



REMOVAL OF JUDGES OF THE HIGHER JUDICIARY: A COMPARATIVE STUDY BETWEEN BANGLADESH AND INDIA

Md. Abu Talha¹, Shawlin Jahan Shefa²

DOI: <https://doi.org/10.60143/ijls.v10.i1.2024.110>

Abstract

A democracy without the proper distribution of powers among the organs cannot be defined as a welfare state. Judiciary plays a significant prolegomenon as this organ is the guardian of the Supreme law in most of the constitutional democratic countries. Judges should be free from all sorts of pressure when discharging their duties. This paper has emphasized the judge's removal procedure in Bangladesh and India and has tried to analyze the provisions regarding judges' removal. In the case of the judge's removal procedure in Bangladesh, the reader can find expert opinions regarding this issue as to how a judge of the apex court can be removed as the Appellate Division has declared the 16th amendment of the Constitution void, illegal and ultra-vires the Constitution. In case of India, provisions regarding judges' removal are critically analyzed and the reader can see as to why not a single judge is removed in the history of India. This paper has endeavored to show the Provisions of judges' removal in the light of Separation of power and Judicial Independence theory and practical scenario in Bangladesh and India. It has also compared the two legal systems regarding judges' removal. Lastly, this research has found out the major problems and has proposed some possible recommendations.

Keywords: Judges' Removal Procedure, Judicial Independence, Separation of Power, Supreme Court, Parliament, Supreme Judicial Council.

Introduction

The judiciary is one of the integral parts of the state. For the sake of the "checks and balance" theory, the judiciary must be independent from the other two organs of the state. Judicial independence is one of the prerequisites of rule of law. Without an independent and impartial judiciary, it is impossible to become a welfare state, and it is a *sine qua non* of a democratic country.³ The removal of judges from the higher judiciary is a crucial matter that immediately affects the independence, accountability, and integrity of the judiciary. Higher judiciary plays a significant role in upholding rule of law, safeguarding the rights ensured in the Constitution and maintaining the checks and balance within the Government in both Bangladesh and India. There are many disciplinary procedures that have been adopted throughout the world in the case of removing the judges such as legislative resolution, ad hoc tribunal, disciplinary committee, compilation of executive, legislative and disciplinary committee.

Bangladesh and India are following the parliamentary democracy form of Government.⁴ Though both Bangladesh and India have followed the Common law system as both countries were the colonies of the English Empire, there are many distinctions when the question arises regarding removal of Judges of the higher judiciary. The first constitution of Bangladesh which was adopted in 1972, conferred the power to remove the

1. Advocate, District and Sessions Judge Court, Dhaka
2. Law Graduate and Apprentice Lawyer, District and Sessions Judge Court, Dhaka.
3. Mohammad Abdul Hannan & Md. Arifuzzaman, *Separation of Judiciary and Judicial Independence in Bangladesh: An Appraisal*, 8 OPEN ACCESS LIB. J. 1, 3 (2021), https://www.scirp.org/pdf/oalibj_2021042916022507.pdf.
4. Aldo Zammit Borda, *The appointment, tenure and removal of judges under Commonwealth principles: a compendium and analysis of best practice*, 42 COMMONW. LAW BULL. 501, 507-508 (2015).

Md. Abu Talha, Shawlin Jahan Shefa

Judges of the Bangladesh Supreme Court to Parliament without any debate in the Constituent Assembly.⁵ In the 4th amendment of such Constitution, the president was vested with this power. This was the first evolution in case of removing the judges of Bangladesh. In the Fifth Amendment, it was legalized to formulate an independent council (Judicial body) named “Supreme Judicial Council (SJC)” to investigate and provide recommendation to the President to remove a judge on the grounds of “misconduct and incapacity”. The President shall act in accordance with the report given. In the Sixteenth amendment, such removal power was vested to the Parliament like the first Constitution which was adopted in 1972. This completely a legislative resolution to remove a judge. The amenders without showing cause as to why this amendment is necessary, they made this amendment. On May 5, 2016, a High Court bench consisting of three judges has announced the 16th amendment as illegal, void, unconstitutional and against the theory of judicial independence and the separation of powers.⁶ Later on, Appellate Division also stands on the same footing of High Court.

On the other side, India is practicing a compilation of legislative, judicial disciplinary committee and executive action in removing judges. The Constitution of India, 1950 and the Judges (Inquiry) Act, 1968 had conferred the power of removing the judges to the Parliament and the President on the ground of “misconduct and incapacity”. Article 124(4) and Article 217 (1) (b) of the Indian Constitution has adopted a long system to remove a judge. The 1st attempt took place under the Article 124 of the Indian Constitution in case of removal of Justice V. Ramaswami of the Supreme Court.⁷ Several removal attempts had been taken place in the history of India. Almost in all cases, accused Judges had submitted their resignation to the President while removal procedures were going on. The President had accepted the resignation letter.⁸

The procedures mentioned in both jurisdictions were mostly unsuccessful in achieving their actual goal. The removal process is often denounced for being highly politicized, complexity and shortcomings of fairness as these often hinder the process. Consequently, there is an increasing discussion on the necessity of implementing changes to enhance the efficiency, impartiality, and transparency of the judicial accountability system, while also maintaining judicial independence.

Separation of Power: Judicial Independence

According to Lord Hailsham⁹, “*The significance of Judicial Independence isn’t less yet all the more prominent when judges need to serve under an all-powerful parliament overwhelmed by a Party and practicing all the powers and more than all powers of the executive and governing body joined in one intelligible complex.*”

Judicial Independence is the base of the theory of rule of law. Another principle named ‘due process of law’ emerged on the independence of judiciary as well. Most often it is observed that the adjudicating system of Bangladesh and India are interfered with by the executive. Though theoretically judicial independence is ensured in these countries. It is found from the British rule that the separation of power, specifically speaking the independence from the other organs have been a regular discourse.¹⁰ Judiciary must be free from the other organs of the state. Without an independent judiciary, rule of law cannot be established.

Bangladesh and India are following Parliamentary democracy. Both countries are members of the Commonwealth that means both countries are common law countries. Though Bangladesh and India are the common law countries, there are some differences in the legal system. In the same way, provisions regarding judges’ removal are also different as well. After the

5. ABDUL HALIM, BANGLADESH GANAPARISHAD BITARKA 364 (CCB Foundation 2014).

6. M Ehteshamul Bari, *The Independence of the Judiciary in Bangladesh* (Springer Singapore 2022) *The Independence of the Judiciary in Bangladesh: Exploring the Gap Between Theory and Practice* 145 (Springer, 2022).

7. HK SAHARAY, *THE CONSTITUTION OF INDIA: AN ANALYTICAL APPROACH* 556-558 (4th edn, Eastern Law House Private Ltd 1987)

8. *Id.* at 558

9. LORD QUINTIN HOGG HAILSHAM, *THE DOOR WHEREIN I WENT* 87 (1st ed. 1975).

10. Nabila Rubaiyat Anzara, *Independence of Judiciary in Bangladesh: A Critical Appraisal*, BANGLADESH LAW DIGEST, (Apr. 25, 2024, 2.35 PM), <https://bdlawdigest.org/independence-of-judiciary-in-bangladesh.html>.

war of 1971, the Constituent Assembly was framed for adopting a constitution for the newly born country and adopted a provision regarding judges' removal. In 1950, Indian Constituent Assembly has also adopted a provision regarding judges' removal.¹¹

Almost all the modern countries have followed Montesquies's theory which is called separation of power. For the sake of maintaining the balance among the organs, separation of power plays a significant role. Independence of Judiciary stands at the center point of the idea of modern government, in accordance with this concept, judges are to be free to perform their activity freely from all sorts of pressures. Montesquieu believed that the utmost important independence is judicial independence. He said, "There is no liberty, if the judiciary is not separated from the legislative and executive."¹² An effective judiciary prevents the other organs from manipulating the outcomes of suits. An independent judiciary upholds the rule of law. If the judiciary is not free from the executive and legislature of the state, there are possibilities that the rights of the citizen may be violated.

Constitutional Framework of Judicial Independence in Bangladesh

Judicial independence is a constitutional mandate, and it is adopted in many Articles of the Constitution. Therefore, Judicial independence is ensured under The Constitution of Bangladesh. Article 22 of the constitution illustrates; the state shall confirm judicial independence from the executive and legislature. Part II of the Constitution provides the fundamental principles of the state policy. As Article 22 is incorporated in Part II of the Constitution of Bangladesh, it is not enforceable by the court of law. Article 94(4) of the Constitution denotes that the Judges of the Bangladesh Supreme Court will be free in the activity of their legal duties. A similar result appears as well in Article 116A regarding the subordinate courts. In, *Masdar Hossain Case*, 52 DLR (AD) 82 (1999), it was believed that the Provisions of Judicial freedom insisted on in Article 94(4)

and 116A. These Articles are the basic structures of the Constitution which couldn't be changed, amended and altered.¹³

Judges Removal under the Constitution of Bangladesh

Article 96 of the Constitution deals with the Judges removal procedure. Currently there is a debate regarding Judges removal in Bangladesh after the Apex Court of Bangladesh has declared 16th amendment of the Bangladesh Constitution as ultra-vires and void. In, Constitution of 1972 of Bangladesh, judges' removal power was vested in the legislature. In, 5th amendment, the power was delegated to an independent body named "Supreme Judicial Council". In the 16th amendment the power to remove a judge of the Apex court was conferred to the Parliament.

16th Amendment of the Constitution of Bangladesh

The 16th amendment of the Bangladesh Constitution authorized the Parliament to remove the Judges of the SCD of Bangladesh for misconduct and incapacity which had been previously vested on the SJC which had been comprised of 3 seniors most Judges of the SCD of Bangladesh along with the Chief Justice of Bangladesh. This amendment is basically restored of Article 96 of the Constitution which was adopted in 1972. According to the amended Article 96 of the Constitution, a minimum of two-third parliamentarian would be able to remove any judge for his/her misconduct or incapacity. The removal could not be completed without the order of the President of Bangladesh. Along with the Judges of the Higher Judiciary, 6th amendment would make it possible to remove the top positions of the Election Commission and the Public Service Commission. According to the Article 118 and Article 139 of the Constitution of Bangladesh- no election commissioner or any official of Public Service Commission can be removed by any other procedure except those applicable to the Supreme Court Judges. So, through the 16th amendment, the capacity to removal of the Election

11. Awal Hossain Mollah, *Independence of Judiciary in Bangladesh: An Overview*, 54 INT. J. LAW MANAG. 61, 69-70 (2012).

12. BARON DE MONTESQUIEU, *THE SPIRIT OF THE LAWS* 115 (Hafner Publishing Company 1949).

13. Md Milan Hossain, *Separation of Judiciary in Bangladesh-Constitutional Mandates and Masdar Hossain Case's Directions: A Post Separation Evaluation*, 11 INT. J. COURT ADM. 45, 53 (2020).

Md. Abu Talha, Shawlin Jahan Shefa

commissioner and Member of the Public Service Commission vested automatically to the Parliament.¹⁴

16th Amendment Case

The 16th amendment has revived Article 96 of the constitution of 1972. In ‘*Government of Bangladesh and others vs Advocate Asaduzzaman Siddiqui and others*’ Writ Petition No. 9989 of 2014, nine (9) Advocates and an NGO lodged a writ petition under Article 102 of the Constitution before the HCD challenging the legality and constitutionality of the 16th amendment.¹⁵ The question on the case was whether the 16th amendment of the Bangladesh Constitution has violated the basic structure of the Constitution or not? The HCD as well as the AD declared the 16th amendment as void, illegal and ultra-vires the Constitution being against the spirit of the separation of judiciary and its independence. The main concern of the court was the “Will of the People”. The court says that people’s concern was that if the removal mechanism of the Judges is conferred to the Parliament, the judicial independence will be affected. The Apex Court has discussed the events taken place in our political history of last seven decades.¹⁶

History of the Judges Removal in Bangladesh

Only once this removal mechanism was used in the history of Bangladesh. A High Court Division judge named Justice Shahidur Rahman was removed by the President of Bangladesh on the suggestions of the SJC. No judges were removed other than Mr. Shahidur Rahman in the history of Bangladesh.

Current Removal Procedure in Bangladesh

There is debate in Bangladesh about the present procedure to remove a judge of the Higher Judiciary of Bangladesh after declaring the 16th Amendment unconstitutional, void and violation of separation of power. The researcher took some experts’ opinions regarding this issue.

The Questions before them are: -

1. Is there any Constitutional Vacuum in Bangladesh for removing Supreme Court Judges?

2. As the 16th amendment is declared unconstitutional and void by the Supreme Court, what is the present procedure to remove the Judges of the Supreme Court? Will the Supreme Judicial Council be automatically restored?

Justice Afzal Hossain Ahmed: Justice Afzal Hossain has said that there is no constitutional vacuum in Bangladesh regarding the Judges Removal procedure under Article 96 of the Constitution of Bangladesh. He said, when the 16th amendment is declared ultra-vires and void, the previous procedure (Supreme Judicial Council) is automatically restored. There is no need for further constitutional amendment.

Advocate Mahbubur Rahman: Advocate Rahman said Supreme Judicial Council is automatically restored as 16th amendment declared as void and unconstitutional. He also said that there is no constitutional vacuum and no need for further constitutional amendment for the restoration of the previous system.

Barrister Muhammad Jamiruddin Sircar: Barrister Jamiruddin Sircar said that the 16th amendment is declared unconstitutional by the Appellate Division. After the verdict given by the apex court, the previous system was automatically restored.

Advocate Manzil Murshid: Advocate Manzil Murshid who was one of the petitioners of the case said that the SJC was reinstated and from the date of the verdict the SJC deals with the removal matter.

Professor Dr. Ridwanul Hoque: Professor Ridwanul Hoque says this is a difficult question. But since the decision is under review, and hence the 16th amendment remains a valid law, the procedure should be the one described in the 16th amendment. That is parliamentary removal.

In accordance with the Constitution of 1972, Judges were removed by Parliament. Then the power was vested to the SJC. Parliament has adopted the 16th amendment of the Constitution in 2014 which empowers to remove a Higher Judiciary Judge to the Parliament again from the Supreme Judicial Council. In *Advocate Asaduzza-*

14. Syed Morshed Rahad Udin, *Bangladesh’s Take on Restoring the Parliamentary Control over the Judiciary: New Course through the 16th Amendment to the Constitution*, 6 KATHMANDU SCH. LAW REV. 142, 144 (2018).

15. M JASHIM ALI CHOWDHURI, AN INTRODUCTION TO THE CONSTITUTIONAL LAW OF BANGLADESH 287 (3rd ed. Book Zone Publications 2010).

16. MAHMUDUL ISLAM, CONSTITUTIONAL LAW OF BANGLADESH 423 (3rd ed. Mullick Brothers 1995).

man Siddique and others v Government of Bangladesh and Others, Writ Petition No. 9989/2014, Appellate Division of the Supreme Court has declared the 16th amendment ultra vires, illegal and void.¹⁷

Constitutional Framework of Judicial Independence in India

Judicial Independence is predicted by every person of the country. It is not solely the fundamental right of the people however it is also one of the basic structures of the Indian Constitution. The purpose of justice is enclosed within the preamble of the Constitution of India. The Indian Judiciary plays a very important role for protecting the interest of the citizens of India. The significance of independence of judiciary is that the freedom of practicing the Judicial activities by the judges in an impartial way.

Judges Removal under Indian Constitution

Article 124(4) of the Constitution of India and Section 3 of the Judges (Inquiry) Act, 1968 pertain to the process of removing judges in India.

The President of India has the authority to remove a Judge of the Indian Supreme Court. The order is promulgated by the president following a parliamentary address that receives the support of a two-thirds majority in both chambers. In order to initiate a removal motion, it is necessary for 100 members of the Lok Sabha and 50 members of the Rajya Sabha to sign the move, which must then be submitted to the Chairman/Speaker. The Chairmen/Speaker has the authority to either approve or deny the motion. If the Speaker agrees, he will establish a committee comprising of three members to examine the allegations. The committee will comprise the Chief Justice or other Supreme Court judges, the Chief Justice of the High Court Division, and a jurist. If the Committee determines that the Judge is culpable of misconduct or incompetence, the legislative body that started the motion shall proceed with the deliberation of the motion. If the motion is approved in the house where it was initially introduced with a supermajority, the motion is then forwarded to the second house. The

motion is to be approved in the second house with a supermajority.

When the motion is passed in the both houses with the two-third majority of the present member, an address is presented to the president to remove the accused Judge. When the president accepts it and passes an order, the judge is removed from his office.

Removal of Judges in India

Under Article 124 and 217 of the Constitution of India, Judges of the Supreme Court and High Courts of India can be removed. The Constitution of India says, only the President can remove a judge, based on a motion passed by the both houses of Parliament with at least two-third majority of its members appearing. The Judges Inquiry Act, 1968 has elaborated the procedure of removing a Judge. Several attempts were taken but these all were unsuccessful attempt.¹⁸

History of the Judges Removal in India

Several attempts were made in India to remove the Judges of the Supreme Court and High Courts. But all of them were unsuccessful.

In the *V. Ramaswami* case 1992 AIR 320, Justice V. Ramaswami was the 1st judge against whom removal proceedings were placed. The motion was initiated in Parliament. It failed to acquire the required two—third majority. Some inconsistencies were found against V Ramaswami in an audit regarding purchases made for his residence (official) while he was the Chief Justice of Punjab and Haryana in 1990. The Inquiry Committee instituted by the Parliament had found V Ramaswami guilty. The party in power at that time had abstained from voting on the motion.

In *Justice P.D. Dinakaran vs Hon'ble Judges Inquiry Committee* 2011 AIR 2011 SC 3777, Justice P.D. Dinakaran was the Chief Justice of the High Court of Sikkim. Rajya Sabha Chairman had made a judicial committee against him to inquire charges of corruption against him. He resigned from his office before the removal proceedings could be initiated against him.

17. Asano Noriyuki and Minato Kazuki, *Politicisation of the appointment and removal of judges in a declining democracy: the case of Bangladesh*, Institute of Developing Economies (Apr. 27, 2024, 4.16 PM) <https://ir.ide.go.jp/records/50884>.

18. Meera Emmanuel, *Impeachment of Judges: A Rigorous Process and a History of Fruitless Attempts*, BAR AND BENCH - INDIAN LEGAL NEWS, (May 5, 2024, 4.26 PM), <https://www.barandbench.com/columns/impeachment-judges-rigorous-process>.

Md. Abu Talha, Shawlin Jahan Shefa

In *Hardik Bharatbhai Patel v. State of Gujarat and Others*, R/CR.MA/9441/2016, Justice Pardiwala who was the Justice of Gujrat High Court. He was in a tough situation. 58 Rajya Sabha MPs documented a removal notice against Justice Pardiwala for his “questionable comments on the issue of reservation.” The movement lost its force when the Judge eliminated the disputable parts from the judgment.

There were some attempts that were initiated for the removal of the judges, but all failed. There is no evidence of removal in the history of India.¹⁹

Comparison between Bangladesh and India regarding Judges Removal

Bangladesh and India are following the Common Law Legal System. Though Both Bangladesh and India have followed the parliamentary form of Government, there are some distinctions regarding laws and enforcement of laws between two states. Judges Removal procedure is one of them.

Provisional Distinctions

The original Constitution of Bangladesh which was adopted in 1972 empowered the Parliament to remove the Judges of the Higher Judiciary of Bangladesh. Later on, in the 5th amendment of the Constitution, the impeachment power moved to an independent body named the Supreme Judicial Council comprised of three members along with the Chief Justice of Bangladesh. In the recommendation of the Supreme Judicial Council, The President of Bangladesh has removed the accused Judge. In, 16th amendment of the Constitution of Bangladesh, Judges’ Removal power vested to the Parliament like the original Constitution. The Supreme Court of Bangladesh declared the amendment unconstitutional, void and violation of the Separation of Power and Judicial Independence. In India, there are three steps to remove a Judge. Firstly, a motion of removal has to be presented in Parliament. The Speaker or the Chairman as the case may be, will decide whether this motion will be granted or not. Secondly, If the motion is granted, a three-member committee (judicial) is made

to investigate the charges. If it is proved in the investigation, it is presented in both houses in Parliament and has to be passed with a special majority. Finally, if it is passed in both houses, the president shall remove the Judge.²⁰

In case of Bangladesh, the researcher have mentioned the two procedures (Supreme Judicial Council and Parliament)

Firstly, the first Constitution and 16th amendment of Bangladesh, judge’s removal power was in the hand of Parliament, whereas Parliament plays an important role in India in case of removing a Judge. Parliament is not the only authority to remove a judge.

Secondly, in, 5th amendment of the Bangladesh Constitution, the Supreme Judicial Council was created, and removal power was vested to the President with the help of such SJC, whereas in India, after the motion was presented a three membered committee was created to investigate the charges.

Thirdly, In Bangladesh, after the recommendation of the Council, the president shall remove the judge/ the parliament may remove the judge with two-third majority. Whereas in India, Parliament, Council and President are directly involved in the removal procedure.

Practicality of Provisions regarding Judges Removal in Bangladesh and India

There is only one evidence of the Judges Removal in the history of Bangladesh and India. In Bangladesh, there is only one evidence of attempting to remove of Judges of the Supreme Court²¹, whereas India has made some attempts in case of removal of the Judges of the Higher Judiciary. All of them were unsuccessful. Practical scenario of the Judges Removal is that one Judge was removed under the Judges Removal provision in Bangladesh. On the other hand, in India, no judge was removed.²²

19. Aditi Agarwal, *Appointment and Removal of Judges*, 4 INT. J. LAW MANAG. 2027, 2032 (2021).

20. JASHIM, *supra* note 14, at 313.

21. JASHIM, *supra* note 14, at 310.

22. Agarwal, *supra* note 18, at 2031.

Judicial Independence and the Current Procedure

Judicial Independence is like a polestar in a democratic system which ensures that judges can perform their judicial duty independently and free from internal and external pressures. In the case of Bangladesh, there is an uncertainty as to how the judges of the higher judiciary be removed. If it is in the control of the parliament solely, there may be the chance of political interferences which may unduly influence the removal process as anti-defection law exists in the Constitution of Bangladesh. Politics plays an important role in Bangladesh and politicians possess huge power. Parliamentarians may enjoy discretion to file the motion in the Parliament. So, Judges may feel pressure in performing their judicial duties and there is a huge chance of compromising judicial independence.

In India, the removal process involves rigid procedural requirements. Though India made this process complex for upholding the judicial independence, it can allow the judges with serious allegation remain in office peacefully for its complex removal procedure. As a result, India has not witnessed a single removal though several attempts have taken places.²³

Democracy and the Current Provisions

India and Bangladesh are following the parliamentary form of Government. Judiciary is one of the important pillars of the state. It is said that India is the largest democratic country in the world, whereas Bangladesh is also a constitutional democracy. In a democratic society, balance among the organs of the state is a very important part. Separation of power should be maintained by the state. It is still uncertain in Bangladesh as to how a judge can be removed. The apex court has stricken down the 16th amendment. The government has filed a review petition which is not entertained yet. The Government has not changed the relevant provision of the constitution in accordance with the decision of the apex court. Current provisions regarding Judges removal in India are very complex as it is a compilation of legislative, executive, and judicial action.

In this stage, both in Bangladesh and India, there is a possibility of misusing the power. Parliamentarians may exercise more power over the judiciary. There is a chance to control the Judges. Most of the politicians in Bangladesh and India are charged with criminal charges. Judges may feel pressure that they may be removed by the Parliament if the decision goes against the politicians.²⁴ It may violate the democratic values.

Findings

Bangladesh and India are the democratic Countries. Both the countries have followed the Parliamentary form of Government. There are some distinctions regarding laws of the lands between two countries. There are some differences in Judges removal procedure as well.

- Parliament was the authority in case of removing judges in Bangladesh in accordance with its original Constitution which was adopted in 1972. Later on, in the 4th amendment, the power was given to the President. In the 5th amendment, the Supreme Judicial Council was introduced, and power of removal vested on the President with the suggestion given by the SJC. The 16th amendment of the Constitution of the Constitution of Bangladesh empowers lawmakers to remove the Judges of the Higher Judiciary with two-third majority. Later on, a writ was filed against the 16th amendment. Appellate Division of the Bangladesh Supreme Court declared the 16th amendment unconstitutional; void and such amendment violates the separation of power among the organs of the state. After the judgment delivered by the Supreme Court, a question has been raised that what will be the procedure to remove the Judges of the Higher Judiciary? Majority experts in the law field opined that the Supreme Judicial Council was automatically restored when the Apex Court declared the 16th amendment as void. Few have said that the 16th amendment will stand as it is in the review stage. There is no unanimous opinion regarding this issue.
- In India, Judges Removal procedures are very complex. Removal motion has to be made in

23. Juhi Mathur, *A Relook at Impeachment of Judges in the Past*, 4 INT. J. LAW MANAG. 2036, 2044 (2021).

24. Rishiraj Baruah and Ronak Arora, *Judicial Accountability and Judicial Independence: The Touchstone of Indian Democracy*, 14 Soc. Sci. Res. Net. 34, 36 (2012).

Parliament. Then a judicial committee is made for the inquiry. If the committee found the judge guilty, it has to be passed in both parliaments with two-third majority. After then the President removed the Judge from his office.

- There are some provisional distinctions regarding judges' removal in Bangladesh and India. Bangladesh have already adopted and witnessed the parliamentary resolution process and the system of disciplinary committee (Supreme Judicial Council) to remove the judges. Whereas India adopted the compilation of Judicial, Legislative and Executive process to remove the accused judges which is certainly a rigorous procedure.
- Both Bangladesh and India have the Anti-defection law in their legal system which restricts the MPs to express their opinion independently. MPs are bound to follow the party line even if the party took the wrong decision. If a removal motion is made and the ruling party refuses to vote in favour of the motion, the judge cannot be removed even if he is found guilty.
- Judges' removal procedure in Bangladesh has not sorted yet. There is a constitutional vacuum in this regard. In the case of India, the procedures enunciated are not practical and realistic as there is no successful removal happens in the history of India due to its procedural complexities. If Parliament retains the power of removal solely, it could potentially be abused, possibly undermining the principle of judicial independence. A rigorous and intricate procedure in the removal process might safeguard judicial independence, but judges found guilty of grave misconduct may hold their office due to the procedural intricacy. India has already seen its results.

Recommendations

After the above discussion regarding the separation of power, judicial independence, and judge removal procedure, the following measures are recommended to be taken to ensure the checks and balances among the organs-

- As there is no unanimous opinion of the experts regarding this judge removal procedure in Bangladesh. Both countries have a long history of political mistrust in political culture. An

independent body (the name might be Judicial Accountability Commission) should be established to investigate the misconduct. This commission must be independent from the executive and Judiciary comprising members from different fields like judges, lawyers, civil society etc.

- The Commission shall discharge its duty in accordance with the Code of Conduct. Such code of conduct must define the term "misconduct" so that the committee cannot exercise arbitrary power. If any application is made against any judge, the commission shall investigate it. If the judge found guilty in the investigation, the Committee shall recommend the President to remove that accused Judge from the office.
- Implication of performance evaluation system for the judges of the Supreme court is required to know whether judges are conducting their judicial duty adherence to the ethical standard. It may help the judges to conduct their respective duties effectively.
- The code of conduct should introduce a clear timeline and a clear process so that the cases are handled transparently. All the offences do not warrant full removal. So, other measures should be implemented, such as suspension, reprimands etc. Members of the Election Commission and Public Service Commission should be removed in the same procedure as the Judges are removed.
- Judges' removal power should be taken from Parliament as there exists a chance for the violation of judicial independence and the separation of power among the organs. Judicial officers must work independently without the fear of being removed from the office. Both countries should introduce a new practical, realistic and impartial system.

Conclusion

All the welfare states in the world follow the Separation of Power Principle, especially the Independence of Judiciary. Without judicial independence, we cannot think of a welfare state. Judges are the heart of the Judiciary. They should be discharged from their duties without any kind of interference. The removal procedure of the superior court judges is not the exclusive responsibility of the judiciary; instead, it pertains to the

Removal of Judges of the Higher Judiciary: A Comparative Study Between Bangladesh and India

guardianship of constitution, due process, government accountability, rule of law and democracy. While both countries follow the constitutional removal procedures, political interference, delay in procedure and lack of practicality, fairness and transparency in the procedure. Reforming the process by establishing an independent body, fairness in the process and public participation can reinforce judicial integrity. The maintenance of a balanced approach to judicial independence and accountability is of utmost importance in order to preserve the rule of law, ensuring democratic governance, and enhance public confidence in the judiciary in both Bangladesh and India.

References

1. Aditi Agarwal. Appointment and Removal of Judges, 4 Int. J. Law Manag. 2027, (2021).
2. Aldo Zammit Borda. The appointment, tenure and removal of judges under Commonwealth principles: a compendium and analysis of best practice, 42 Commonw. Law Bull. 501, (2015).
3. Arifuzzaman, Md. & Mohammad Abdul Hannan. Separation of Judiciary and Judicial Independence in Bangladesh: An Appraisal, 8 Open Access Lib. J. 1, 3 (2021), https://www.scirp.org/pdf/oalibj_2021042916022507.pdf.
4. Asano Noriyuki and Minato Kazuki. Politicisation of the appointment and removal of judges in a declining democracy: the case of Bangladesh, Institute of Developing Economies (Apr. 27, 2024, 4.16 PM) <https://ir.ide.go.jp/records/50884>.
5. Awal Hossain Mollah. Independence of Judiciary in Bangladesh: An Overview, 54 Int. J. Law Manag. 61, (2012).
6. Baron De Montesquieu. The Spirit of the Laws (Hafner Publishing Company 1949).
7. Ehteshamul Bari, M. The Independence of the Judiciary in Bangladesh: Exploring the Gap Between Theory and Practice (Springer, 2022).
8. Halim, Abdul. Bangladesh Ganaparishad Bitarka (CCB Foundation 2014).
9. Jashim Ali Chowdhuri, M. An Introduction to the Constitutional Law of Bangladesh (3rd ed. Book Zone Publications 2010).
10. Juhi Mathur. A Relook at Impeachment of Judges in the Past, 4 Int. J. Law Manag. 2036, 2044 (2021).
11. Mahmudul Islam. Constitutional Law of Bangladesh (3rd ed. Mullick Brothers 1995).
12. Milan Hossain, Md. Separation of Judiciary in Bangladesh-Constitutional Mandates and Masdar Hossain Case's Directions: A Post Separation Evaluation, 11 Int. J. Court Adm. 45, (2020).
13. Morshed Rahad Udin, Syed. Bangladesh's Take on Restoring the Parliamentary Control over the Judiciary: New Course through the 16th Amendment to the Constitution, 6 Kathmandu Sch. Law Rev. 142, (2018).
14. Nabila Rubaiyat Anzara. Independence of Judiciary in Bangladesh: A Critical Appraisal, Bangladesh Law Digest, (Apr. 25, 2024, 2.35 PM), <https://bdlawdigest.org/independence-of-judiciary-in-bangladesh.html>.
15. Quintin Hogg Hailsham, Lord. The door wherein I went (1st ed. 1975).
16. Saharay, HK. The Constitution of India: An Analytical Approach (4th edn, Eastern Law House Private Ltd 1987).