

# Assessing the Mechanisms of Removal Procedure of Supreme Court Judges in Bangladesh: An Analytical Study

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## Abstract

Bangladesh, a deltaic country in South Asia, has its own Constitution, similar to other independent nations, to govern its affairs. Over time, the Constitution has undergone multiple amendments, often driven by political interests rather than national welfare, to align with the demands of modern democratic practices. Among these changes, the provision for the “Removal Procedure of Judges of the Supreme Court” has been amended several times without adequately considering the nation’s interests. With the judiciary serving as a cornerstone of democracy, ensuring its independence and accountability is imperative. This study offers an in-depth analysis of the legislative guidelines, administrative frameworks, and grounds for judicial removal of Supreme Court Judges in Bangladesh. Through a focus on constitutional provisions, judicial precedents, and historical context, the research identifies significant challenges and shortcomings in the existing procedures, including politicization, lack of transparency, and inefficiencies that undermine judicial independence. Furthermore, the study identifies challenges and deficiencies within the current system, providing critical insights for legal scholars, policymakers, and practitioners. It also proposes strategies to enhance the system’s transparency, fairness, and efficiency, fostering a more robust and independent judiciary.

## Keywords

Removal of Judges, Judicial Independence of Judges, Impeachment, Judicial Appointment, Sixteenth Amendment

## 1. Introduction

A real democratic country, which does its all activities for the welfare of nation,

cannot create any pressure on the judiciary to keep under its control. A nation cannot progress and reach at the expected highest peak of development if there is no free and fair judicial system. However, this paper argues against creating pressure on the judges by executive or legislature to adjudicate in their favor unlawfully which is indirectly followed in Bangladesh and not followed in other democratic countries such as Australia, India, Canada, South Africa, and the United Kingdom etc. Though yielding the authority to remove judges to Parliament is a practice observed in several other democratic countries, such as Australia, India, Canada, South Africa, and the United Kingdom, it is not created any pressure by those countries. Although all these countries, including Bangladesh, are democratic, the way democracy is implemented in each of them differs significantly from the democratic practices in Bangladesh. The 16th Amendments of the Constitution has vested removal procedure of the Judges upon Supreme Judicial Council after 40 years. This paper emphasizes on ensuring the international standards for the appointment and removal procedures of judges in the Supreme Court of Bangladesh, ensuring the judiciary remains free from any form of pressure and keeping the judiciary free from any kind of pressure imposed by executive, legislature or any political persons so that the judges may perform their judicial functions freely and fairly pursuant to the laws of the land.

## 2. Objectives of the Study

The main objective of the paper is to maintain and ensure the international standards governing the appointment and removal processes for judges in the Supreme Court of Bangladesh. There are some additional objects of this paper which are:

To maintain the procedure lawfully and avoid the personal, political or any type of pressure imposed upon the judges.

To create awareness among the people of the country about the behavior of the judges and impeachment power of the government.

## 3. Methodology

Basically, the research has been conducted using on the non-empirical and *analytical method*. Secondary sources namely, books, journal articles, internet documents are also used.

## 4. Scope and Limitation

The study does not concern itself with the issue relating to the appointment system, terms and conditions, age of retirement, security tenure, accountability and removal procedure of the of the judges of lower courts rather pertaining to the removal procedure for Supreme Court Judges in Bangladesh along with it includes the discussion of judicial independence briefly. This paper uses the term “judges” to mean only the judges of the Supreme Court of Bangladesh and “judiciary” referring specifically to the Supreme Court of Bangladesh have some particular cases mentioned substantively.

## 5. Conceptual Framework of Impeachment and Process for Removing Supreme Court Judges in Bangladesh

The removal procedure of the judges and the other public officials is a process by which a judge or a public official may face removal due to “misconduct” or “misbehavior” by parliament or any other separated body/commission. The process is determined by the Constitution or any other Act. In that case, at first there shall have any allegation against the judges or the public officials. To formally accuse a judge or public official of committing a serious offense related to their position is referred to as “impeachment”. So there is a connection between the removal procedure and the impeachment. Impeachment is the first step to bring any charge where the removal procedure is final step whether the alleged judge or public official is removed or not from his/her office. As a result, at first this paper discusses the concept and historical background of impeachment before discussing the removal procedure.

### 5.1. Impeachment

The impeachment (22De) process establishes a mechanism for removing the President, Vice President, and other officials who have committed treason, bribery, or other high crimes and misdemeanor (Bazan & Henning, 2010). This paper discusses only the impeachment of judges as it is concerned with the removal procedure of judges.

#### 5.1.1. Bangladesh

In Bangladesh, there is no precedent on removing the judges of Supreme Court on the grounds of proved misconduct and incapability except a letter to the president and copies of it to the Prime Minister, Speaker, Chief Justice, law minister and the Supreme Court judges, for impeachment of Chief Justice Mr. Surendra Kumar Sinha given by former justice Mr. AHM Shamsuddin Chowdhury Manik.

The fact is that, Supreme Court justice AHM Shamsuddin Chowdhury has reportedly sent a letter to the President of Bangladesh seeking impeachment of Chief Justice Surendra Kumar Sinha, alleging he had violated the Constitution and his oath. Bringing allegations of “gross misconduct” and “violating Constitutional oath”, Justice Choudhury has mentioned in his letter that the Chief Justice “out of his personal grudge” has removed him from the Supreme Court Bench that deals with cases. The top Appeal Court Judge said that Chief Justice has not given him jurisdiction to sit in the bench from September 9 (Biplab, 2015). In his letter to the president, he said that he would retire on September 17 but his pension process was halted. He dubbed the chief justice’s action “discriminatory, spiteful and vengeful” adding that such behavior amounted to interfering with his judgment and a violation of the Constitution’s Article 94 (4). Justice Choudhury also said that the chief justice’s “misconduct” by “removing” him from judicial processes was impeachable (Correspondent, 2015). The chief justice is not just an individual, but an institution. Such allegation has never been brought against a chief justice in the country’s history, it has set a bad precedent (Justice Choudhury, 2015).

### 5.1.2. Historical Framework of the Removal of Judges in the Supreme Court of Bangladesh

The Constitution of Bangladesh came into force on the 16<sup>th</sup> December 1972, the first anniversary of the country's independence. It contains fairly stringent safeguards for the independence of the judiciary in Article 95 (Appointment of Judges), Article 96 (Removal of Judges), and Article 99 (Prohibition on Further Employment of Judges). Over the years, its safeguards for judicial independence, rather than being strengthened and consolidated, have been diluted through a number of Constitutional amendments.

The Constitution of 1972 says: *"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."* (The Constitution (Sixteenth Amendment) Act Article 96 (2) 2014)

Most of the jurists and constitution specialists opine that the provision inserted in the original Constitution about the "Removal Procedure of Judges of Supreme Court in Bangladesh" is democratic. Because there would not be given any pressure and threat on the judges for personal interest either by executive or legislature. But the AL government in 1975 amended the article 96 of the Constitution of 1972 by the "Fourth Amendment" which provides that *A judge may be removed from his office by order of the President on the ground of misbehavior or incapacity. Provided that no judge shall be removed until he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him* [The Constitution (Fourth Amendment) Act, 1975]. The "Fourth Amendment" vested the power to remove the judges to the President. So the President could then remove a judge including the Chief Justice simply by an order on the ground of misbehavior or incapacity. Again the incapacity or misbehavior need not be proved; President's subjective intention became everything to remove a judge. Thus the President became both the appointing and removing authority of the judges (Abdul, 2011). The "Fourth Amendment" has given rise to lots of arguments though it could not be implemented for a long period of time. This undemocratic provision was repealed and the provision of the original Constitution was restored by the President Justice Sayem on 28<sup>th</sup> May, 1976 by issuing a Proclamation (Rizwanul, 2014). However, clauses (2), (3), (4), (5), (6) and 7 of Article 96 were substituted by the Second Proclamation (Tenth Amendment) Order, 1977 providing the procedure for removal of a Judge of the Supreme Court of Bangladesh by the Supreme Judicial Council in the manner provided therein instead of earlier method of removal (Rizwanul, 2014). This provision was constitutionalized by the "Fifth Amendment" in 1979 (The Constitution (Fifth Amendment) Act 1979) revoking the "Fourth Amendment".

Article 96 (2) substituted by the Second Proclamation (Tenth Amendment) Order, 1977 provides that *"A judge shall not be removed from office except in accordance with the following provisions of this article"*.

Article 96 (3) provides that *"There shall be a Supreme Judicial Council, in this*

*article referred to as the Council, which shall consist of the Chief Justice of Bangladesh, and the two next senior Judges. Provided that if, at any time, the Council is inquiring into the capacity or conduct of a judge who is a member of the Council, or a member of the Council is absent or is unable to act due to illness or other cause, the Judge who is next in seniority to those who are members of the Council shall act as such member.”*

Article 96 (4) says that “*The function of the Council shall be:*

- (a) to prescribe a Code of Conduct to be observed by the Judges; and*
- (b) to inquire into the capacity or conduct of a Judge or of any other functionary who is not removable from office except in like manner as a Judge.”*

Article 96 (5) provides that “*Where, upon any information received from the Council or from any other source, the President has reason to apprehend that a Judge:*

- (a) may have ceased to be capable of properly performing the function of his office by reason of physical or mental incapacity, or*
- (b) may have been guilty of gross misconduct, the president may direct the Council to inquire into the matter and report its finding.”*

Article 96 (6) says that “*If, after making the inquiry, the Council reports to the President that in its opinion the Judge has ceased to be capable of properly performing the functions of his office or has been guilty of gross misconduct, the President shall, by any order, remove the Judge from office.”* Article 96 (7) provides that “*For the purpose of an inquiry under this article, the Council shall regulate its procedure and shall have, in respect of issue and executive of processes, the same power as the Supreme Court*” (The Second Proclamation (Tenth Amendment) Order 1977).

These substituted provisions being more transparent procedure than that of the earlier ones and also safeguarding independence of judiciary, are to be condoned (Rizwanul, 2014). The *Fifth Amendment* introducing Supreme Judicial Council, a progressive one and healthy provision for the security of tenure of judges (Abdul, 2011). Though the Awami League-led Grand Alliance government had brought the 15th Amendment in 2011, the article 96 was kept safely as it was. But the removal procedure pursuant to the original Constitution was restored on 18 September 2014 by the ruling party passing the 16<sup>th</sup> amendment bill in a voice vote of 327-0, allowing the Parliament to impeach the Supreme Court judges for “Misconduct and Incapacity” despite the opposition of the BNP-led 20 Partisans Alliance and a section of lawyers including representatives of civilized society and most of the jurists.

Before discussing the removal procedure of the judges, it should be pertinent to elaborate their appointment system from general perspective, criteria and mechanisms of judicial appointment.

## 6. General Perspective and Criteria of Judicial Appointment

Judicial appointment is an important factor to the fair administration of justice

(Shetreet, 1987). The *Montreal Declaration* 1983, the *UN Basic Principles* 1985 and the *Beijing Statement* 1995 provide some standards for judicial appointment. Some international reports, jurists and columnists recommend some criterions for appointment of judges. Generally, the criteria for judicial appointments involve three broad aspects—merit, non-discrimination and political considerations (Malleson, 1997).

### 6.1. Merit Principle

Merit should always be an essential and dominant criterion of judicial appointment (Gibbs, 1987). The *Montreal Declaration* 1983 states that judicial candidates should be “individuals of integrity and ability, and well-trained in law” (The *Montreal Declaration* 1983). The *UN Basic Principles* 1985 provides that judicial appointees should be “individuals of integrity and ability with appropriate training or qualifications in law” (The *UN Basic Principles* 1985). The *Beijing Statement* 1995 states that “judges should be selected on the basis of proven competence, integrity and independence” (The *Beijing Statement* 1995). Different jurists and academic writers consider a variety of elements of merit, which can be broadly divided into two groups, professional skill and personal qualities. Professional skills include legal knowledge and experience, intellectual ability and competence. Personal qualities can be explained as independence, integrity, impartiality, high moral character, patience, temperament, and good manners etc. (Yackle, 2019). In England, some important criteria for judicial appointment were defined and made public in April 2000. The qualities they should possess include legal knowledge and experience, analytical and intellectual abilities, sound judgment, decisiveness, communication and listening skills, authority and case management skills, integrity and independence, fairness and impartiality, an understanding of people and society, maturity and a balanced temperament, courtesy, commitment, conscientiousness, and diligence (The Lord Chancellor’s Department, *Judicial Appointments Annual Reports: 2000-2001*).

### 6.2. Non-Discrimination

In the selection of judges, no individual shall face discrimination based on race, color, sex, religion, political or other opinions, national or social origin, property, birth, or status. However, a requirement that a candidate for judicial office must be a national of the country will not be regarded as discriminatory (The *UN Basic Principles* 1985, Art 10 and 13 and *Beijing Statement* 1995). The *Montreal Declaration* 1983 provides that in the selection of judges, no discrimination shall occur based on race, color, sex, language, religion, political or other opinions, national or social origin, property, birth, or status, provided that citizenship requirements are met. The processes and criteria for judicial selection should take into account the need for the judiciary to fairly represent the diverse aspects of society (The *Montreal Declaration* 1983). The processes and criteria for judicial selection should adequately ensure that the judiciary reflects the diverse aspects of society

fairly (The Montreal Declaration 1983).

### 6.3. Political Considerations

In the appointment of judges, political consideration should be avoided. If judges are appointed exclusively for political reasons, it can significantly undermine public confidence in the judiciary (King, 1994). This is due to the fact that when the executive government has exclusive authority to select judges, there is a constant risk of abuse of the appointment power. At this stage, political or other factors may take precedence over merit-based criteria for appointments (Friedland, 1995). As to political consideration, in the appointment of judges, none of the international instruments such as the Montreal Declaration (1983), the UN Basic Principles (1985), and the Beijing Statement (1995) include specific provisions; however, these documents acknowledge the importance of ensuring that there is no discrimination based on political or other opinions.

## 7. Mechanisms for Judicial Appointment

Mechanisms for judicial appointment are important factors in appointing judges as the trust of judiciary depends on the judges. Regardless of the mechanism employed in a given country, it should be transparent and accessible to public oversight whenever possible. The presence of these essential qualities largely depends on the method used for selecting judge (Garner, 1935). Judicial appointment mechanisms utilized in various countries around the globe are mentioned herein below.

### 7.1. Election by the People

The system of popular election for judges was first implemented in France in 1790, but it proved unsuccessful, as the general electorate often lacks the necessary understanding to evaluate the validity of judicial opinions. The elections of 1793 resulted in many individuals being elected who were engravers, stone-cutters, clerks, gardeners, and common laborers—none of whom had the qualifications to administer justice. Consequently, the system of popular election was abolished with the rise of Napoleon (Abdul, 2011). In the United States, some states use a model of popular election to select judges, while others employ a mixed system that incorporates elements of both appointment and popular election (Abraham, 1986). The main drawback of this method is that various political parties nominate their candidates, and voters, influenced by these parties, may elect a candidate who lacks the ability to administer impartial justice.

### 7.2. Election by the Legislature

The election model by the legislature is used in a few states in the United States, for federal judges in Switzerland, and for judges of the German Federal Constitutional Court (Abdul, 2011). This system is viewed unfavorably because judges are



nominated by political parties in parliament, and the majority is likely to ensure the election of their chosen candidate, regardless of that candidate's ability to administer justice effectively (Abdul, 2011).

### 7.3. Appointment by the Executive

The most prevalent method for appointing judges is through the executive branch. It may be of two types. Such as appointment of judges, either independently by the executive, or after consulting with the court, or from a list of nominees provided by the court, or with the approval of the legislature or following discussions with the Judicial Service Commission. The first method is often criticized for potentially allowing personal favoritism or political motives to influence appointments, with examples drawn from countries such as Britain, France, the USA, and particularly from many developing nations (Garner, 1935). The second method is the most democratic and impartial. When the court compiles a list or the Chief Justice consults with someone closely connected to the Bar's performance, they are likely to choose lawyers known for their legal expertise, integrity, and independence in justice. This approach to appointing judges fosters the enhancement of judicial decision-making standards (Abdul, 2011).

Supporting the second method the *Montreal Declaration* 1983 provides that "Participation in judicial appointments by the Executive or Legislature is consistent with judicial independence, so long as appointments of judges are made in consultation with members of the judiciary and the legal profession or by a body in which members of the judiciary and the legal profession participate" (The Montreal Declaration 1983). Judges are well-equipped to evaluate the performance of lawyers considered for judicial positions. Thus, consulting with members of the higher judiciary is crucial for appointing the most qualified individuals to these roles. This practice is essential for reinforcing the independence of the judiciary (Barr, 1991). According to the *Beijing Statement* 1995 appointment, supervision and disciplinary control of administrative personnel and support staff must vest in the judiciary, or in a body in which the judiciary is represented and has an effective role (The Beijing Statement 1995). The *UN Basic Principles* 1985 states that the "terms of office of the judges, their independence, security, adequate remuneration, conditions of service pensions and the age of retirement shall be adequately secured by law" (The UN Basic Principles 1985). The use of an independence commission in appointing judges is the most acceptable mechanism among the commentators in the contemporary world (Barr, 1991). In certain societies, appointing judges with the approval or after consulting a Judicial Service Commission is viewed as a way to ensure that selected judges are suitable for the role. When a Judicial Service Commission is established, it should comprise representatives from the higher judiciary and the independent legal profession to help uphold judicial competence, integrity, and independence (The Beijing Statement 1995). The commission system is functioning effectively in various countries, including Canada, South Africa, and several jurisdictions in the United States.



Additionally, judicial appointment committees exist in Ireland, Israel, New Zealand, and the Netherlands (Blair, 2001). These commissions and committees are responsible for either selecting candidates directly, making recommendations, or providing a shortlist from which the executive must justify any appointments made outside of it (Barr, 1991).

The success of the commission system relies on its composition and the methods it employs. It may consist of senior judges, experienced lawyers, and esteemed legal scholars, with the possibility of including community and parliamentary representatives as well (Spry, 2001). A fair and non-discriminatory selection process employed by the commission can help ensure the selection of the most qualified candidates for judicial positions. Furthermore, if the commission's system is transparent and subject to public scrutiny, it can diminish exclusive executive influence over judicial appointments and bolster public trust in the appointment process. Consequently, this approach is likely to enhance transparency and accountability while eliminating inappropriate political interference or other irrelevant factors in the appointment system (Kendall, 1997).

## **8. Criteria for Appointment of Judges of Supreme Court in Bangladesh**

The standard for appointing judges to the Supreme Court of Bangladesh is “eligibility” that encompasses legal expertise and professional experience.

### **8.1. Eligibility**

There are no detail outline of the qualifications required for the appointment of judges to the Supreme Court in the Constitution of Bangladesh except citizenship or practice period. It does not interpret the eligibility (The Constitution of the People's Republic of Bangladesh 1972) which was indicated by the Montreal Declaration 1983, the UN Basic Principles 1985 and the Beijing Statement 1995 including most of the jurists. So, a non-skilled can be appointed by fulfillment of other Constitutional conditions on the basis of political consideration. However, this paper points out for maintaining the International Standards while appointing the judges.

### **8.2. Principle of Seniority**

The principle of seniority is typically followed in appointing judges to the Appellate Division and the Chief Justice in Bangladesh, though it is unwritten and often disregarded for political reasons. This practice undermines judicial morale and the perception of justice. Past instances show that judges have resigned over favoritism in promotions. Strict adherence to seniority is advocated to uphold fairness and integrity in the judiciary.

### **8.3. Mechanism for Judicial Appointment in Bangladesh**

The Constitution of Bangladesh states the procedure for the appointment of the

judges of Supreme Court. It provides the Chief Justice shall be appointed by the President, and the other judges shall be appointed by the President after consultation with the Chief Justice (The Constitution of the People's Republic of Bangladesh 1972). It provides that if the President is satisfied that the number of the judges of a division of the Supreme Court should be for the time being increased, the President may appoint one or more duly qualified persons to be Additional Judges of the division for such period not exceeding two years as he may specify, or, if he thinks fit, may require a judge of the High Court Division to sit in the Appellate Division for any temporary period (The Constitution of Peoples' Republic of Bangladesh 1972). The current constitutional provisions for appointing Supreme Court judges are inadequate (Blacks, 2009). Because as per Art. 48 (3) of the Constitution, the President must follow the Prime Minister's advice in all functions, except when appointing the Prime Minister and the Chief Justice of the Supreme Court. In that case, the president has nothing to do except to obey the request of the Prime Minister. Concentrating executive authority in the Prime Minister, with the President bound to act on their advice, risks over-centralization of power. This can create opportunities for authoritarian tendencies, especially if the Prime Minister dominates Parliament. The article does not address scenarios where the Prime Minister's advice might conflict with national interest, constitutional principles, or public welfare. The lack of any discretionary authority for the President in such cases can lead to governance paralysis or unchecked executive action. The *Montreal Declaration* 1983, the *UN Basic Principles* 1985 and the *Beijing Statement* 1995 suggests for involvement of judiciary in the case of appointment of all judges. That is, judicial participation should be accompanied by transparent, merit-based procedures that include objective criteria for evaluating candidates' qualifications and integrity. A balanced approach that combines judicial involvement with input from the executive, legislature, and civil society can enhance the legitimacy and accountability of the appointment process. Its implementation should account for the need to balance judicial autonomy with broader accountability, ensuring that the judiciary remains both independent and responsive to the principles of justice and democracy. But Bangladesh could not reach to the International Standards in appointment of judges of Supreme Court except the appointment of Chief Justice.

## 9. Grounds of Removal of the Judges

To ensure the justice and keep hold of public confidence toward the judiciary, Judges should perform their assigned duties in pursuant to the laws freely and fairly. Therefore, a judge should be accountable for any breach of judicial conduct and can be removed by proper corrective actions.

The grounds for judicial removal should be clearly specified and defined by law. *The Montreal Declaration* (1983), *the UN Basic Principles* (1985), and *the Beijing Statement* (1995) each outline two primary grounds for removing judges: misconduct or misbehavior, and incapacity. The *Montreal Declaration* 1983 states that

“judges should not be removed from office except on the proved grounds of incapacity or misbehavior rendering [them] unfit to continue in office (The Montreal Declaration 1983).” Similarly, a judge may be subject to disciplinary action only for the causes of “incapacity or behavior” which makes him or her unfit to perform judicial duties (The UN Basic Principles 1985). Likewise, a judge may be removed from his or her office only for proved incapacity, conviction of a crime, or conduct which makes the judge unfit to be a judge (The Beijing Statement Art 22 1995). However, there are various causes of removal of judges. But most common causes are misconduct or misbehavior and incapacity.

## 10. Mechanisms of Removal of The Judges

On proved misconduct or misbehavior or incapacity a judge can be removed from his or her office. *The Montreal Declaration* 1983 provides that a judge shall not be subject to removal except on proved grounds of incapacity or misbehavior, rendering him unfit to continue in office (The Montreal Declaration 1983). Similarly, the UN Basic Principles 1985 says that judges shall be subject to suspension or removal only for reasons of incapacity or behavior that renders them unfit to discharge their duties (The UN Basic Principles 1985). Likewise, the Beijing Statement 1995 states that judges should be subject to removal from office only for proved incapacity, conviction of a crime, or conduct that makes the judge unfit to be a judge (The Beijing Statement 1995). *The Montreal Declaration* 1983 provides that the proceedings for judicial removal or discipline, when such are initiated, shall be held before a court or a board predominantly composed of members of the judiciary and selected by the judiciary (The Montreal Declaration 1983). In nations where the legal profession is essential for upholding the rule of law and judicial independence, it is advisable for legal professionals to be involved in the selection of court or board members and to be appointed as members themselves. The UN Basic Principles 1985 says decisions in disciplinary, suspension or removal proceedings should be subject to an independent review (The UN Basic Principles 1985). Removal by parliamentary procedures has traditionally been adopted in some societies. In other societies, that procedure is unsuitable; it is not appropriate for dealing with some grounds for removal; it is rarely, if ever, used; and its use other than for the most serious of reasons is apt to lead to misuse (The Beijing Statement 1995). Where parliamentary procedures or procedures for the removal of a judge by vote of the people do not apply, procedures for the removal of judges must be under the control of the judiciary (The Beijing Statement 1995). However, there are different types of removal procedures applied in various countries based on their social and cultural values. Such as:

### 10.1. Removal by the Parliament

The removal of a judge by a parliament on ground of “misconduct or misbehavior” or “incapacity” is practiced in several countries including Australia, Canada, England, India and United States of America. In that case parliament can remove

the judges. So the judges are under the control of members of parliament. The parliamentary process of removal of judges carries inherent drawbacks. The process may be influenced by partisan politics, undermining the impartiality and fairness of proceedings. The high procedural and evidentiary thresholds can make it cumbersome and time-consuming, hindering timely action against misconduct.

So the parliamentary process is susceptible to executive interference, posing a significant threat to judicial independence. Given that Parliament is a political entity, political emotions play a crucial role in the process of judicial discipline. Consequently, the entire framework of parliamentary discipline may be influenced by political motivations (Shetreet, 1987).

## **10.2. Removal by Judiciary**

The judiciary may participate in disciplining judges in two ways: (i) through investigative involvement and (ii) through consultation or recommendations.

### **10.2.1. Judicial Involvement through Investigation**

In such cases, judges can be removed based on an investigative report conducted by the judiciary, followed by action from the executive or legislature, as practiced in India. This process aligns with international standards, with many jurists supporting judicial involvement in investigating allegations of misconduct or incapacity as a democratic approach. International guidelines also recommend this principle for addressing such allegations.

### **10.2.2. Judicial Involvement via Consultation or Recommendation**

When it comes to consultation, the authority to remove judges rests with the executive, which may seek the input of senior judges in exercising this power. In this scenario, the judiciary's role is purely advisory, and the recommendations provided by judges during the consultation process may or may not be accepted by the executive. Judicial recommendations are often conducted behind closed doors, which could lead to perceptions of secrecy or lack of public accountability. Over-reliance on judicial involvement might undermine the role of other branches of government, disrupting the balance of power. The judiciary initiates disciplinary proceedings and proposes actions against judges, after which the executive enforces disciplinary measures based on the higher judiciary's recommendations (Shetreet, 1987).

### **10.2.3. Removal by Independent Commission**

The removal of judges through an independent commission is a modern practice seen in countries like the United States and Australia. California pioneered this approach in 1960 with its Commission on Judicial Performance, inspiring similar commissions across the U.S. and in New South Wales, Australia, which established a Judicial Commission in 1986. The effectiveness of such commissions depends on their composition, powers, and transparency. Including representatives from the executive, legislature, judiciary, legal profession, and public ensures

accountability while maintaining judicial independence. This approach is considered more democratic than other procedures.

## 11. Legal Framework of Removal Procedure of the Judges in Bangladesh

The original Constitution provides that the judges are subject to removal on the ground of “proved misbehavior or incapacity”. The Article 96 (2) of the original Constitution uses the term “*proved misbehavior or incapacity*”, but the *Constitution (Fourth Amendment) Act, 1975* omitted the word “*proved*”. The section 105 (2) of the *Second Proclamation (Seventh Amendment) Order, 1976* again used the term “*proved misbehavior or incapacity*”. The *Proclamations (Amendment) Order, 1977* incorporated “*physical or mental incapacity*” and “*gross misconduct*”. Eventually, the *Constitution (Sixteenth Amendment) Act, 2014* returned to the provision of original Constitution substituting the term “*proved misbehavior or incapacity*”. Most of the jurists opine that the causes of “*physical or mental incapacity*” and “*gross misconduct*” are more specific than the terminology “*proved misbehavior or incapacity*”. However, “*proved misbehavior or incapacity*” are the present causes upon which Judges of Supreme Court can be removed (The Constitution of the People’s Republic of Bangladesh 1972).

### 11.1. Removal Procedure in Original Constitution

The original Constitution of Bangladesh conferred upon Parliament the power to remove Supreme Court judges based on proven misbehavior or incapacity by the vote of a two-thirds majority. 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 (Article 96 (2) of the Constitution of 1972). Requiring a two-thirds majority in Parliament ensures a high threshold for removing a judge, promoting fairness and preventing politically motivated removals. Article 96(2) safeguards judicial independence by requiring a robust process for the removal of judges, but its reliance on political institutions for execution may pose risks of political interference. Strengthening judicial involvement or oversight could enhance its fairness and impartiality.

Again, this provision does not match with the provision of International Documents like the *Montreal Declaration* 1983, the *UN Basic Principles* 1985 and the *Beijing Statement* 1995. These documents suggest that the removal proceedings should be conducted before a court or a panel comprised of judicial members selected by the judiciary, and these proceedings must undergo independent review. But original Constitution grants Parliament the authority to impeach Supreme Court judges without involving the judiciary. It requires that the judges should not be subject to control by the political branches of the government and that they should enjoy protection from any threats, interference, or manipulation which may either force them to unjustly favor the government or subject themselves to

[punishment] for not doing so (Larkins, 1996). If the tenure of judges, the terms, and other conditions of their service were left to the exclusive discretion of the executive government, the judges would not be able to perform judicial functions without fear or favor. Under these circumstances public confidence in the justice system would be seriously undermined. Therefore, the conditions of judicial transfer, remuneration and pension etc. should be assured the judges that they are independence of the executive government. The tenure of judges, along with the terms and conditions of their service, should be protected to guarantee that they can perform their judicial duties without fear or favor, affection or ill-will (Malleson, 1997). So, this paper suggests that the government shall not impose any pressure upon the judges to adjudicate pursuant to their order and the laws of the land should be standard of Judges to render their decisions in any case.

### **11.2. The 4<sup>th</sup> Amendment for Removal Procedure of the Judges**

The Fourth Amendment undermined judicial independence by introducing an undemocratic provision allowing judges to be removed at the president's discretion. Critics argue that this provision obstructs the fair and free performance of judicial duties, as judges may feel pressured to align with the ruling party's interests. This system, they contend, subjects judges to political influence, threatening their ability to administer justice impartially and independently. However, this provision was repealed by the section 105 (2) of the *Second Proclamation (Seventh Amendment) Order*, 1976. It did not exist for a long period of time.

### **11.3. Supreme Judicial Council for Removal Procedure of the Judges**

The 4<sup>th</sup> amendment was repealed by the *Second Proclamation (Seventh Amendment) Order*, 1976. This proclamation returned the power of removal of judges to the parliament as it was existence in the original Constitution. Again, the *Second Proclamation (Seventh Amendment) Order*, 1976 was repealed by the *Proclamations (Amendment) Order*, 1977 introducing the provision of Supreme Judicial Council to impeach the judges on ground of “*physical or mental incapacity*” and “*gross misconduct*” as the then the parliament was dissolved while issuing the Martial Law. Eventually, by the *Second Proclamation (Tenth Amendment) Order*, 1977, the provision of Supreme Judicial Council was finalized and it was constitutionalized by the “*Fifth Amendment*” of the Constitution in 1979 (THE CONSTITUTION (FIFTH AMENDMENT) ACT 1979) revoking the “*Fourth Amendment*”. According to the article 96 of the *Constitution (Fifth Amendment) Act*, 1979 the Supreme Judicial Council (SJC) consists of the Chief Justice and the two next senior Judges of Appellate Division of the Supreme Court of Bangladesh. The Council's responsibilities include: (a) establishing a Code of Conduct that all Supreme Court judges must adhere to, and (b) investigating the capacity or behavior of a judge or any other official whose removal from office is subject to the same procedures as those for a Supreme Court judge. If the President, based on

information from the Council or other sources, believes that a judge—“may have ceased to be capable of properly performing the functions” of his office by “reason of physical or mental incapacity”, or “may have been guilty of gross misconduct”, then the president may direct the SCJ to “inquire into the matter and report its finding”. If a member of the Council faces any allegations, or if a member is absent or unable to perform their duties due to illness or other reasons, the judge with the next highest seniority shall serve in that capacity. However, The SJC investigates allegations of misconduct or incapacity against the judge in question. If, following the inquiry, the Council informs the President that, in its view, the judge is no longer able to effectively perform the duties of their office or has committed gross misconduct, the President shall issue an order to remove the judge from their position. From this view, it is said that the SJC is more effective to protect the judges from undue influence and interference of the other organs and to save the tenure of judges so that they can ensure the administration of justice. Article 96 and the SJC represent a significant attempt to institutionalize judicial accountability while preserving judicial independence. However, its historical context, procedural limitations, and lack of transparency have undermined its effectiveness. Hence, this healthy provision was repealed by the then ruling party Awami league led government passing the 16<sup>th</sup> amendment of the Constitution in 18 September 2014 after 40 years defying the allegations of most of the jurists, senior lawyers and opposite parties.

#### 11.4. 16<sup>th</sup> Amendment for Removal Procedure of Judges

The latest amendment of the Constitution of Bangladesh entitled the *Constitution (Sixteenth Amendment) Act, 2014*, in 18 September 2014, is regarding the provision of impeachment of the judges of Supreme Court. This amendment restored the power of removal of judges of Supreme Court to the Parliament like the original Constitution. After this amendment, a Supreme Court judge may be removed from their positions through an order issued by the President, following a resolution from Parliament that is endorsed by a two-thirds majority of its total membership, based on established misconduct or misbehavior or incapacity (The Constitution Sixteenth Amendment Act 2014). This paper has already discussed that this provision is not healthy enough for Bangladesh as the political systems of Bangladesh are not similar to developed countries. The amendment represents a major threat to the independence of the judiciary (Felden, 2014). Judges will have to live in constant fear of being removed from office once they issue verdicts that are against the wishes of the Parliament (Felden, 2014). Yet making such changes to the law, some are of opinion that the last ruling Government aims to ensure that it retains its hold on power. An eminent columnist, is of the opinion of that ‘the observation is true but it ignores the difference in socio-political culture between those countries and Bangladesh. We must not forget that the laws do not operate in a vacuum and law’s effectiveness depends not just on its mechanical form but also in the culture of the society in which it operates (Abdul, 2011). So



Bangladesh shall obey the democracy strictly if it follows the other democratic countries of the world.

However, this paper emphasizes that the executive, legislature or any individual persons shall not impose any pressure on the judges directly or indirectly to accept any kind of request to decide in their favor. In deciding any case, a judge should follow some standard as “impartiality”, “assessment of the facts” and “understanding of the law” and free from any direct or indirect undue influence or interference from any source or for any reason (The Beijing Statement 1995).

### **11.5. Findings**

This article evaluates the judicial independence, appointment and removal procedure of the judges of Supreme Court both General Perspective and Bangladesh Perspective. The judges of Bangladesh face hesitation during performing their legal obligations for some reasons: The judges are appointed by the president. There is no board, council or commission for recommendation in such appointment. Most of the time it is alleged that their appointments are influenced by political considerations and have to obey the indication of ruling party. The promotion also depends on the political consideration, favoritism and previous judgments. So the judges lose their moral character by favoring for the ruling party for their promotion. Moreover, the principle of seniority is not obeyed for promotion. This is why most of time the senior judges are compelled to resign from their offices.

The current provision adds a new challenge for the judges to keep hold of their moral character while performing their legal duties. Because they now have to keep in mind indirectly that they are under the control of the government. So any time an allegation may bring against him/her by the parliament for either harassment or removal if he or she does not follow the instruction of the government. This article shows that Bangladesh should follow the International Standards in the case of appointment and removal of judges so that they can ensure the justice to keep hold of the public confidence and to establish the peace and security in the society. It does not ignore the provision of Bangladesh but recommends following the provisions provided in the International Documents which are followed by developed countries. It provides the following ways out in this regard:

- Establishment of Independent body: The government should adhere to international standards in the appointment of judges by establishing an independent body such as a Board, Council, or Commission. This body should include the Chief Justice, three to four next most senior judges, and two to three senior advocates elected by the Bar Council, tasked with recommending candidates to the President.
- Judicial Promotions: Judges’ promotions should strictly follow the principle of seniority and remain free from political influence.
- Judicial Removal Procedure: The process for removing judges should be reformed in alignment with international standards. If allegations arise against a judge, a motion must be supported by at least majority members of Parliament.

An independent committee—comprising the Chief Justice, three to four next most senior judges, and two to three senior advocates elected by the Bar Council—will investigate the claims. If the committee finds the judge guilty or incapable, their recommendation must be endorsed by a two-thirds majority in Parliament before the President can remove the judge.

- **Judicial Independence:** Judges must remain free from external pressures, whether from the executive, legislature, or any individual, and should not be influenced to act in favor of anyone.
- **Adherence to Law and Public Confidence:** Judges should perform their duties in accordance with the laws of the land and international standards, ensuring impartiality even in minor matters. Their conduct should uphold and maintain public trust in the judiciary.

## 12. Conclusion

The mechanisms for the removal of Supreme Court judges in Bangladesh remain a critical issue in maintaining judicial independence and upholding the rule of law. This study has highlighted the historical evolution, current practices, and challenges associated with the removal process, particularly in light of constitutional amendments like the 16th Amendment. While the transfer of impeachment authority to Parliament was intended to ensure accountability, it has been criticized for exposing the judiciary to political influence, thereby compromising its independence. An analysis of international best practices and democratic norms reveals that judicial accountability mechanisms must strike a delicate balance between holding judges accountable for misconduct and safeguarding their independence from undue political or external pressures. However, this paper does not criticize any government for any reason but recommends for following the other democratic countries and international documents in the case of the appointment, other opportunities and removal of the judges so that none can complain against the judiciary and the judges also can ensure the justice pursuant to the Constitution and laws of the land. The Supreme Judicial Council, as previously established, appears to align more closely with this principle, offering a comparatively impartial and independent forum for judicial oversight. To strengthen the judiciary's independence and credibility, Bangladesh should adopt reforms that draw from international standards and the practices of other democratic nations. Such reforms should aim to create a transparent, impartial, and robust mechanism for the removal of judges while preserving the judiciary's autonomy and public trust. Ultimately, ensuring a fair and independent removal process is not only essential for the integrity of the judiciary but also for safeguarding democracy, promoting the rule of law, and reinforcing public confidence in the judicial system.

## Conflicts of Interest

The author declares no conflicts of interest regarding the publication of this paper.

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