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Bangladesh's Take on Restoring the Parliamentary Control over the Judiciary: New Course through the 16th Amendment to the Constitution

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Abstract

Shortly after its emergence as a nation through a historic struggle for national liberation, Bangladesh formed its constitution in 1972. Since its formation in 1972, the Constitution of Bangladesh has been amended many times. The latest addition to that amendment list is the 16th amendment of the constitution that was endorsed from the parliament on 17th September 2014. The 16th amendment of the constitution brought back an old provision of the impeachment process of Supreme Court judges of Bangladesh replacing Article 96 of the constitution of Bangladesh. Since the passing of the 16th amendment in the parliament of Bangladesh, it has been a hot topic to be discussed under constitutional law. This short article embodies a critical analysis of the 16th amendment of the constitution and an opinion regarding the very issue.

Introduction:

Constitution is the supreme law of the state. Since the formulation of the constitution of Bangladesh, there have been 16 amendments till date. However, most of those have been repealed. The 16th amendment bill was passed in the parliament of Bangladesh on 17th September, 2014.[1] The recent 16th amendment is made on article 96 of the constitution. Article 96 states about the tenure of judges and the process of impeachment of the judges in case they are accused with gross misconduct or incapacity. Through this 16th amendment of the constitution, the parliament of Bangladesh has willed to reinstate the original article 96 of the constitution of 1972 which was later replaced with a new provision by the 5th amendment of the constitution in 1979. The original article 96 involved a parliamentary resolution process to impeach a judge but the 5th amendment in article 96 of the constitution provided a new procedure that involved a supreme judicial council. Although recently the Supreme Court of Bangladesh has declared the 16th amendment unconstitutional, still a lot of possibilities and probabilities can be related with the 16th amendment to the constitution of Bangladesh. But the 16th amendment affects the separation of power and judicial independence at noticeable sphere and that's what needs to be discussed at first.

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1 Asma Sultana, '16th Amendment to the Constitution: Re-assertion of Parliamentary Authority over Judiciary', no. 13, *Law Vision*, 2014-2015, p. 68.

The 16th Amendment itself

Before the 16th amendment to the constitution, Article 96 of the constitution of Bangladesh provisioned a supreme judicial council comprising of the Chief Justice and two next senior judges. The supreme judicial council would investigate about gross misconduct or incapacity of an accused judge; and after the investigation, if the supreme judicial council gave report to the President affirming the accusation, the President would impeach the judge by an order. Only the President could initiate the impeachment process upon any information from any reliable source. The President had to have reason to apprehend that a judge is physically or mentally incapable or has committed gross misconduct.[2]

After the 16th Amendment, Article 96 now stands-

> (1) Subject to the other provisions of this article, a Judge shall hold office until s/he attains the age of sixty-seven years.
>
> (2) A Judge shall not be removed from his/her 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.
>
> (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/her office by writing under his/her hand addressed to the President.[3]

The power to impeach a judge is still in the hand of the president. But now, instead of the recommendation from any supreme judicial council, the President requires affirmation of the parliament passed through a resolution supported by a majority of at least two-third of the total number of parliament members.

Separation of Power & Checks and Balance

The doctrine of Separation of Power has been followed by most of the countries in their constitutions and as such, the Constitution of Bangladesh has also formed of following this principle. But complete separation of power is neither possible nor desirable. That's how the check and balance system come to play in the notion of the separation of power. It makes one organ of the state accountable to another so that the whole state can run as one complete system. Now in case of 16th amendment, the question that arises as is 'To whom the Judiciary should be accountable to?' By involving parliament in the impeachment process of judges, the 16th amendment to

2 M. Jashim Ali Chowdhury, *An Introduction to the Constitutional Law of Bangladesh*, 2nd edition, Sun Shine Books, Chittagong, 2014, p. 462.

3 The Constitution of Bangladesh, 1972, art 96.

the constitution ensures that the judiciary is accountable to the legislature. In many developed countries like UK and USA, the process to remove a judge from his/her office is similar to the amended article 96. In UK, both Houses of Parliament hold the power to file a petition to the Queen for the removal of a judge of the High Court or the Court of Appeal.[4] And in the USA, judges of Supreme Court can only be removed through a combined effort of House of Representatives and the Senate.[5]

Before the 16th amendment of the constitution, the President could impeach the judges but s/he had to take recommendation from the judicial council, meaning that the judiciary could have a say on this matter. The 16th amendment of the constitution of Bangladesh made the judiciary accountable to the legislature. But one question may arise as to whether the judiciary should be accountable to anyone. In a democratic state, the position of judiciary is between the people and the state. And as all organs are accountable to the sovereign, so should the judiciary be as well.[6] But then, again another question arises regarding whether the judiciary should be compared to the other organs of the state. Each organ plays its role differently, that is the reason why the theory of separation of power came in the first place.

The modification that has been done through the 16th amendment already existed from beginning until the 'Supreme Judicial Council' was introduced in the 5th amendment of the constitution of Bangladesh through the Proclamations (Amendment) Order, 1977 by the then Chief Martial Law Administrator, Ziaur Rahman, who became the President later. And as such, although it seemed that the judiciary has been given power to deal with its own business, the main power was centralized into the hand of the head of the executive, the President, as opposed to the theory of separation of power. Nonetheless, under new article 96 of the constitution, a judge could not be impeached without the order of the President but now the President requires 2/3rd majority of the parliament members affirming the impeachment, plus the parliament holds the power to initiate the impeachment process.

The Question of Judicial Independence

The Supreme Court has declared the 16th amendment to the constitution invalid and unconstitutional. It may have been done so basically considering the political condition of Bangladesh, as it might not be wise to give the legislature a part to play in impeachment process of a judge.

The intent of the 16th amendment to the constitution was to make judiciary accountable

4 'Judges and Parliament', *Courts and Tribunals Judiciary* available at https://www.judiciary.uk/about-the-judiciary/the-judiciary-the-government-and-the-constitution/jud-acc-ind/judges-and-parliament/, accessed on 28 July 2018.

5 Yosemitest, 'Impeach and Remove US Supreme Court Justices', 29 June 2010, *Free Republic* available at http://www.freerepublic.com/focus/chat/2543298/posts, accessed on 28 July 2018.

6 Anisur Rahman, '16th Amendment of the constitution: another view', *The Daily Star* (August 2019) available at http://www.thedailystar.net/16th-amendment-of-the-constitution-another-view-42884, accessed on 28 July 2018.

to the general will of people i.e. the elected parliament members. But question is 'Whether all the parliament members are at freedom to do what is right?' Yes, the parliament reflects the general will of people but the main power remains on the hand of the political party leaders. And, article 70 of the constitution has tied the hands of the parliament members. Section 70 of the constitution of Bangladesh states-

> A person elected as a Member of Parliament at an election at which s/he was nominated as a candidate by a political party shall vacate his/her seat if s/he –
>
> (a)resigns from that party ; or
>
> (b) votes in Parliament against that party ;
>
> but shall not thereby be disqualified for subsequent election as a member of Parliament.[7]

So, the Parliament members are barred from voting against their party will. And even if they are allowed to vote freely without any restriction, the outcome might not change so much. Most of the parliament members, who are elected, are businessmen who have very little knowledge about the judicial independence itself. So, perhaps it would not be wise to give them a power which can shake the very core of judicial independence.

But, was the previous process that had been stated by the 5th amendment so perfect? The 5th amendment of the constitution of Bangladesh was brought into the constitution when there was no parliament in the country. While one can talk about the flaws of 16th amendment because of the application of article 70, what about the fact that the president is also bound by the advice of prime minister under article 48(3) of the constitution? Article 48(3) of the constitution states-

> (3) In the exercise of all his/her functions, say only that of appointing the Prime Minister pursuant to clause (3) of article 56 and the Chief Justice pursuant to clause (1) of article 95, the President shall act in accordance with the advice of the Prime Minister:
>
> Provided that the question whether any, and if so what, advice has been tendered by the Prime Minister to the President shall not be enquired into in any court.[8]

Except appointment of the prime minister under article 56 and appointment of chief justice of Supreme Court of Bangladesh under article 95, the President of Bangladesh has to follow the directions made by the prime minister. If there was no 16th amendment to the constitution of Bangladesh, what would guarantee that the prime minister won't use his/her power under article 48(3) to force the president to start an impeachment process in the name of misconduct or incapacity of any judge for his/her party's benefit. Moreover, while the process of the parliament is a lot transparent

7 The Constitution of Bangladesh, 1972, art 70.

8 Ibid, art 48(3).

to the people, the previous process that included Supreme Judicial Council is way more concealed to people.

Parliament is the most overtly criticized institution in democracy and because they are criticized so much by the public and media, the parliamentarians are more exposed and vulnerable to public criticism.[9] And public criticism might be the most powerful instrument in democracy.

The process of impeachment against judges on ground misconduct and incapacity by the president with the help of Supreme Judicial Council seemed like a better system if any judge had to be removed. But in present condition, where even the president is bound under the advice of the prime minister as per article 48(3) of the constitution, the system doesn't sound much neutral. Rather, the system that 16th amendment of the constitution has brought back into the constitution sounds more transparent and scrutinized. But the amended article 96 of the constitution of Bangladesh could have been given a little more perfection if the 16th amendment had brought a little bit more change in the article 96 of the constitution, like there should have been some sort of procedural devices that wouldn't bind the members of the parliament under article 70 of the constitution while exercising this power. There could be secret ballot voting or prohibition of official announcement of any party decision on removal of judges.[10]

Security on tenure of judges is one of the most important elements that helps ensure independence of judiciary if we look at the system both before and after 16th amendment to the constitution of Bangladesh. Thus, the 16th amendment of the constitution sounds much ensuring to keep judicial independence especially considering constitution of Bangladesh and its political and government cultures. Only if there had been few more changes to the article 96 as stated above, the impeachment process would have been a perfect move.

Conclusion

Judicial authority originates from public confidence in justice system and, public confidence in judicial system has its source in the independence of judiciary.[11] Additionally, to ensure judicial independence, application of separation of power among the organs of the state is a must. The 5th amendment was made to the constitution when there was no democratic government in the country. And probably, the democratic governments that came afterwards did not amend that article 96 of the constitution because the system sounded much soothing than the original article 96. Also, perhaps the Supreme Court might have committed a mistake in invalidating the 16th amendment of the constitution of Bangladesh. Again, no human-made system can be 100% perfect. But, the stated process in the amended article 96 with 16th amendment of the

9 Nirmal Kumar Saha & M. Jashim Ali Chowdhury, 'On Removal of Supreme Court Judges: 16th amendment & beyond', p. 6 (Unpublished).

10 Ibid, p. 4.

11 Sarkar Ali Akkas, 'Judicial Independence and Accountability: A Comparative Study of Contemporary Bangladesh Experience', Doctor of Philosophy Thesis, University of Wollongong, 2002, p. 37.

constitution could have been made better easily by introducing some little procedural device as discussed earlier in this paper. Absolute judicial independence is still a far cry for Bangladesh but gaining independence of judiciary is like a primary objective of a nation. By strengthening separation of power, 16th amendment to the constitution of Bangladesh could set the way for judicial independence as *Andrew Jackson* once said, *'All the rights secured to the citizens under the Constitution are worth nothing, and a mere bubble, except guaranteed to them by an independent and virtuous Judiciary.'*[12]

[12] Constitution Quotes, Brainy Quote available at http://www.brainyquote.com/quotes/andrew_jackson_401401?src=t_constitution, accessed on accessed on 29 July 2018.