution and the Tenure of Federal Judges: Some Notes from History' [1969] 36 *University of Chicago Law Review* 665, 698.

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Constitution in which, we all expect, 'misconduct' and 'incapacity' would be defined clearly to judge the Judges.