# THE QUEST OF JUDICIAL INDEPENDENCE: AN ANALYSIS OF THE REMOVAL OF SUPREME COURT JUDGES IN BANGLADESH IN THE LIGHT OF LEGAL PRACTICES IN THE US AND CANADA

By Md Rabiul Islam

LL.M. SHORT THESIS

COURSE: Constitutions at Work: Comparative Perspective

Professor: Renáta Uitz

Central European University

1051 Budapest, Nador utca 9.

Hungary

## Table of Contents

**Abstract**

To ensure the rule of law throughout a democratic process, the independence of judiciary is significantly apposite to confirming the constitutional commitment of the government. In the expedition of democratization, any attempt to curbing judicial independence is, of course, a fundamental challenge to an emerging democracy like Bangladesh. It may engender potential risks of transgressing judicial independence if adequate safeguards are not installed. Given the emphasis on the underpinnings of judicial independence, the impugned Sixteenth Amendment of the Constitution of Bangladesh that tends to remove the judges of the Supreme Court by the parliament has been the focal point of this thesis. A comparative analysis can facilitate an academic debate on the interplay of judicial independence and the removal process of superior judges. To this end, this thesis, will conduct a comparative legal analysis of the Bangladeshi practice of removal of superior judges with the US and Canadian practices that have reinforced both the independence and accountability of the judiciary.

**Acknowledgment**

My profound gratitude first goes to Professor Renáta Uitz of the Department of Legal Studies, Central European University (CEU) who has always expertly suggested me about the right direction of the thesis. She persistently let this thesis to be my own work. Her relentless support and encouragement facilitated me to accomplish this research work. I would also extend my appreciation to Charlotte Steinorth, Assistant Professor of the Department of Legal Studies CEU and Robin Bellers, Academic Writing Instructor, CEU for their significant guidance on academic writing. My special thanks go to technical staffs of CEU and Wongani Mvula, my classmate for their technical (computer related) support. Finally, I have to tender my heartfelt thanks to my family members who always provided mental supports during the preparation of this research work.

## Introduction

The Sixteenth Amendment (2014) of Bangladesh Constitution permits the removal of judges of the Supreme Court by the parliament. This has been a major concern to the independence of judiciary and its correlation with the rule of law.[1] By this latest reform of Constitution, a judge of the Supreme Court of Bangladesh can be removed from his office "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".[2]From the inception as an independent nation, it is the third time that the removal process of superior judges has been experimented. This reform empowers the unitary parliament highly manipulated by the ruling party while passing laws or taking decisions. Critics[3] commented viciously by coining this amendment as a severe blow to the independence and accountability of the judges of Bangladesh Supreme Court. This reform can, to some degrees, impact on the discourses of judicial review, constitutionalism, and interpretation or the guardianship of constitution. However, the Sixteenth Amendment of the Constitution heightening the tension between judicial independence and accountability has been invalidated recently by the High Court Division[4] and the case is currently pending before the Appellate Division of the Supreme Court.

Retreating the importance of judicial independence in Bangladesh, this comparative thesis will be based on the theoretical literatures focusing on the issue of removal of superior judges, and its



[1] Sadiat Mannan "Striking balance between the parliament and judiciary, "*The Daily Star, Bangladesh*, October, 20, 2014, accessed on March 03, 2017,http://www.thedailystar.net/parliament-and-judiciary-striking-a-balance-46452; Besides, the criticism in the newspapers, the writ petition has been filed on writ petition no. 9989 of 2014 between *Advocate Asaduzzaman Siddiqui and Others v Bangladesh*.

[2] Part VI, Chapter One, Article 96, of the Constitution of Bangladesh.

[3] Chowdhury, Md. Yasin Khan, "Removal of Judges under 16th Amendment of Bangladesh Constitution: A Euphemism to Curb on Judiciary", *DIU Journal of Humanities and Social Science*, 3 (2015): 89-102; Anisur Rahman, "16th Amendment of Bangladesh Constitution: Another View, "*The Daily Star, Bangladesh*, September 23, 2014, accessed on February, 11, 2017.

[4] Writ Petition No. 9989 of 2014.

relation with and impact on the judicial independence. The investigation on the scopes and standard of independence judges will be emphasized here. During the analytical research, judicial accountability will be considerably and systematically discussed due to its immediate association with the process of removing judges and its constant tension with judicial independence. In order to offer an informed assessment and provide recommendations for a better realization about the interplay of judges' removal and judicial independence in Bangladesh, this work will accordingly examine the merits, motivations and compatibility of such procedures of removal in the context of unitary parliament, the acute control of the cabinet on the parliament, the existence of the anti-floor crossing laws, the trend of absolute majority of one political party or its alliance in the parliamentary election, and the previous and contemporary relations between the judiciary and other two branches.

To conduct a comparative research, I have to endeavor to explain the position of judicial independence in Bangladesh focusing on the removal process of the superior judges in the light of the practices of the US and Canada. The initial reason to select these two jurisdictions for comparing with Bangladeshi practices is their Common Law legal system, and common colonial ancestors. Furthermore, alike the current constitutional rules of removing superior judges in Bangladesh, in the US and Canada, the ultimate decision at the end of removal process is taken by legislatures irrespective of procedural divergence to some extents. Nonetheless, it is worth to consider the US case because of the gradual development of proceedings besides the core constitutional provision of parliamentary removal process. During the exercise of removal mechanism against the federal judges, they tend to promote judicial independence, on the one

hand and embrace the democratic control over the judiciary, on the other hand.[5]Conversely, the Canadian process of removing the superior judges has been a distinctive model since the involvement of a judicial council comprising of the judges exclusively into the investigating tasks prior to the final decision of legislature. Unlike the US practice, the Canadian solution has evidently rendered prevalence to the judiciary for its own cause.

This research has been structured on several chapters to accomplish its objectives. The first chapter provides a glimpse on judicial independence and accountability containing the tension between independence and accountability of judiciary, disciplining mechanism of judges, and the possibility of judicial review on the decision of removing judges. The second chapter entitled the story of judicial independence in Bangladesh explores the violations of judicial independence, the current debate between the old and existing process of removing judges, and the colonial heritage of curbing the independence of judiciary. The third chapter provides an overview of American and Canadian constitutional provisions on the independence and accountability of the judiciary, the US and Canadian model of removing the superior judges, and the comparison between their practices. The fourth chapter discussed the lessons for Bangladesh aiming at a balance between independence and accountability during the removal of the superior judges, and the essential contextual legal considerations to praising judicial independence.



[5] Mira Gur-Arie and Wheeler Russell, "F. Judicial Independence in the United States: Current Issues and Relevant Background Information," *Center for State Courts* 25, no. 2 (1999):133.

## Chapter 1: A Glimpse on Judicial Independence and Accountability

The enforcement of judicial independence and its consequences are used as an indicator to assess the country' governance quality.[6] The maximum independence of the court is deemed essential for preserving democracy within the state and for obtaining international recognition centering on rule of law and good governance. When the judiciary is in all terms dependent on the other two branches of government *e.g.* their appointment, finance, benefits, disciplining and so on, the attitude of political government is nothing new to marginalize the independence of judiciary in the case of exercising these powers. In this chapter, an inquiry into the notion of judicial independence and accountability from a historical and theoretical perspective along with the disciplinary measures against the judges will contribute to assessing the features and impacts of the Sixteenth Amendment of Bangladesh Constitution. Additionally, the reviewing mechanism of the decisions of removal of judges may facilitate in completing the assessment.

### 1.1: Revisiting Judicial Independence and Accountability

It is not easy to discuss with judicial independence and accountability under a single and same chapter because of a perceived dichotomy has been remaining between them for a long time.[7] Therefore, it would be convenient if at first they are discussed independently and later on move towards the pragmatic problems they produce while are understood at a time. Judicial independence as the more ancient ingredient of rule of law needs to be explained first in this synchronization. It is a substantial challenge even in this twenty-first century to define it in a few words. Encyclopedia of political Science defines it in a literal sense "judicial independence refers to the ability of courts and judges to perform their duties free of influence or control of other

[6] Julius Court, Goran Hyden, and Ken Mease, "The Judiciary in and Governance in 16 Developing Countries", World Governance Survey Discussion Paper 9, p.2, prepared in May 2003, accessed at 11.35 on 28/11/2016,https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/4108.pdf.

[7] AB Atchinson, LT Liebert, and DK Russell, "Judicial Independence and Judicial Accountability: A Selected Bibliography," *S. Cal. L. Rev.* 72 (1998): 723-724.

actors".[8] While its genesis was observed in the Act of Settlement, 1701, the modern scholarship on it was articulated by some international instruments. The UN Basic Principles on the Independence of Judiciary, 1985 focused on the constitutional guarantee of judicial independence[9] to endorse impartiality against "improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason"[10]. Taking into account the ambit of rule of law lodged in the free society, Beijing Statement suggests that the judges would conduct their function on the impartial assessment without any influence.[11]As the common standard of judicial independence for the Commonwealth nations, the Latimer Principles have maintained the provisions of judicial independence along with the fair and merit based appointment and security of tenure for judges.[12]

The claim of independence of judges does not only serve in their own interest, rather it is compelling to maintain their responsibility and accountability entrusted in them throughout all contexts.[13] The common version of the independence of judiciary falls within the political commitment that the judiciary would be separated from the executive and the legislatures as far as possible. Peter Russell and David O'Brien, by examining the political science literatures, noted two aspects of judicial independence as firstly, the personal and collective autonomy of the judges from others *e.g.* individuals and institutions; secondly, the available environment that helps the judges to think and decide independently.[14] The accord of judicial independence, thus,

[8] Bertrand Badie, DirkBerg-Scholsser and Lionardo Morlino, ed. *International Encyclopedia of Political Science, Vol. 5.* (Los Angeles, London, New Delhi, Singapore, Washington D.C.: Sage Publications, 2011) 1369.
[9] Article 1 of the United Nations Basic Principles on the Independence of Judiciary, 1985.
[10] Article 2 of the United Nations Basic Principles on the Independence of Judiciary, 1985.
[11] Article 3(a), The Beijing statement of Principles of the Independence of the Judiciary in the LAWASIA Region, 1995.
[12] Title II of the Commonwealth (Latimer House) Principles, 2009.
[13] Supreme Court of British Colombia, Statement on Judicial Independence, March 15, 2012, accessed on February, 04, 2017, http://www.courts.gov.bc.ca/about_the_courts/Judicial%20Independence%20Final%20Release.pdf.
[14] Peter H. Russell, "Toward a General Theory of Judicial Independence" in *Judicial independence in the age of democracy: Critical perspectives from around the world*,ed. Russell, Peter H., and David M. O'Brien (Virginia: University of Virginia Press, 2001), 6.

should not be treated as a single aspect of not interfering with the judges' professional activities; rather, the use of political powers by numerous institutions of the government can reproduce this concern. Appositely, the urge to designing an independent judiciary fundamentally centers on the impartiality and accountability of the judges whereas they need to be absolutely free from drawing their decision without political, social, professional, and financial pressures.[15]If the judiciary cannot be independent, all national interests and priorities might be controlled by the rule of other two branches of the government instead of the rule of law.[16] This position then may ultimately jeopardize the paradigms of constitutionalism.

Comparing to judicial independence, judicial accountability originated much later. The American Bar Association developed the 'enduring principles' for judicial accountability of twenty-first century encompassing rule of law, independence, impartiality and the fair treatment.[17] The Venice Commission while praising the independence of the judges insisted on their accountability as to implementations of rights and freedoms of the people.[18] In the words of Geyh, judicial accountability originated from the vanishing point of judicial independence as it prompts initially the impartiality and integrity of the judges in the adjudicative process.[19] Additionally, it requires proper budgetary appropriation and avoidance of corruption and political motivation. Impartiality, as the first requisite of accountability is viewed as a common law principle[20] and corresponds to due process of law[21] accordingly. Professional credence of



[15] Archibald Cox, "The Independence of the Judiciary: History and Purposes," *University of Dayton Law Review* 21.3 (1996): 565-566.
[16] Bernd Hayo and Voigt Stefan, "Explaining de facto judicial independence," *International Review of Law and Economics* 27, no. 3 (2007): 270.
[17] The Report of 2003 prepared by American Bar Association.
[18] Paragraph 6 of the Venice Commission Report, 2010 on the Independence of Judicial System, Part 1: the Independence of Judges.
[19] Charles Gardner Geyh, "Rescuing Judicial Accountability from the Realm of Political Rhetoric," *Case Western Reserve Law Review* 56, no. 4 (2006): 915-916.
[20] Jeffrey M. Shaman, "Bias on the Bench: Judicial Conflict of Interest," *Georgetown Journal of Legal Ethics* 3.2 (1989): 245.
[21] *Berger v United States*, 255 US 22.

judiciary is determined by observing the performance of judges leading to the commitment of accountability.[22] Illustratively, accountability repudiates bribery, nepotism, favorism, biasness and loyalty to the employing government to gain public confidence on judiciary.[23] Particularly bribery seems a common problem in many countries whereas the litigants tend to alter the result of a given case by offering bribes.[24]Judicial accountability also extends to the appropriation of funds allotted for the uninterrupted operation of judiciary.[25]Such accountability of judges will be defying corruption from the administration of justice. Thus, all these principles to regulating the behavior of judges spotlight on both personal judicial and extra-judicial accountability.

The Commonwealth Latimer House Principles[26] ascribes that "[j]udges are accountable to the Constitution and to the law which they must apply honestly, independently and with integrity."[27] In order to embrace this constitutional commitment, a country needs the qualified and experienced judges. Therefore, their legal knowledge, experience, decisiveness, communication and interpreting skills, sense of integrity, maturity, sound temperament, understanding of society and culture should be the priorities during their appointment.[28]Otherwise, the mission of accountability would collapse in the hands of unskilled and less-qualified judges. Furthermore, whereas judges are human beings, there may be the variation of capabilities and skills necessary



[22] Gillian K. Hadfield, "Judicial Competence and the Interpretation of Incomplete Contracts." *The Journal of Legal Studies* 23, no. 1 (1994): 162.

[23]Article 2.2 of the Bangalore Principles on Judicial Conduct, 2002.

[24] Siri Gloppen, "5. Courts, corruption and judicial independence," *Corruption, Grabbing and Development: Real World Challenges* (2013): 68-79, pp.69-70.

[25] Stephen B. Burbank, "Judicial Independence, Judicial Accountability, and Interbranch Relations," *Geo. LJ* 95 (2006):912.

[26] It's the set of principles prepared and announced by Commonwealth on March 12, 2004 (modified in 2009), for determining the relations among the parliament, judiciary and the executive for the member states.

[27] "Principle VII(b) – Judicial Accountability" mentioned in The Appointment, *Tenure, and Removal of Judges under Commonwealth Principles: A Compedium and Analysis of Best Practice* (London: British Institute of International and Comparative Law, 2015) 79.

[28] Paragraph 1.19 of the Judicial Appointments Annual Report (2000-2001) prepared by Lord Chancellor's Department in the UK.

for ensuring proper interpretation of laws and quality judgments.[29] In this aspect, a certain norm of 'accountability' can be a precaution for the professional homogeneity and holding public trust.

This UN Basic Principles entail the accountability notion of judiciary asking the fair conducting of proceedings and respecting the rights of the litigants.[30] The judges are pertinently supposed to obey the established legal norms and principles.[31] This cardinal professional responsibility potentially ensures the implementation of substantive and procedural laws and upholds the spirit of justice all the possible ways. Besides the judicial accountability, the extra-judicial accountability rises in various contexts, *e.g.* personal, professional, charitable, political, organizational and so on.[32]Strikingly, the political motivation of judges has been a major concern of impartiality of the judges appointed on the basis of their political ideology and affiliation. This conundrum of political loyalty to the employing government's party may cause serious national crisis. For example in *Bush v Gore*[33]the majority of judges (most of them appointed during the Republic government) overruled the decision of counting votes manually given by the Florida Supreme Court and ultimately favored the Republic presidential candidate.

The tension between judiciary and other branches of the government is pragmatic and historical. The independence of judges are considered as a threat to other branches. The policies and the laws made by the legislatures and the concerned actions performed can be struck down by the exercise of judicial review power.[34] This constitutional power to annul any legislation makes the Supreme Court the negative legislator as noted by Hans Kelsen. "[t]he annulment of a law is a



[29] Stephen B Burbank and Barry Friedman, "Reconsidering Judicial Independence" in *Judicial Independence at the Crossroads: An Interdisciplinary Approach*, ed. Burbank,Stephen B Burbank and Barry Friedman (London: SAGE Publications, 2002) 12.
[30] Article 6 of the United Nations Basic Principles on the Independence of Judiciary, 1985.
[31]*Marsh v. Chambers*463 U.S. 783 (1983).
[32] Charles Gardner Geyh, "Rescuing Judicial Accountability from the Realm of Political Rhetoric." *Case Western Reserve Law Review* 56, no. 4 (2006): 920.
[33] 531 U.S. 98 (2000).
[34] Richard H. Fallon Jr, "Legitimacy and the Constitution," *Harvard Law Review* (2005): 1817.

legislative unction, an act, -so to speak-of negative legislation. A court which is competent to abolish laws- individually or generally-functions as a negative legislator".[35] Furthermore, as the whistleblower, the judiciary can inform people about the transgression of powers by other branches, and decide the issue independently.[36] This pragmatic tussle between judiciary and other two branches results in less coordination in the institutional dealings. The dependence of judiciary on the legislatures for its budget and on the executives to enforce the judgments unveils opportunities to these bodies to control judiciary.[37]Decreasing Budget of the judiciary by other two organs significantly impedes fair trial process and institutional independence of judiciary.[38] This constrain to diluting the judges' performance is observed as a practical challenge to the judiciary.[39] Therefore, these limitations need to be eliminated for the independent performance of judiciary whereas it is the last shelter for common people.

Judicial independence seems indispensable to eradicate the interference of any person or institution with regular and proper functioning of judges. In contrast, judicial accountability moves to ascertain the responsible performance of judges in line with professional standards. Hence, they jointly run for the same ethos of smooth judicial performance by securing a balance between the competing qualities.[40] The magical relation between these two principles has been illustrated convincingly by Stephen Burbank whereas he sought that the necessity to know the independence of the judges of whom and what, very rationally entails the question of



[35] Hans Kelsen, *General Theory of Law and State* (Andres Wedberg trans., 1961), p.268 attributed by Norman Dorsen, Micheal Rosenfeld, Andras Sajo, Bear, Susanne Baer, and Susanna Mancini, *Comparative Constitutionalism*, (USA: West Academic Publishing, 2016) 165.

[36] David S. Law, "A theory of judicial power and judicial review." *Georgetown Law Journal* 97 (2009): 731.

[37]John Ferejohn, "Independent judges, dependent judiciary: explaining judicial independence," *S. Cal. L. Rev.* 72 (1998): 355.

[38] In *Salov v. Ukraine* case (Application no.65518/01), the ECtHR quashed the national verdict of the Ukrainian Court, on the issue of fair trail, mentioning that that the national court was not sufficiently independent due to constraints engendered by the legislators and financer.

[39] R. Dworkin, *Law's Empire*, (Cambridge: Mass- Belknap Press, 1986), 380.

[40] Kate Malleson, *The New Judiciary*, (London: Ashgate, Aldershot, 1999) 71.

accountability to whom and what.[41] Therefore, it would not be unfair to apprehend that the adequate accountability of the judiciary advances its scheme of independence and *vice versa*.

### 1.2: Removal as a Disciplining Measure

The judges during adjudication will be subjected to the legal norms, *sine spe ac metu* without any fear and favor. To fulfill this mission, they need the personal independence denoting sufficient safeguards against the motion of discipline and removal.[42]The proposition to tightening the tenets of judicial independence and accountability requires adequate measures devised for ensuring their proportionate practices. Disciplining mechanism, at present, is installed in constitutions of many democratic countries outlining the grounds and the process of removal. This package of regulation was traced back in the Act of Settlement, 1701 particularly in the Common Law countries. It pronounced that by the resolution of the both houses of the Parliament, a judge could be removed from his office.[43] Given the significance of the colonial hegemony, the founding fathers of the US Constitution also thought of the notion of judges' removal as a mode of disciplining. The eloquent voice of Alexander Hamilton solicited the insertion of permanent position of the judges in the Constitution subject to the provision of holding office until good behavior.[44] This idea was embedded in the US Constitution and gradually converted to a global trend to maintain the professional standard of the judiciary.[45]However, the practices of other disciplinary measures against the judges are common in the countries irrespective of their legal families. The judges for their poor performance may face '(1) executive action; (2) address; (3) impeachment; (4) recall; (5) defeat at election; (6) bar

[41] Burbank, Stephen B. "Judicial Independence, Judicial Accountability, and Interbranch Relations." *Geo. LJ* 95 (2006): 909-927, p.912.
[42] Carlo Guarneiri and Daniela Piana. "JUDICIAL INDEPENDENCE AND THE RULE OF LAW: EXPLORING THE EUROPEAN EXPERIENCE" in Shetreet, Shimon and Forsyth, Christoper. *THE CULRURE OF JUDICIAL INDEPENDENCE* (Leiden; Boston: Martinus Nijhoff Publishers, 2012) 114-115.
[43] Article 7 of the Act of Settlement, 1701.
[44] Federalist Paper 78.
[45] Life tenure of judges maintained in Austria, Belgium, Estonia, Aruba, American-Samoa, Cabe-Verde, Guinea-Bissau etc.

association action; (7) removal by judicial action; and (8) action by a permanent judicial disciplinary commission'[46]. Apart from these formal mechanisms, the denunciation of the civil society, reprisal of lawyers, appraisal of media and academics commentaries may be considered good checks against erroneous decisions or biased judgments.[47]

Judicial immunity as an ingredient of independence has never been considered absolute.[48] Therefore it is not controversial if the judges face charges for "misuse of office[49], undignified behavior[50], bias or prejudgment, harmful or offensive conduct[51], dereliction of duty[52], or disrespect for the law[53] (including, of course, law breaking).[54]Apart from these areas, corruption as the intellectual dishonesty of a judge underlying the knowingly misrepresentation in deciding a case would amount to maximum injustice.[55] However, removal proceeding as a disciplining mechanism is extremely sensitive. It can circumvent the constitutional guarantee of judicial independence of security of judges. They may always carry the fear of political sanctioning.[56] This scary position of judges would reduce the quality of decisions and afflict the norms of fairness and objectivity. Ultimately, public trust which is the most desirable outcome of judiciary would suffer exceedingly.

After the independence from the colonial powers, the democratic nations practicing Common Law for disciplinary purposes adopted different models for removing the judges from their office



[46] Edward J. Schoenbaum, "A Historical Look at Judicial Discipline." *Chicago-Kent Law Review* 54.1 (1977): 1.
[47] Andrew Le Sueur, "Developing Mechanisms for Judicial Accountability in the UK," *Legal Studies*24.Issues 1-2 (2004): 80.
[48] Steven Lubet, "Judicial discipline and judicial independence," *Law and contemporary problems* 61, no. 3 (1998): 60.
[49] Chicago Daily Law Bulletin, May, 16, 1997.
[50] In the Matter of William C. McCLAIN, Judge of the Vigo County Court, 662N.E.2d935 (1996).
[51] *United States v. Lanier*, 117 S.Ct. 1219, 1222 (1997).
[52] *Doan v. Commission on Jud. Perf*., 902 P.2d 272, 275 (Cal. 1995).
[53] In the Matter of Fournier, 480 S.E.2d 738, 739 (S.C. 1997).
[54] StevenLubet, "Judicial discipline and judicial independence," *Law and contemporary problems* 61, no. 3 (1998): 61-62.
[55] Anthony D'Amato, "The ultimate injustice: when a court misstates the fact," *Cardozo L. Rev.* 11 (1989): 1313- 1314.
[56] Martin H. Redish, "Judicial Discipline, Judicial Independence, and the Constitution: A Textual and Structural Analysis," *S. Cal. L. Rev.* 72 (1998): 676.

*e.g.* parliamentary resolution, ad hoc tribunal, disciplinary council, and mixed of disciplinary council and parliamentary resolution.[57]On the point of independence of judges, prosecutors and lawyers, the UN Human Rights Committee firmly supports the deployment of a particular independent institution of the government to adjudicate their unethical behaviors as laid in Article 14(1) of ICCPR.[58] The Latimer House Guidelines, 1998 while articulating accountability mechanism against a judge, requires proper notice, opportunity of hearing and defence and adjudication by an independent and impartial tribunal.[59] The alleged actions or unfair decisions of judges should not be charged unless it is proved sufficiently[60] or found that he has reached the erroneous verdict knowingly or recklessly[61]. Nonetheless, the wisdom of the disputed judge and his contribution to holding public confidence throughout his performances needs to be considered during his trial of misconduct.[62] It is now a minimum international standard that the executive would neither be the sole nor principal decision maker about the removal of a judge from his office.[63] The IBA Minimum Standard, 1982 agreed on the initial role of the executive in referring complaint or asking investigation but robustly denounced their role in the adjudicating process.[64] This international standard firmly solicited the involvement of judiciary in deciding the case finally.[65] About the parliamentary resolution, it opined that the resolution would proceed

[57] Principle 3.3.9of the Appointment, *Tenure, and Removal of Judges under Commonwealth Principles: A Compedium and Analysis of Best Practice* (London: British Institute of International and Comparative Law, 2015) 91.
[58]*Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers* (New York, Geneva: United Nations, 2003) 130.
[59] Guideline VI(1)(a)(i).
[60] *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485 (1984).
[61] *New York Times v. Sullivan*, 376 U.S. 254 (1964).
[62] Principle 3.3.4. of The Commonwealth Secretariat, *the Appointment, Tenure and Removal of Judges under Commonwealth Principles: A Compendium and Analysis of Best Practice.* (London: British Institute of International and Comparative Law, 2015) 89.
[63] Principle 3.3.3. of The Commonwealth Secretariat, *the Appointment, Tenure and Removal of Judges under Commonwealth Principles: A Compendium and Analysis of Best Practice.* (London: British Institute of International and Comparative Law, 2015) 88-89.
[64] Article 4(a) of the International Bar Association (IBA) Minimum Standard, 1982.
[65] Article 4(b) of the International Bar Association (IBA) Minimum Standard, 1982.

on the recommendation of a judicial body.[66] Furthermore, the filtering process of complaints before the parliamentary resolution amplified in the Beijing Statement[67] can secure the judges against the capricious proceedings and decision of parliament.

Analyzing the span of progression of judicial independence and accountability as from 1983 to 2010, it can be inferred that the international accords prepared in the quarter of last century focused on the abstract independence. In the Montreal Declaration and in the UN Basic Principles, the independence of judiciary was mentioned but lacked of sufficient elaboration. On the other hand, from the inception of twenty-first century the independence of judiciary has been more extended and clarified than the previous documents. For example, the Bangalore Principles illustrated the independence of judges from all possible actors like legislatures, executive, colleagues and also from the society.[68] These documents though defined independence but did not illustrate the mechanism of ensuring it. However, the most modern and advanced Venice Commission's recommendation focused on the immunity of the judges besides independence. It specified that the judges can only be criminally liable for the offences committed outside of their judicial offices.[69] It stated that the judicial errors would not make any allegation against the judges, rather it would be redressed by the appeal proceedings.[70] However, there is always a risk of abusing the independence of judiciary when other branches conduct the proceedings of removing judges. Therefore, it is not only the well-designed procedures but also the good motive of the empowered authority signifies to prevent the contamination of the entire process removal convincing as not an uncommon method of disciplining.



[66] Article 4(c) of the International Bar Association (IBA) Minimum Standard, 1982.
[67] Article 25 of the Beijing statement of Principles of the Independence of the Judiciary in the LAWASIA Region, 1995.
[68] Articles 1.1 -1.6 of the Bangalore Principle of Judicial Conduct, 2002.
[69] Paragraph 59 of the Venice Commission Report, 2010 on the Independence of Judicial System, Part 8: Freedom from Undue External Influence.
[70] Paragraph 59 of the Venice Commission Report, 2010 on the Independence of Judicial System, Part 8: Freedom from Undue External Influence.

### 1.3: Possibility of Judicial Review of the Decision of Removing a Judge

The rigorous efforts of the international norms requiring the national mechanism to justifying the removal decision against a judge have added the importance of judicial independence. All the international instruments envisage principles to preventing the arbitrary removal of judges. Thus, most of the declarations necessitated the review process as the last safeguard against the unfair, biased, or unjustified removal of a judge. However, the applicability of judicial review against different models of removing judges needs to be assessed considering the degree of miscarriage of judicial accountability. This venture of examination may provide different results on account of the variation in composition and procedures of the models of accountability mechanism.

About the decision of *ad hoc* tribunal on the removal proceeding against a judge, the UN Basic Principles advocated for the deployment of judicial review.[71] This requirement seems essential to prove that the tribunal is acting according to the constitutional and legal rules and deciding the cases consistently. The practice of ad hoc tribunal may be more balanced when there is the provision of appeal or referral to the independent judicial body having wider power to consider both the legal and fact findings.[72] Similarly, after being independent from British reign, few member states of Commonwealth established the *ad hoc* tribunal to decide the removal of judges and the decision of the tribunals were automatically brought before the Privy Council for confirmation.[73] The risk of judicial errors resides potentially in the proceeding of *ad hoc* tribunal due to its temporary and flexible nature. Contrastingly, the highest court or a higher judicial body composing of judges predominantly may reduce the anxiety of biasness and arbitrariness. Their



[71] Article 20 of the UN Basic Principles on the Independence of Judiciary, 1985.

[72] Principle 3.4.2. of The Commonwealth Secretariat, *the Appointment, Tenure and Removal of Judges under Commonwealth Principles: A Compendium and Analysis of Best Practice.* (London: British Institute of International and Comparative Law, 2015) 100.

[73] John McLaren, DEWIGGED, BOTHERED, AND BEWILDERED: BRITISH COLONIAL JUDGES ON TRIAL, 1800-1900. (Toronto: Osgoode Society for Canadian Legal History and University of Toronto Press, 2011) Chapter 6.

experience, expertise and accountability can preclude the risk of unlawful and irrational decision. Thus, this mechanism does not necessitate the compulsory judicial review.

The UN Basic Principles relaxed the practice of judicial review for the parliamentary resolution[74] though it has not clarified the grounds and extent of relaxation. However, the proceedings maintained before the final resolutions may guide to come across the applicability of reviewing the removal decision. In Canada and South Africa, the involvement of the independent Judicial Council/Commission in the investigation process and recommendation has reduced the chance of injustice in case of the parliamentary resolution. On the other hand, in Sri Lanka, the engagement of parliamentary Select Committee instead of a judicial body in the investigation and trail stages abused the norms of procedural fairness.[75] Therefore, the IBA minimum standard suggested that the parliament, when is vested with the power of removal, should employ the judicial commission and consider their recommendation.[76] This scenario, consequently, provokes to conceive the provision of UN Basic principles which did not absolutely exclude the judicial review against the parliamentary resolution of removing a judge.

The classic problem of leaving the removal powers to the parliamentary body is their political motivation and partisanship. Politically motivated decision of removing a judge is the ugliest attack on the judicial independence. Therefore, the decisions of removing judges from their offices have been challenged in various occasions. When three judges of the Constitutional Court of Peru were impeached and finally removed by the resolution of the legislature, the matter was challenged in the Inter-American Court of Human Rights on the alleged breach of the due



[74] Article 20 of the United Nations Basic Principle on the Independence of the Judiciary, 1985.
[75] *Chief Justice Bandarnayake case*, 2013 cited *in A Crisis of Legitimacy: The Impeachment of Chief Justice Bandaranayake and the Erosion of the Rule of Law in Sri Lanka: A report of the International Bar Association's Human Rights Institute*, 2013 prepared by International Bar Association.
[76] Article 4(c) of the International Bar Association Minimum (IBA) Standards, 1982.

process clause[77] after being rejected by the national Constitutional Court.[78] The Inter-American Court found that the ill-fated judges were not properly informed of the charges brought against them and they were precluded from the access to evidences. Along with the breach of the due process clause, the Court found also the violation of the judicial protection and remedies.[79] In this judgment, basically the Inter-American Court tried to examine the decision on the basis procedural rulings.

However, the practice of judicial review of the decisions of removal of a judge is not largely practiced, especially when it is committed through parliament. For example, the US Supreme Court has clearly rejected this in *Nixon v US* due to the restriction of the doctrine of political question.[80] The US Supreme Court deliberated that the judicial review had not been possible whereas there was presence of the explicit commitment to coordinate to a political department. Furthermore, the Court found that the lack of judicially manageable standard restrained the judicial review. The judicial review of the decision of the parliament or the highest court might be possible due to the severe legal consequences as the "…right to respect for private life, including the development of relationships of a professional nature".[81]

Nevertheless, it can be pertinently argued that the business of legislation is not similar to the adjudicative functions. The huge number of politicians coming from different backgrounds, motivated by different ideologies may undermine the merits of trial of judges unless the specific safeguards like the small trial committee, the engagement of judicial commission are not ensured. Parliamentary control on the disciplinary measures against the judges carries the



[77] Article 8 of the American Convention of Human Rights, 1969.
[78]Inter-American Court HR, Constitutional Court Case- *Aguirre Roca, Rey Terry and RevoradoMarsano v. Peru*, judgment of 31 January 2001.
[79] Article 25 of the American Convention of Human Rights, 1969.
[80] (1993) 508 US 927.
[81] *ERMÉNYI v. HUNGARY*(Application no. 22254/14).

concern that the legislatures may be influenced by the executive government. However, it might be a rational inquiry that when a constitutional amendment made by parliament affecting the interest or will of the people is subjected to judicial review, why the parliamentary resolution of removing a judge will not be reviewed by the court. It, thus, can be rationally reconciled that for the sake of both institutional independence of the judiciary and personal independence of an individual judge coupled with the rights universally applicable to the human beings, the application of substantive grounds and procedural irregularities should be brought under the judicial review process regardless of the body conducting the investigation of the complaint before the final resolution of the parliament.

As demonstrated by looking at the segments of this chapter, the quest of independence of judges on their removal is exceedingly concerned with the scopes of their professional accountabilities. The constitution or the laws of a country regulating the means of independence and accountability may be manufactured according to the character of their political society and the nature of the government but there is no scope to compromise the universal standards of judicial independence indispensable for justice in all respects. Therefore, it can be surmised that the foundation of judicial independence can be deep-rooted when these international tenets are transplanted into the domestic laws practicably. Finally, in the journey of judging judges, the deployment of judicial review would help to remove the legal and factual wrongs made mistakenly or deliberately throughout the proceedings. Nevertheless, to prioritize the independence of judiciary, the national measures of removing judges may be more balanced and evenhanded by following the international set of principles and well-recognized foreign models.

## Chapter 2: The Story of Judicial Independence in Bangladesh

The independence of the judiciary is overtly mentioned in Articles 22 and 94(4) of Bangladesh Constitution whereas the former underlines on the separation of judiciary from the executive and the latter proclaims the independence of the judges of Bangladesh Supreme Court in exercising their functions. The pledge of judicial independence was also declared as an entrenched provision of the Constitution in *Eighth Amendment Case*[82] by invoking the essence of accountability related to impartiality. Political motivation of the judges and political influence on them opens out the intersection between the independence, and the impartiality, the indispensible criteria of accountability of judiciary.[83] This apprehension stirs up the tension about the appointment and removal of superior judges by the political government. Accordingly, when the legislature makes law to regulate the judiciary, it seems suspicious and is attached to political debate.[84] The risk of curbing judicial independence in Bangladesh may be apprehended well when the previous cases of transgression will be assessed simultaneously. Furthermore, the inquiry on colonial heritage has been spotlighted in this chapter to be guided in reviewing the consistency of practices.

### 2.1: Violations of Judicial Independence in Bangladesh: An Overview of Previous Cases

Given the independence of judiciary, after the landmark, *Masdar Hossain Case*[85], a judicial commission was set up in 2007 to appoint the judges but unfortunately it worked only for the lower judiciary. According to the Constitution, the judges of the Supreme Court are appointed by



[82] *Anwar Hossain vs. Bangladesh*, BLD 1980 Special Issue 1.
[83] Charles Gardner Geyh, "The Dimensions of Judicial Impartiality," *Fla. L. Rev.* 65 (2013): 503.
[84] Ibid, 550-551.
[85] 52 DLR (AD) 82.

the President from them who just have passed 10 years either in bar or bench[86] without maintaining further rules of recruitment. He is, constitutionally, only required to consult with the Chief Justice.[87] Apparently, this procedure implicates the human choice against the merit-based international standard.[88] In addition to this, the executive appointment invoking 'consultation with the Chief Justice' lacked both the constitutional and conventional compulsion. These dilemmas impair the fairness and objectivity of judicial appointment and are advantageous for 'nepotism and political favoritism'.[89] Therefore, the contingency of political consideration in appointment process equally underscores the risk of abusing powers of during the removal.

The researched discourse of judge's removal coincides with the predicament of the security of tenure. The Bangladesh Constitution contains norms for appointing temporary judges[90] besides the permanent appointment[91]. Surprisingly, all the judges of the High Court Division are appointed under the provision of Article 98 and after serving two years as a temporary judge, they are either being appointed to the permanent office or compelled to leave the office on the expatriation of the provisional period.[92] In this venture of temporary appointments, it is observed that the judges who either previously the supported the ruling party or sympathetic to their political ideologies are regularized in the High Court Division.[93] Conversely, a certain number of judges are not regularized for some mysterious and untold reasons. This unnatural removal of the judges unearths the debate of certainty of judges' tenure which is considered as the first and



[86] Article 95(2)(a)(b) of Bangladesh Constitution.
[87] Article 95(1) of Bangladesh Constitution.
[88] Art. 12 of the Beijing Statement ("the appointment of persons who are best qualified for judicial office").
[89] S. A. Akkas, *Independence and Accountability of Judiciary: A Critical Review*, (Dhaka: CRIG) 155.
[90] Art. 95 of Bangladesh Constitution.
[91] Art. 98 of Bangladesh Constitution.
[92] Ibid 88, 145-146.
[93] M.A. Mutaleb, 'Bangladesh', in *Judicial Independence*, ed. S. Shetreet, and J. Deschenes, (Boston: Martinus Nijhoff Publishers, 1985) 39.

foremost precision of judicial independence.[94] The temporary appointment and their further renewal of term or regularization induce judges to compromise their independence.[95] Hence, the Montreal Declaration as an eminent international instrument denounces this practice of provisional appointment considering it "inconsistent with judicial independence".[96]

The fundamentals of judges' powers are not to ratify the random political wishes of the ruling party unless those contain reasonable principles.[97] This extent of judicial independence has been designated as the 'insurance to the politicians'[98] when they are not in power. The politicians too often become scared about the future when they are rejected in popular election.[99] Bangladesh Supreme Court as the guardian of constitution can strike down irrational ordinary legislations, constitutional amendments and executive orders when they either undermine rule of law and democracy or are used to suppress the opposition vindictively.[100] However, this empowerment of judiciary is perceived as the threat to the political wishes and actions of the government.

By the Fourth Amendment 1973, the parliament bestowed the President with the exclusive power to remove the judges of the Supreme Court with his sole discretion, though the original constitution ruled to remove the judges on the resolution of the parliament passed by two-third majority. This reform was treated as an approach to make the judges subservient to the President.[101] In this backdrop, the parliament may be condemned for undercutting judicial

[94] *Valentine v The Queen* (1985) 2 SCR 673; Art. 2.19 of the Montreal Declaration, 1983; and Art. 11 of the UN Basic Principle on the Independence of Judiciary, 1985.
[95] *Ciraklar v Turkey* (2001) 32 EHRR 23, ECHR.
[96] Article 2.20 of the Universal Declaration of the Independence of Justice, 1983.
[97] W.M. Landes and R.A. Posner. "The independent judiciary in an interest-group perspective." *The Journal of Law and Economics* 18, no. 3 (1975): 876.
[98] Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (New York: Cambridge University Press, 2003) 22-25.
[99] Kirk Randazzo, M. Gibler Douglas, and Reid Rebecca, "Examining the Development of Judicial Independence" *Political Research Quarterly* 69-3(2015):585.
[100] Article 102 of the Constitution of Bangladesh enunciates writ jurisdiction.
[101] M.M. Islam, "The Politics behind the Passage of Fourth Amendment to the Constitution of the People's Republic of Bangladesh and Its Provisions: A Modest Analysis," *Public Policy and Administration Research*, 4-9(2014) 61.

independence determining and limiting the budget of the Supreme Court.[102] Though since 2008, the Supreme Court has been able to send the independent budget proposal to the concerned executive authorities, the ultimate allocation of financial resources is decided by the executive and the legislature jointly.[103] The Supreme Court, moreover, constitutionally[104] lacks review authority on the money bills passed by the parliament.[105]

Besides the direct role of parliament in curbing the independence of judiciary, in several instances, the parliament acted reluctantly in ensuring accountability of the executive while it undermined judicial independence. The executives' decisions on either confirming the position of the additional judge on expiration of the term of two years or rejecting them to continue could have been charged by the parliament under the collective ministerial responsibility. For example, in 2000, Justice AFM Mesbahuddin, AKM Shafiuddin, Nazmun Ara Sultana and NK Chakravarty were recommended by the Chief Justice to be appointed as the permanent judges of the High Court Division. Only Nazmun Ara became permanent out of them and no public clarification was made on this susceptible issue.[106] This issue might not have been contentious if all the judges were appointed directly under Article 95 of the Constitution.

In 1982, by the Proclamation Order No. 1, it was provided that the Chief Justice would retire either at the age of 62 years old or the attainment of three years after his appointment.[107] This law can be designated as a tailor-made item targeting to remove the then Chief Justice, Kamal Uddin Hossain for realizing political objectives *inter alia* ratification of the martial-law

[102] Ibid.
[103] R Hoque, "Courts and adjudication system in Bangladesh: in quest of viable reforms" in *Asian Courts in Context*, ed. Yeh, J-R and Chang, W-C, (UK: Cambridge University Press, 2014), p. 465-466.
[104] Article 81(3) of the Constitution of Bangladesh.
[105] N. Ahmed, "Parliamnet" in *Routledge Handbook of Contemporary Bangladesh*, ed. A. Riaz and M. Rahman (New York: Routledge, 2016) 84.
[106] The Daily Star, Dhaka, 22/05/2002.
[107] S.A. Akkas, *Independence and Accountability of Judiciary: A Critical Review*, (Dhaka: CRIG, 2004) 181.

proclamations if challenged and non-granting the writ of Habeas Corpus to the people arrested and detained politically. Interestingly, after few days of appointing FKMA Munim as the brand new Chief Justice in the martial law regime, and the longest Chief Justice ever in the history of Bangladesh, 'the three years rule' was repealed[108] and the retirement age of the judges of the Supreme Court was confirmed by the Constitution (Seventh Amendment) Act, 1986. Thus political appointment and removal both coherently stigmatized the independence of judiciary.

### 2.2: Explaining the Recently Past and the Current Process of Removing Judges: Impact of the Changes on the Constitutional Essence of Bangladesh

In the original constitution, the power to remove the judges of the Supreme Court was vested in the parliament[109]. At 1975, the regular and democratic government was exiled and in 1977, this removal power was snatched away from the parliament and vested it in the President but the new mechanism, the Supreme Judicial Council (SJC) was devised to hear and investigate the allegations raised against the judges of the Supreme Court. It was also empowered to recommend the President about the further action.[110] This SJC was entirely composed of the judges of the Supreme Court as headed by the Chief Justice. Surprisingly, the Sixteenth Amendment as the restitution of parliamentary resolution to remove the judges has been made without showing any justification for the replacement of SJC. The amenders allegedly failed to corroborate the abrogation of immediate past mechanism because no judges have been tried or removed by it till to date. Reversely, the logic behind the transmission of power from the legislature to the SJC may be construed as an endeavor to liberate the judges from the unnecessary influence of party



[108] AKM Shamsul Huda, *The Constitution of Bangladesh Vol. II.*(Chittagong: Rita Court, 1997) 809.
[109] Article 96 of the (Original) Constitution of Bangladesh, 1972.
[110] Article 96 of Bangladesh Constitution replaced the provision of the original constitution and has been replaced by the Sixteenth Amendment.

politics.[111]

The distressing relation between Bangladesh Supreme Court and the Parliament, however, reached its peak when the hostility came across and became public immediate before the Sixteenth Amendment. A High Court Division judge namely Shamsuddin Chowdhury Manik, in 2012 accused the then Speaker Abdul Hamid of the offence of sedition and criticized the Speaker as ignorant of jurisdiction of the apex court and the constitution.[112] The MPs of the ruling party reacted to it vigorously and they became exclaimed when a judge criticizes the proceedings of the Parliament which have the absolute indemnity.[113] The outraged parliamentarians demanded the removal of Manik, J. shortly.[114] Though the disputed judge was not removed, the Speaker rendered the ruling on this contending sensational issue. Pertinently, in the past, the task to remove or discipline could be conducted by the President on the recommendation of the Supreme Judicial Council. However, the existing government perhaps thought that in the Westminster system, the removal of a superior judge by the President in association with the Supreme Judicial Council other than the involvement of parliament might be surmised by the people as a political revenge against the upper judiciary. This unprecedented squabble induces the Parliament not to leave this power with any other authorities rather than itself.

The last three parliaments, since 2001, witnessed absolute majority of two major alliances headed by Bangladesh Awami League (BAL) and Bangladesh Nationalist Party (BNP).[115] The omnipotent parliament led by the alliance but virtually by one major political party did not face any problem to amend the constitution. This political tragedy has been accelerated with the



[111] Louis H. Burke, "Judicial Discipline and Removal-The California Story," *J. Am. Jud. Soc.* 48 (1964):170.
[112] Shakhawat Liton, "Justice Manik and image of Judiciary," in The Daily Star, Bangladesh, September 21, 2015 accessed on December, 22, 2016, http://www.thedailystar.net/frontpage/justice-manik-and-image-judiciary-146344.
[113] Article 78 of the Constitution of Bangladesh.
[114] *The Daily Star, Bangladesh*, June 06, 2012.
[115] http://amardesh.com/electionHome.php, accessed on December 23, 2016.

installation of undemocratic commotion of Article 70[116] in the constitution which prevented the parliamentarians to cast their vote against the will of their political parties. It has dented the freedom of expression, conscience and the decision making ability of the MPs.[117] This anti-floor-crossing law has been serving helpful to promote the wish of the Prime Minister and his ruling party instead of the individual opinion of a parliamentarian.[118] Therefore, Article 70 vows to work with 'intra-party deliberation' irrespective of the merits of bill.[119] Consequently, the removal process through parliamentary resolution passed by absolute majority places a cardinal debate on its symposia in Bangladesh. It has jeopardized the removal process of the Supreme Court judges in two ways as on the one hand, by having the absolute majority, the parliament can nimbly remove a judge on the stipulated allegation; on the other hand, a judge will never be removed no matter what the allegation is if the two-third majority is in favor. Nevertheless, the magnitude of fear centering on the removal of superior judges has been heightened due to this anti-defection measure which is used as the sharp sword of party politics against the rule of law.

The issue of removal of judges by the parliament has signified immensely when the Sixteenth Amendment replacing the Supreme Judicial Council has been challenged with a writ petition[120]. Some recent incidents may be considered as the influential background and backlash either to the latest amendment. For example, the verdict of the Supreme Court by nullifying the Contempt of Court Act, 2013 granted more freedom to journalists to criticize the judicial and legal affairs of the government. Additionally, on account of the judicial order of the High Court Division to

[116] "a person elected as a member of Parliament at an election at which he was nominated as a candidate by a political party shall vacate his seat if he resigns from that party or votes in Parliament against the party."

[117] Khabele Matlosa, and Victor Shale. "Impact of floor-crossing on party systems and representative democracy: the case of Lesotho." In *a Workshop on 'Impact of Floor Crossing on Party Systems and Representative Democracy in Southern Africa,'Co-hosted by EISA and KAS, The Vineyard Hotel, Cape Town, South Africa*, vol. 15. 2006. p.14.

[118] S. L. Sutherland,"Responsible Government and Ministerial Responsibility: Every Reform Is Its Own Problem." *Canadian Journal of Political Science / Revue Canadienne De Science Politique* 24, no. 1 (1991): 95.

[119] KEllY NoRm, and SEFAkoRAshiAGboR. *Political Parties and Democracy in Theoretical and Practical Perspectives: Developing Party Politics*, (Washinton, D.C.: National Democratic Institute (NDI), 2011) 16.

[120] *Advocate Asaduzzaman Siddiqui and others v Bangladesh* (WRIT PETITION NO. 9989 OF 2014)

arrest some senior officers of Rapid Action Battalion[121] allegedly involved in Seven Murders-Narayanganj, the parliamentarians became furious as demanded the convoking of the Supreme Judicial Council to remove the judges made such order. Connecting this incidents, the High Court Division while deciding the constitutionality of the Sixteenth Amendment explicitly outlined that "[t]his move was crystallized by the passing of the Sixteenth Amendment at the behest of political executives with the *malafide* intention of interfering with the independence of the Judges of the Supreme Court of Bangladesh in the discharge of their judicial functions".[122] However, the decision declaring the Sixteenth Amendment *ultra vires* has been appealed before the Appellate Division of the Supreme Court and the Law Minister is excessively confident of scraping the High Court Division's verdict.[123] This tussle between parliament and judiciary has been momentum to study the Sixteenth Amendment as synthesized with political motivations.

### 2.3: Colonial Heritage of Curbing the Independence of Judiciary

The independence of the judiciary is seemingly devised in English constitutional practices in the seventeenth and eighteenth century. However, as the colonial administrators, in the empire, they paid less attention to the judicial independence.[124] The idea of judicial independence in the subcontinent during the British period was not considered imperative comparing to other colonies like Australia and Canada because British-Indian administration was never brought under the direct supervision of the British Colonial Office.[125] The Regulating Act, 1773 retained the provision to set up the English modeled Supreme Court in three presidency towns of India tending to introduce common law elements across the Subcontinent. Unfortunately, the then apex



[121] RAB (Elite Police Force).
[122] Page 4 of the judgment given by the High Court Division of Bangladesh Supreme Court, accessed on December 24, 2016. http://www.supremecourt.gov.bd/resources/documents/783957_WP9989of2014.pdf.
[123] The Daily Star, Bangladesh, 05/05/2016 (http://www.thedailystar.net/country/hc-verdict-16th-amendment-illegal-law-minister-1219129 accessed at 09:15 am on 25/12/2016)..
[124] J.Ervin Sam "Separation of Powers: Judicial Independence," *Law and Contemporary Problems* 35, no. 1 (1970): 112.
[125] Raymond H. Arnot, "The Judicial System of the British Colonies," *The Yale Law Journal* 16, no. 7 (1907): 511.

Court could not function independently because of the conspiracy and close affinity between the Governor General W. Hastings and Chief Justice Elijah Impey.[126] Consequently, the anomalous conditions of this judicial framework resulted in some controversial judicial decisions of the then Supreme Court led the inference of limited independence of the supreme judiciary. The Supreme Court found itself downcast against the frequent contempt of court committed by the executive.

In *Raja Nanda Kumar case*, 1775, the Governor General Warren Hastings was charged with bribery on the complaints of a revenue collector of East India company namely Raja Nanda Kumar. After being hostile to Nanda Kumar, Warren Hastings filed a case of forgery against him and manipulated the decision in all possible ways by using intimacy with the Chief Justice Elijah Impey. The application of English forgery law instead of the local laws, the inquisitorial role of the Supreme Court contrary to the adversarial nature of the Common Law, and the denial of the mercy petition to the Crown amounted to consider the case as the 'judicial murder' in the legal history of India.[127] In *Kamal Uddin case*, 1775, the exercise of revenue jurisdiction by the Supreme Court was rejected by the Supreme Council of the British administration. They ignored the decision of the Supreme Court by arresting and imprisoning *Kamal Uddin* who got the bail from the Court.[128] Alike the intervention of the colonial administrators to the judicial independence ascribed in *Kamal Uddin case*, the Supreme Court's decision of *Cassijurah case (1779-1780)* to convicting and penalizing the Zamindar[129] of Cassijurah for the charge of loan-default was prevented by the total force of Governor General and his Council.[130] Finally,

[126] B.N. Puri, P.N. Chopra, M.N. Das, *A Comprehensive History of India: Ancient India, Mediaval India, Modern India V.3.*, (India: Sterling Publishers Pvt. Ltd. 2003) 45.
[127] B.N. Puri, P.N. Chopra, M.N. Das, *A Comprehensive History of India: Ancient India, Mediaval India, Modern India Vol.3.* (India: Sterling Publishers Pvt. Ltd. 2003) 44-46.
[128] V. D. Kulshreshtha, and ShumitMalik, *Landmarks in Indian Legal History and Constitutional History*, (Lucknow, India: Eastern Book Company, 1975) 137-138.
[129] The native revenue collector for a particular boundary appointed by the British colonial administrators.
[130] B.M. Gandhi, *V.D. Kulshreshtha's Landmarks in Indian Legal and Constitutional History* (Lucknow: Eastern Book Company, 2007) 118-120.

constant non-cooperation of executives with the Supreme Court in implementing the judicial decisions led the exclusion of the colonial executives and the revenue collectors from its jurisdiction under the amended Act of Settlement, 1781.

Afterwards, Lord Cornwallis, by introducing Cornwallis Code 1793, in the excuse of reformation and uprooting corruptions, removed all the existing Indian judges[131] from their offices and also declared them disqualified for further appointments.[132] Lord Wellesley, thereupon, reformed the judicial system and took stand against the entire concentration of all legislative, executive and judicial powers in the hands of the Governor General. He made free the Sadar Diwani and Sadar Nizmat Adalat from the control of the highest executive of the realm.[133] In this sequel, the Government of India Act, 1935 as the durable constitutional document[134] for the Subcontinent kept transparent provisions on the salaries and incentives for the judges[135] and the institutional autonomy of the Federal Court[136]. However, the rule of removal of the judges by His Majesty on the ground of undefined 'misbehavior'[137], the option of appointment of a temporary Chief Justice[138] and the individual deciding power of the Governor General about the expenditures of the Federal Court questioned the institutional independence of the highest court.[139] In this proposition, the independence of upper judiciary was also shackled by the power and grabbing-all tendency of Governor General and his executive Council.

In conclusion of this chapter, it can be inferred that the lack of the power of Bangladesh Supreme

[131] The judges of Mofussil DewaniAdalat (local civil court) and Mofussil FoujdariAdalat (local criminal court).
[132] Mohammad Tarique, *Modern Indian History*, (New York: Tata-McGraw Hill Education, 2007) 2.13.
[133] B.M., Gandhi, *V.D. Kulshreshtha's Landmarks in Indian and Constitutional History*, (Lucknow: Eastern Book Company, 2008) 169.
[134] Even after the independence of India and Pakistan, the Government of India Act 1935 was used as the constitutional document in association with the Independence of India Act 1947 until the adoption of their own document.
[135] Article 201 of the Government of India Act, 1935.
[136] Article 214of the Government of India Act, 1935.
[137] Article 200(2)(b) of the Government of India Act, 1935.
[138] Article 202 of the Government of India Act, 1935.
[139] Article 216(2) of the Government of India Act, 1935.

Court in determining and facilitating its budgetary allotment, the absence of standard rules to appointing the superior judges, the lack of practice of appointing the judges permanently, non-transparency in regularizing the provisional judges, the unnecessary experiments with the removal mechanism without justified specific reasons have questioned the merit of the Sixteenth Amendment. Moreover, Bangladesh throughout different political regimes has been following the colonial legacy of curbing judicial independence which started two hundred fifty years ago. The International commission of Jurist, immediately after the Sixteenth Amendment, expressed its deep concern about the independence of judiciary in Bangladesh.[140] As an international watchdog, they mentioned that if the new laws are applied to discipline or remove the judges without insulating adequate safeguards, it would turn to be a political assault of the parliament against the judiciary. Such perception of transgressing judicial independence by the politicians through the enactment of laws or decisions has been engendered far much because of its historical setbacks. Likewise, the culture of political mistrust and suppression ignited the contentious position of the Sixteenth Amendment that has repudiated the Supreme Judicial Council and placed the Parliament for the removal of superior judges. Thus, if this new law sustains in the final verdict of the apex court, it would be the further responsibility of the policy makers to extinguish all related concerns.



[140] International Commission of Jurist, *Bangladesh: ICJ urges Parliament to ensure laws governing impeachment of Supreme Court judges respect the independence of Judiciary* (September24, 2014) https://www.icj.org/bangladesh-icj-urges-parliament-to-ensure-laws-governing-impeachment-of-supreme-court-judges-respect-the-independence-of-the-judiciary/, accessed on March, 20, 2017.

## Chapter 3: An Overview of American and Canadian Practices of Removing the Superior Judges

The constitutional practice of interdependencies among the principal branches was neither declined by Madison nor seemed cumbersome to the political practices.[141] The reasons of introducing the mode of impeachment to remove the judges by the legislatures was corroborated by Federalist Hamilton and Anti-Federalist Brutus whereas both of them preferred this mechanism as the only implicated option to deal with the judges' wrongs or inability within the sphere of the Constitution. They consciously tried to motivate their readers about the political independence of judiciary.[142] As the oldest modern constitution, the US Constitution enunciates the removal of the federal judges by employing the both houses of the Congress. This process underpins simultaneously the aspect of legitimacy and the doctrine of checks and balances potentially. Additionally, this arrangement seems nothing peculiar whereas the constitutional framework of the US maintains checks and balances among the three branches by accommodating judicial review power to the courts, appointment and removal power to the President in conjunction with the Senate, budgetary power to the Congress and so on. On the other hand, the removal of the Canadian superior judges through the parliamentary mandate can be contemplated as the adoption of colonial heritage but was reconstructed by involving the Supreme Judicial Council to ensuring the independence of judiciary in the superlative level.

### 3.1: The Standards of Independence and Accountability of the Judiciary in the US and Canada Discussing the Constitutional Rules and Legal Implications

As Justice Stephen Breyer remarks "[j]udicial independence is in part a state of mind, a matter of expectation, habit, and belief among not just judges, lawyers, and legislators, Guidance for

[141] John Ferejohn, "Independent judges, dependent judiciary: explaining judicial independence," *S. Cal. L. Rev.* 72 (1998): 357-358.
[142] Ibid 359-361.

Promoting Judicial Independence and Impartiality 145 but millions of people."[143] Pertinently, the judicial independence has been emphasized in the US Constitutions through different provisions. For example, the Compensation Clause[144] has protected financial interests of the federal judges in the guise of the right of compensation for their service. It is conceptually connected with the 'good behavior clause'. The life tenure of judges would not sustain unless the judges are independent of government for their salaries and benefits. Historically, the negligence of the British colonial administration in providing financial benefits worsened the relation between the colonial judges and the Crown.[145] The US Supreme Court in *Williams v US*[146] viewed that the ignorance of the Congress to increasing the salaries of the judges adjusting the inflation, is the threat to the independent decision making process of judiciary. To reduce the dependence of judiciary on the Congress for financial aspects, in 1939, the Administrative Office for the US federal courts was created composing of 26 appellate and trail judges and headed by the Chief Justice.[147] They are responsible to prepare the budget for the judiciary coupled with other statistical and routine functions.

The second ingredient of independence for the judges in the US Constitution laid down in the 'Tenure Clause' whereas the federal judges remain in their office until good behavior.[148] Historically, the independence of tenure of the American federal judges denotes the life tenure.[149] This purview was succeeded by the Americans from the Act of Settlement, 1701.[150]



[143] In 1998, Breyer, Stephen G. commented to the symposium of American Bar Association on "Bulwarks of the Republic: Judicial Independence and Accountability in the American System of Justice", attributed *in Law & Contemporary Problems 61:3 (1998).*

[144] Rendering the opportunity of claiming compensation by judges during their office, Article III, Section 1 of the US Constitution.

[145] Adrian Vermeule, "The Constitutional Law of Official Compensation," *Columbia Law Review* 102, no. 2 (2002): 509-510.

[146] 242 F.3d 169 (2001).

[147] 28 U.S.C. 331.

[148] Article III, Section 1 of the US Constitution.

[149]Charles D. Cole, "Judicial Independence in the United States Federal Courts," *J. Legal Prof.* 13 (1988): 194.

[150] Sec. 3 of the Act of Settlement, 1701.

Thus, the life-tenure clause prompted the independence of the judiciary securing the immunity from the liability for the judicial activities and accelerated the judicial accountability leading to the recovery of public confidence.[151] Under the scheme of good behavior clause, the most of the modern judicial disciplinary systems of the states and the federal government protect the judges from their erroneous and unpopular decisions.[152] In addition to this, the federal judiciary has been empowered to resolve the minor problems relating to the performance and behavior of the judges because the gross charges for removal of the judges are not found apparently always.[153]

The Article III of the US Constitution specifies the accountability of the American federal judges along with other official mentioning the grounds of removal as "treason, bribery or other high crimes or misdemeanours". Besides the mandate of independence of judiciary, the accountability was also insisted on by the US laws. To ensure the transparency in the financial aspects, a federal law passed in 1898 has ruled the amount of gifts and the caps of outside earnings to 15 percent of their annual salary.[154] Moreover, they are also required to submit their annual financial holdings and made them public for inspection. Another law asks the judges to disqualify themselves when they have the personal knowledge, involvement or financial interest in the given cases.[155] After the enactment of the Judicial Conduct and Disability Act of 1980, before the impeachment proceeding, the Circuit Judicial Council, if finds the accuracy of complaint after initial investigation, may temporarily suspend the assignment of cases to the disputed judge, censure or reprimand the judge either privately or publicly and even ask the judge to retire voluntarily.[156]



[151] *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 347 (1871).
[152] Jeffrey Shaman, "Introduction (Issue on Judicial Conduct, Discipline and Independence), 69 Judicature 64 (1985)." (1985). *College of Law Faculty Publications.* Paper 399, p.65.
[153] Mira Gur-Arie, and Wheeler Russell "F. Judicial Independence in the United States: Current Issues and Relevant Background Information," *Center for State Courts* 25, no. 2 (1999):137.
[154] 5 U.S.C. §§501-505.
[155] 28 U.S.C. §455.
[156] 28 U.S. Code § 354 (a)(2).

As a Common Law country, in Canada, the independence of judiciary extracted formally through the Act of Settlement, 1701 alike the colonial heritage of the US. This law ruled that judges would remain in their offices until good behavior. Besides the evolutionary stages of the independence of Canadian courts, after the enactment of the Canadian Charter of Rights and Freedoms in 1982, judicial independence and activism was enhanced plausibly because of its constitutional power to protect and promote the rights of the people against the intrusive actions of the government.[157] Few constitutional provisions carry the glaring examples of the accommodation of judicial independence in Canada. Apart from this, as the fundamental ingredient of liberal democracy[158], the independent Supreme Court of Canada interpreted and expanded the notion of judicial independence.

About the security of tenure, while Article 99 (2) of the Constitution of Canada fixes the retirement age of the superior judges to 75 years, Article 99 (1) rules that they would remain in office until the good behavior. Conventionally, the federal judiciary of Canada is entrusted with the administrative autonomy *e.g.* the assignment of cases, the court lists, the sitting of the judges in the bench, directing the staffs are associated to carry out the regular functions of courts.[159] This administrative autonomy of the federal judiciary was not announced exhausted rather open-ended.[160] The Chief Justice of Canada in 1985 declared the administrative autonomy of the courts as the constitutional principles.[161] Additionally, the financial security of judges is protected by Article 100 of the Constitution. Albeit, the authority of allocating budget is vested



[157] Beauregard v. Canada [1986] 2 S.C.R. 56.
[158] JohnLocke, *The Second Treatise of Government* (New York: Bobbs-Merrill, 1952) at 49-54.
[159] *Valente v. The Queen*, (1985) 2 S.C.R.
[160] *Mackeigan v. Hickman*, (1989) 2 S.C.R. 796.
[161]Martin L.Friedland, *A Place Apart: Judicial Independence and Accountability in Canada*, (Ottawa, Canada: Canadian Judicial Council, 1995) 179.

in the department of justice, the judiciary is too often consulted with in case of taking important decisions on the financial matters.[162]

The accountability of the Canadian superior judges is rooted in the provision of 'good behavior tenure'[163]. Unlike, the US Constitution, though the grounds of removal of superior judges are not enumerated in Canadian Constitution, it deems that the judges are accountable for complying with good behavior. Therefore, this clause can be considered as the guarantee of judicial independence and accountability, both. The establishment of the Judicial Commission under the amended Judges Act, 1971 can be considered as the formal arrangement to examine the accountability of superior judges. The Canadian Judicial Council's Ethical Principles for Judges require that "the judge should disclose on the record anything which might support a plausible argument in favour of disqualification."[164] In a recent statement[165], the current Chief Justice of Canadian Supreme Court, McLachlin, mentioned that the concept of accountability of the superior judges is 'misplaced' rather they are responsible for their everyday functioning. She also added that the accountability of the judges is ensured in the open court and by the reason-based judgments.

### 3.2: Reviewing the US Model of Removing the Federal Judges Identifying Legal Rules, Impacts and Safeguards to Embracing Judicial Independence

The American impeachment model is as old as its constitutional expedition. Alexander Hamilton designated the 'good behaviour clause' as the shield against the despotism of monarchy and considered it equally functional in the Republic especially against the aggressive attitudes of the



[162] Fabien Gélinas, "Judicial Independence in Canada: A Critical Overview," *Judicial Independence in Transition*. Springer Berlin Heidelberg, (2012): 570.
[163] Article 99(2) of the Constitution of Canada.
[164] Commentaries E.12, Canadian Judicial Council's Ethical Principles for Judges.
[165] The Daily Globe and Mail, Canada, (August, 13, 2015).

people's representatives to the judges.[166] The removal of judges through the parliamentary resolution though can be evaluated as the colonial heritage, a long discourse concentrating to its merits, especially the legitimacy and the rigorous procedures justified its installation. Therefore, the constitutional provisions categorize this process and distribute it among the houses of Congress as firstly, the power of impeachment of the judges is vested in the House of Representative as it passes the charge of impeachment and secondly, the Senate conducts the trial and finally decides the removal.[167] However, to supplement the entire procedures of impeachment conducted by the Congress, it needed additional norms. The Subcommittee on Improvements in Judicial Machinery of the Committee on the Judiciary headed by the Senator after having a comprehensive study on the probable and rational procedures to removing the Federal judges from their offices, proposed the bill relating to the judicial reform to the Congress. These recommendations came into the light with the title Judicial Reform Act aiming at establishing the Commission on Judicial Disabilities and Tenure.[168] This change of the federal judicial domain may be treated as the duplication of the Californian model whereas the California Commission on Judicial Qualifications works on the identical issue.[169]

In the US Constitution, the impeachment clause is applicable to officials among them the federal judges are not included expressly.[170] Thus, the fate of the judges remained as a constitutional dilemma. Nevertheless, this tension is also found addressed in the 'appointment clause'[171] which

[166] The Federalist Paper No. 78.
[167] Article I, Section 2 (the charge will be initiated by the House of Representative); Article I Section 3 (the impeachment will solely tried by the Senate.).
[168] John H. Holloman, "The Judicial Reform Act: History, Analysis, and Comment," *Law and Contemporary Problems* 35, no. 1 (1970): 128.
[169] Preble Stolz, "Disciplining Federal Judges: Is Impeachment Hopeless?," *California Law Review* 57, no. 3 (1969): 659.
[170] Article II, Section 4 of the US Constitution ("The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.")
[171] Article II, Section 2, Clause 2 ("shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law")

includes judges of the Supreme Court in the guise of 'all other officers'. The phraseology of 'during good behavior' had been construed as the indefinite period. It was equated by the US Supreme Court with the grounds of impeachment as 'conviction of, Treason, Bribery, or other High Crimes and Misdemeanors' against "civil officers" together with the President and the Vice-President,.[172] This categorization of the federal judges as the "civil officers" created huge debate, particularly, recalling the tension of other judicial disciplinary proceedings against them or the power of the Congress enacting law to disciplining the judges under the "necessary and proper clause".[173] The puzzle had, nevertheless, been resolved[174] while impeachment was recognized as the sole mechanism operated by the Congress to remove the judges without requiring any involvement of judiciary.

Given the fact that the impeachment process in the US is totally a political saga, it, to some extents, mirrors the judicial prosecution.[175] This identical characterization labeling impeachment as an indictment has signified to ensure the independence of judges and the norms of due process. However, it is the House of Representatives, who can exercise full discretion about the execution of inquiries and investigations on the alleged behavior, and passing the further resolution to start the next proceedings by the Senate.[176] The practices of impeachment process refers its starting "by the introduction of a resolution by a member, by a letter or message from the president, by a grand jury action forwarded to the House from a territorial legislature, by a memorial setting forth charges, by a resolution authorization a general investigation, or by a



[172] *Chandler v. Judicial Council of the Tenth Circuit of the United States*, 382 U.S. 1003, 1005 (1966); THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 66 (eds. Max Ferrand (1966); Federalist No. 79.
[173] Peter M. Shane, "Who May Discipline or Remove Federal Judges? A Constitutional Analysis," *University of Pennsylvania Law Review* 142, no. 1 (1993): 214.
[174] *Nixon v. United States*, 113 S. Ct. 732, 738 (1993).
[175] Peter Charles Hoffer and N.E.H. Hull, *Impeachment in America 1635-1805*. (New Heaven, CT: Yale University Press, 1984) 96-97.
[176] Susan Navarro Smelcer, *The Role of the Senate in Judicial Impeachment Proceedings: Procedure, Practice, and Data* (US: Congressional Research Service, 2010) 3.

resolution by the House Judiciary Committee".[177] The House of Judiciary Committee starts the investigation after lodging the allegation. However, the House of Representative is not bound by the recommendation of the investigation committee, *inter alia*, in 1933, the Committee could not recommend for the impeachment of the judge Harold Louderback due to inadequate proofs but the House finally passed the resolution of impeachment.[178] This action seemed fatal against the independence and secured tenure of the federal judges.

In case of removing the judges, the Senate needs to comply with the 'due process clause' to ensure the fairness of trial.[179] However, the initiatives of the particular investigations committee to conducting trial, established under the Judicial Councils Reform and Judicial Conduct and Disability Act, 1980 were challenged. It was argued that they went against the essence of due process in *Nixon v United States*[180]. In this case Walter Nixon, a federal district judge was declared convicted by a Senate committee for felony and perjury under the Senate Rule XI. The convicted judge challenged the case because the Senate Rule XI prohibits the participation of entire Senate in trial proceedings. The Supreme Court had not entertained this debate under the forbearance of the 'political question' dictum established in *Baker v. Carr*.[181] Unlike the House of Representative, the Senate, in 1868 to ascertain the credibility of trial, adopted specific rules (Senate Rules of Procedure and Practice for Impeachments Trials[182]) harmonizing the trial of impeachment. The requisites of fair trial, *e.g.* summoning the impeached judges to have his reply on the ground of impeachment, appearance of witness, corroboration with evidence, right to



[177] *Guide to Congress* (Washington: CQ Press, 2012) 411.
[178] Ibid.
[179] Buckner F. Jr. Melton, "Federal Impeachment and Criminal Procedure: The Framers' Intent," *Maryland Law Review* 52.2 (1993): 438.
[180] 113 S. Ct. 732 (1993).
[181] 369 U.S. 186, 209-37 (1962).
[182] *Guide to Congress* (Washington: CQ Press, 2012) 412.

examination and cross-examination are ensured throughout the stages.[183] The standard of proof in this trial would be configured with 'clear and convincing'[184] as the standard given in the significant non-criminal case.[185] Here, the standard of proof is more emphasized than the ordinary civil litigation by reason of its seriousness.[186] Furthermore, despite the resemblances in some procedural rules between impeachment trial and traditional criminal adjudication, the impeachment trial is fundamentally distinguished from the criminal prosecution. The House Manager of the Senate pointed out in the impeachment trial "[t]he purpose of impeachment is not personal punishment, but rather to maintain constitutional government through removal of unfit officials from position of public trust".[187]

The impeachment trial rules were comprehended by *the Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials, 1868* containing 26 rules as the standing rules for the Senate and also included in the Senate Manual. However, this law was modified creating 'Impeachment Trial Committee' in 1935 in consequence of the trial of Judge Harold Louderback held in 1933. The Senate passed the resolution to form the committee of 12 members to deal with the evidence and analyze them during the trial.[188] This committee first formed and operated in the trial of Judge Caliborne in 1986 and subsequently it intervened in *Hastings case* (1988-89) and *Nixon case* (1989).[189] Though most of the important procedural segments of impeachment trial are executed by the Committee, it has no authority to make a recommendation based on the



[183] *Guide to Congress* (Washington: CQ Press, 2012) 411.
[184] "[T]hat measure or degree of proof which will produce in the mind of the trier of facts a firm belief or conviction as to the allegation sought to be established. It is intermediate, being more than a mere preponderance, but not to the extent of such certainty as is required beyond a reasonable doubt as in criminal cases. It does not mean clear and unequivocal"- *Fred C. Walker Agency, Inc. v. Lucas*, 211 S.E.2d 88, 92 (Va. 1975)
[185] Ibid 150, 719.
[186] *Nixon v. United States*, 506 U.S. 224 (1993).
[187] Susan Navarr Smelcer, *Role of the Senate in Judicial Impeachment Proceedings*. (US: DIANE Publishing, 2010) 3.
[188] Ibid 5.
[189] Ibid 10.

merits of the case.[190] The Senate takes resolution on each articles of impeachment by its two third majority following the deliberation and consideration of the motions placed before it.[191]

Apparently, the federal judges' removal process in the US seems a political functioning. Nevertheless, the division of impeachment processes between the two chambers of the Congress and the two-third majority requirement for the final decision of removal guarantee the judicial independence instead of an execution of a mere political will. In addition, by inserting the mode of impeachment, the framers of the constitution desired the pure manifestation of public accountability including 'sufficient fortitude'.[192] Thus, "[p]olitical passions no longer could sweep an officer to the gallows".[193] In the present day, any person can, according to the Judicial Conduct and Disability Act, 1980, bring the allegation against any federal judge under the constitutional list of offences.[194] After assessing the complaints throughout different layers, complying "Standards for Assessing Compliance with the Act", the potential complaints come before the House Committee on the Judiciary.[195] Despite the check of dual but separated adjudication in two houses of the Congress, the US Congress advanced the independence of the judiciary arranging further check before the complaint proceedings in the houses of Congress.

The practices of impeachment of the judges have been evolved in the American society facing ample peculiarities and challenges. The impeachment processes indicate the stiffness across the entire proceedings particularly on account of its tough elevation to the final decision by managing the rigid mandate rules of the houses. However, it might not be easy to say that the



[190] Ibid.
[191] Rule XXIII of Rules of *the Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials.*
[192] Michael J. Gerhardt, *The Federal Impeachment Process: A Constitutional and Historical Analysis* (Chicago: University of Chicago Press, 2000) 123.
[193] Raoul Berger, *IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS.* (Boston: Harvard University Press, 1974) xii.
[194] Sections 351-364 of The Judicial Conduct and Disability Act, 28 U.S.C.
[195] The Judicial Conduct and Disability Act Study Committee. Implementation of the Judicial Conduct and Disability Act of 1980: A Report to the Chief Justice (2006) 3-4.

constitutional norms and the legal practices in the US have designed the absolute independence of the judiciary. Institutional safeguards sometimes seem inadequate for judicial independence, especially in term of secured tenure against the vindictive attitudes of the political actors. The trend of adverse actions to curtailing the judicial independence by removing judges during the Jefferson's regime was also followed in this century. For example, the risk rose when the non-criminal behaviors of Chief Justice Warren and Justice Douglas were charged with under the impeachable offences.[196] This fear of undermining judicial independence was substantiated by Representative Ford since during the impeachable allegations against Justice Douglas, he uttered that impeachable offence is nothing but what the majority of the House of Representative considers.[197] Therefore, the lack of precision of the grounds of impeachment, the sole rein of the politicians on the entire process, the reporting system of the National Commission on Judicial Discipline and Removal[198] have resumed the debate of judicial independence against the rhetoric of political dominance. This situation has been a huge concern, when the American judicial activism in the political process[199] offers the remedies to the people regardless of their status.

However, the rejection of judicial review of the decision of removing a judge on the basis of political question in *US v Nixon* by the Supreme Court may not be a total upset, where as Justice White wrote that the judiciary should intervene in 'extremely unlikely' cases.[200] Justice Souter added "If the Senate were to act in a manner seriously threatening the integrity of its results, convicting say upon a coin toss or upon a summary determination that an officer of the US was



[196] Gordon Bermant and Wheeler Russell R., "Federal Judges and the Judicial Branch: Their Independence and Accountability," *Mercer L. Rev.* 46 (1995): 840.
[197] John D. Feerick, "Impeaching Federal Judges: A Study of the Constitutional Provisions," *Fordham L. Rev.* 39 (1970): 2.
[198] National Commission on Judicial Discipline and Removal Act, Pub. L. No. 101-650, §§ 409-10, 104 Stat. 5124 (1990).
[199] Edward White, G. *The American judicial Tradition: Profiles of American Leading Judges,* (New York, Oxford: Oxford University Press, 1988) 24-25.
[200] Geoffrey Robertson QC. "Judicial Independence: Some Recent Cases" International Bar Association's Human Rights Institute (Thematic Paper 4) 14.

simply 'a bad guy', judicial interference might well be appropriate".[201] Nonetheless, the formal absence of judicial review carries the risk of abusing the constitutional powers of impeachments and removal of the legislatures whereas they all are politicians motivated with political ideologies and agendas. However, the academic commentaries, the pressure of NGO and rights activists, exceeding role of media work as the informal safeguards for judicial independence in the US.

### 3.3: Investigating the Canadian Model of Removing the Superior Judges Exploring Legal Rules, Impacts and Safeguards to Championing Judicial Independence

The judicial independence -whereby the judiciary in applying authority and functioning will be separated from other branches of the government- is the fundamental feature of Canadian Constitution.[202] Peter Hogg recalled that the development of Canadian judicial independence is more than a constitutional outcome. Besides the constitutional safeguard, he emphasized political tradition to extend the independence of judiciary.[203] Therefore, the constitutional provisions and their political tradition let the Canadian superior judges enjoy acute independence in their offices as long as they use their judicious faculties and remain capable of performing the vested duties.[204]*Quam diu se bene gesserint*[205] shields them against any prejudicial action endangering their tenure and excelling the risk of removal unduly. This safeguard adequately helps them to work independently until their retirement age. In the words of Shetreet[206], "[t]he grantee holds the office under the conditions that 'he shall behave himself well in it', or in Hawkins' words, that he shall 'execute it diligently and faithfully'".



[201] Ibid.
[202] *Valante v The Queen* (1985) 2 S.C.R. 673; *The Queen v Beauregard* (1986) S.C.R. 56.
[203] P. Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 1977) 120.
[204] V. Venkataramanaiah, *Essays on Constitutional Law*. (New York: State Mutual Book & Periodical Service, Limited, 1990) 19.
[205] Until good behavior.
[206] Shimon Shetreet, *Judges on Trial.* (New York: North-Holland, 1976) 88-89.

The charge of 'good behaviour' seemed a conundrum for the lack of precise definition. To tender sufficient precision to it, Mr Edward Black, the Justice Minister in 1883 enunciated the grounds of removal while demonstrating them as the opposite of 'good behaviour'. He articulated the options saying "[i]t was a charge of partiality, of malfeasance in office- not that the judge erred, for all may err in judgment, but that he degraded his office, betrayed his trust, willfully and knowingly did a wrong thing, perverted justice and judgment- that is the nature of a charge which could alone make it proper to have been brought here."[207] The threshold of 'good behaviour' was also illustrated in Canadian context of judicial independence as "[j]udges are appointed by an instrument to an office, "good behaviour" means behavior which is "good" in and for that office, such as worthy bearing and honesty in the office, carrying out its duties when called on to do so, absence of ill-will and negligence in relation to them and of any conviction incompatible with the public confidence which the office is intended to serve, and so on."[208]

Bribery, criminal proclivity, and proven partiality are contrasting to the established norms of judicial integrity in Canada. However, other scopes of personal misconducts pitch a challenge to the investigating authority since the diversity of behaviors. To construct a precise test on the alleged complaints raised against the judge, Donald Marshall, the Royal Commission Inquiry Report, 1989 questioned "[i]s the conduct alleged so manifestly and profoundly destructive of the concept of the impartiality and independence of the judicial role, that public confidence would be sufficiently undermined to render the judge incapable of executing the judicial



[207] "Canadian House of Common Debate, April 9, 1883" cited in Venkataramanaiah. V. *Essays on Constitutional Law*. (New York: State Mutual Book & Periodical Service, Limited, 1990) 21.
[208] W. P. M. K., "Removal and Tenure of Judges," *The University of Toronto Law Journal* 6, no. 2 (1946): 465.

office?"[209] However, the resolution constitutes by considering the nature of the circumstances and the scholarship of good behavior to the people deal with the case.

In Canadian jurisdiction, the superior courts' judges can be removed by the Governor General on the joint addresses of both houses of the Parliament as prescribed by article 99 (1) of the Constitution[210]. Canada has hardly experienced the motion of removal of a superior court's judge since its journey of confederation.[211] Since the confederation, Canadian parliament had chased only five cases, most of them related to the allegations of alcoholism whereas the parliament did not think of severe sanctioning like removal.[212] However, retreating the hereditary of colonial practice and the constitutional commitment of independence, the removal procedures of Canada were desired to be structured declining the risk of political abuse. In the history of removal of superior judges, the case of Leo Landervile was the turning point and brought the radical change to improve the process. In *Landervile case*, the alleged judge, after being dissatisfied with the process of investigation whereas the investigation commission composed of only one judge, challenged the entire mechanism and questioned its propriety.[213] In this process, both the convicted Justice, Landervile and the one-man Commission led by ex-Justice Ivan Rand had to go through huge public criticism. Landervile was criticized because he was still the sitting judge and Ivan Rand was allegedly biased. Basically, this process was a circumstantial effort to resolve the crisis without any well-designed mechanism to ensuring a balance between judicial independence and accountability. However, this incident, in 1971, led the parliament to establish



[209] Martin L. Friedland, *A Place Apart: Judicial Independence and Accountability in Canada*, (Canada: Canadian Government Publishing, 1995) 102-103.
[210]" Subject to subsection (2) of this section, the judges of the superior courts shall hold office during good behaviour, but shall be removable by the Governor General on address of the Senate and House of Commons."
[211] Martin L. Friedland "Appointment, discipline and removal of Judges in Canada" in *Judiciaries in Comparative Perspective* ed. Lee, H.P. (UK: Cambridge University Press, 2011) 58.
[212] Lee Fredrick Morton, *Law, Politics and the Judicial Process in Canada*, (Montreal: University of Calgary Press, 1984) 174.
[213] *Léo A. Landreville v. The Queen* [1977] 2 F.C. 726, 75 D.L.R. (3d) 380, 1977.

the Canadian Judicial Council pursuant to the Judges Act, 1970.[214] Thus, the Judges Act was reformed to establish the independent Supreme Judicial Council. About the integrity and independence of Canadian judiciary, then the Parliamentary Secretary said to the Minster of Justice particularly during the second reading of the bill to creating this distinctive Council "[b]ecause the independence of the judiciary is an integral part of the Canadian democratic process, it is important that the judiciary become, to some extent, a self-disciplinary body."[215]

The Supreme Judicial Council is exclusively composed of judges and chaired by the Chief Justice of Canadian Supreme Court.[216] The Council is empowered to conduct the inquiries and investigations raised against the judges set forth in Section 63 of the Act.[217] The formation of Inquiry Committee is not fixed, thus, it may consist of one member or more.[218] Throughout the tasks of inquiry and investigation, they maintain the norms of natural justice, *e.g.* notice and hearing[219] and all other requisites of fair trial, *e.g.* oath, ensure the appearance of witnesses, presence of evidence, the usual performance of public inquiry unless that is otherwise requested by the Minister.[220] Furthermore, the pledge of procedural fairness was also guaranteed to all Canadians in the Canadian Charter of Rights and Freedoms.[221] Despite the procedural safeguards followed in the investigation and inquiry stages, the substantive power of the Supreme Judicial Council, a complete judicial body to deal with the proceedings after lodging complaints and before finally passing the resolution by the parliament has heightened the secured tenure of



[214] Martin L. Friedland, *A Place Apart: Judicial Independence and Accountability in Canada*, (Canada: Canadian Government Publishing, 1995) 88.
[215] William Kaplan, *Bad Judgment*, (Toronto: University of Toronto Press, 1996) 194.
[216] Section 59 of the Judges Act, 1985.
[217]Section 60(2)(c) of the Judges Act, 1985.
[218] Section 63 of the Judges Act, 1985.
[219] Section 64 of the Judges Act, 1985.
[220] Section 63(4)(5)(6) of the Judges Act, 1985.
[221] Section 11(d) of the Canadian Charter of Rights and Freedoms- "charged with an offence has the right . . . to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal."

judges.[222] This significant development of Canadian legal system to pursuing judicial independence while adjusting with the essence of accountability has contributed to be a model of disciplinary mechanism.

### 3.4: Comparison between the US and Canadian Model

The question of accountability is strictly fixed with the value of independence when the judges having the discretionary power to maintaining the political role while dealing with too many political subjects throughout the adjudications and reviews.[223] Particularly, in observing both vertical and horizontal scheme of separation of powers, the judiciary comes forward to resolve the conflicts.[224] Admittedly, unfettered independence makes the democratic accountability of the judiciary fragile.[225] Besides, the straightforward analysis on the removal process and the situation of judicial independence in the US, the combined study of selection process and removal mechanism can guide to explain the associated threats to the judiciary and the reasons behind them. The introducing of election process to select the judges was the outcome of the movement of democratization of political process in all aspects of government's functioning.[226] Thus, party politics prevailing in Congress have chance to stage interplay between the appointment and removal, especially, when impeachment was executed through a popular cast. This concern rises considerably with the reaction of the politicians about the decisions of judicial review of their



[222] Commonwealth Secretariat. *1996 Meeting of Commonwealth Law Ministers, Memoranda.* (London: Commonwealth Secretariat, 1996) 17.
[223] Jerold Waltman and Kenneth M. Holland, ed. *The Political Role of Law Courts in Modern Democracies* (USA: Palgrave and McMillan, 1988) 1-2.
[224] Martin Shapiro, "Judicial Review in Developed Democracies". in *Democratization and the Judiciary: The Accountability Function of Courts in New Democracies* (eds.) Siri Gloppen, Roberto Gargarella, and Elin Skaar (London: Frank Cass, 2004) 10.
[225] Francseco Contini and Mohr Richard, "Reconciling independence and accountability in judicial systems," *Utrecht L. Rev.* 3 (2007): 28.
[226] L. Philips Dubois, *From Ballot to Bench: Judicial Elections and the quest for Accountability,* (Texas: University of Texas Press, 1980) 3.

legal enactments.[227] Correspondingly, the anticipation of 'partisan loyalty' of judges is also a criticizing fashion to the public law scholars.[228] Thus, the question of fairness of removal of judges by the ruling party-led legislature can be logically a debatable discourse of judicial independence in the US. But in Canada the interplay between the appointment and removal to threatening judicial independence comparatively remains in a lower degree than the US practices since the judges are appointed on the recommendation of the Appointment Committee in Canada contrary to the American election practice. The declining of political patronage[229] in selecting the Canadian judges helps to afford more judicial independence than the US practice.

The US system on the removal proceedings of superior judges behave differently while comparing with the Canadian one. The exploration throughout the American system as made in the Chapter Two has suggested the variation of rules governing the inquiry of impeachment allegation in the House of Representatives. Usually, this task is carried out by the Judicial Committee but can be possibly conducted by a special select committee.[230] The situation has changed after enacting the Judicial Conduct and Disability Act, 1980. The uncertainty of initiating complaints extinguished but the total procedure started to be predominantly controlled by the politicians. The members of the Judiciary Committee of the House[231] and the Senate Impeachment Trial Committee both are recruited from both Democrats and Republicans.[232] In the total process of the removal of the judges in the US, only the people from judiciary are seen involved as the members of complaints review committee formed under the Judicial Conduct and



[227] G. Alan Tarr, *Without Fear or Favor: Judicial Independence and Accountability in the States* (California: Stanford University, 2012) 15-16.
[228] Michael S. Kang and Joanna Shepherd. "The Long Shadow of Bush V. Gore: Judicial Partisanship in Election Cases," *Stanford Law Review* 69 (2016): 1415.
[229] L. Fredrick Morton, *Law, Politics and Judicial Process in Canada,* (Montreal: University of Calgary Press, 2002) 120.
[230] III Hind's §§ 2342, 2487, 2494, 2400, 2409 cited in Halstead, T. J. "An Overview of the Impeachment Process." Congressional Research Service, Library of Congress, 1998, p.3.
[231] https://judiciary.house.gov/subcommittee/full-committee/ (accessed at 10:39 on 30/12/2016).
[232] *Senate Rule XI*.

Disability Act, 1980. On the contrary, in Canada, in the removal process of the judges, the role of the Supreme Judicial Council exclusively composed of the judges of different level is exceedingly significant whereas the Government has no control on it.[233] After receiving the report containing the recommendation from the Council, the Minister of Justice tables the subject for the parliamentary process.[234] The Canadian removal process invokes particularly two segments maintained by two different branches of the government like the Supreme Judicial Council, a forum of judicial personnel and the Parliament, the form of the people's representatives. The recommendation of the Council is, moreover, the decisive factor because it may either stop the issue to be processed or channel it to the legislatures for their final decision.

Though the involvement of a proper judicial forum is missing in the American process of removal, the conventional practice of conducting investigation by the Judicial Committee may be considered as a safeguard against the prejudicial actions targeting judges. The double levels of resolution passed by both houses of Congress and especially the resolution passed by the absolute majority in the Senate may be a treated as the severe check. The activism of a judicial committee in two houses of Congress has multiplied the strict scrutiny. Besides this toughness of the procedures, the high standard of freedom of expression of the US Congressmen may help to the objective practice of removal of judges so far.

Notwithstanding the forgoing precautions, introducing an ethical code can be imperative to avoid the unnecessary disputed situation striking the dichotomy between the judge's removal and their independence. Because of the increasing size of judiciary, a code of conduct is essential for the



[233] Ian Binnie, "Judicial Independence in Canada," *Observatório da JurisdiçãoConstitucional* 1, no. 1 (2010) 14.
[234] Section 65(1) of the Judges Act, 1985.

clarification of rules regulating the conduct of a judge.[235] This arrangement is also crucial to keep intact the public trust upon the judiciary. The Judicial Conference, 1973 adopted the code of conduct but its application is limited to the federal lower judiciary as not covered the judges of the US Supreme Court.[236] The immense reluctance of CJ Roberts about the adoption of a code of conduct for the justices of the Supreme Court expressed while responding to the continuous urges of the members of Congress, lawyers, right activists. He without hesitation uttered "[t]he Court has had no reason to adopt the Code as its definitive source of ethical guidance".[237] This comment has intensified the crisis of public faith upon the apex federal court.[238] The hypothesis of shrinking accountability due to the absence of the ethical code has been relevantly understood in the arguments in *ABC, Inc. v Aereo Inc.*[239] whereas Justice Scalia unearthed the financial interest of the judges in the individual companies. However, Canada has subjugated this dilemma by formulating the uniform code[240] in 1998 applicable to all judges invariably.[241] Initially, the compilation of ethical principles might be seemed to the judges as a restriction against their professional and personal life but in the long run it saves them from intrusive actions of influential actors.

Relying on the jurisprudence of 'political question', the Supreme Court has quashed the possibility of justifiability of the impeachment trial decision taken by the American



[235] Shimon Shetreet and Wayne McCormack, *The Culture of Judicial independence in the Globalised World* (Leiden; Boston: Brill Nijhoff, 2016) 376.
[236] http://www.uscourts.gov/judges-judgeships/code-conduct-united-states-judges (accessed at 9.52 AM on 01/01/2017)
[237] The Year End Report of the Federal Judiciary, 2011.
[238] LouiseSlaughter (United States Representative) "Supreme Unaccountability: The Nine Federal Judges to Whom No Code of Ethics Applies" *Stanford Law & Policy Review,* accessed on January 01, 2017, https://journals.law.stanford.edu/stanford-law-policy-review/online/supreme-unaccountability-nine-federal-judges-whom-no-code-ethics-applies#fn1
[239] 134 S. Ct. 2498 (2014)
[240] *Ethical Principles of Judges*.
[241] https://www.cjc-ccm.gc.ca/english/conduct_en.asp?selMenu=conduct_judicial_conduct_en.asp#wijc (accessed 11:15 AM on 01/01/2017)

legislatures.[242] The framers of the constitution intended to restrict the exercise of one department's power by others.[243] This lack of judicial review power of the US Supreme Court on the impeachment trial decision is considered as the political check on the judiciary.[244] However, the Supreme Court in *Powell v McCormack*[245], affirmed the scope of reviewing the procedural propriety or the 'explicit constraints' of the political question. Additionally, in *Nixon v US*, the possibility of judicial intervention was considered in 'extremely unlikely' cases. In Canada, antagonistically, the involvement of the Supreme Judicial Council composed of all superior judges including the Chief Justice of the federal Supreme Court has dissuaded the utility of judicial review and made easy for the legislatures to exercise their mandate.[246] Therefore, the Canadian practice maintains a fair balance between judicial independence and accountability.

To sum up the chapter, it can be referred that the process of enhancing judicial independence is continuing even in the developed nations like the US and Canada where politics has grown up to facilitating the norms of constitutionalism. Thus, both jurisdictions have endeavored to improve the removal mechanism of judges gradually by experiencing of various cases over the years. The Canadian practice invoking the Judicial Council throughout the entire process has concentrated the independence of judges by all possible means and pertinently, it has simultaneously reduced the labor of politicians and the risk of political manipulation maximally. On the other hand, the US system has been mature more over the years. Their long constitutional tradition though deploys the judicial people to investigate the complaints, they eventually rely on the houses of Congress in deciding the impeachment cases recalling the impetus of popular sovereignty.



[242] Michael J. Gerhardt, "Rediscovering Nonjusticiability: Judicial Review of Impeachments After Nixon." *Duke Law Journal* 44, no. 2 (1994): 231-232.
[243] The Federalist Paper No. 48.
[244] 506 U.S. 224 (1993).
[245] 395 U.S. 486 (1969).
[246] EDWARD McWHINNEY, *SUPREME COURTS AND JUDICIAL LAW-MAKING: CONSTITUTIONAL TRIBUNALS AND CONSTITUTIONAL REVIEW* (DORDECHT/ BOSTON/ LANCASTER: MARTINUS NIJHOFF PUBLISHERS, 1986) 63.

## Chapter 4: Lessons for Bangladesh

This research opted to trace out the balanced mechanism to remove the Supreme Court judges in Bangladesh. The point to capturing two developed jurisdictions as the US and Canada was to get the ideas maintain balance between the conservation of judicial independence and the removal of judges incapable to perform or misbehaved. The result of a comparative study, however, is bound to take the compatibility of the norms considering the resemblances and divergences of the comparing jurisdictions.[247] On contrary, the momentum of comparative study does not always require the 'familiar arrangements' to get the result.[248] Nonetheless, the comparative analysis of American and Canadian constitutional and legal frameworks to removing the superior judges would signify evoking some accepted and global patterns to triumph over the crisis.[249] This section, thus, would focus on the outcomes of the preceding research and examine the possibility to adopt the lessons for Bangladesh. Accordingly, the development of judicial independence in contemporary Bangladesh requires either redesigning the constitutional framework of removing superior judges or the ingredients to poise the existing mechanism ensuring the political make-up rule of law.

### 4.1: Balancing between Independence and Accountability while Removing the Judges of Bangladesh Supreme Court

The independence and accountability of the judges being the preconditions for the rule of law is expected to evolve in response to the contemporary debate between the theoretical jurisprudence and the fashions of making judicial decision, demand of public accountability, and the societal



[247]Norman Dorsen, Micheal Rosenfeld, Andras Sajo, Susanne Baer, and Susanna Mancini, *COMPARATIVE CONSTITUTIONALISM, CASES AND MATERIALS*(USA: West Academic Publishing, 2016) 31.
[248] Mark Tushnet, "The possibilities of comparative constitutional law," *The Yale Law Journal* 108, no. 6 (1999):1227.
[249] Tom Ginsburg and Rosalind Dixon (eds.) *Comparative Constitutional Law.* (Northampton, USA: Edward Elgar Publishing, 2011) 5.

values that change.[250] Despite the divergences found in the different jurisdictions regarding the processes of appointment and removal of the judges, the fundamental issue of judicial independence is universal and needs to be robustly implemented in any democratic country.[251] Without any regard to the consequences of the democratic governance, the unlimited independence of judiciary may bring the regular government down.[252] The quest of independence of the judges of Bangladesh Supreme Court alike any other judiciary thus needs to devote to the commitments of accountability while invoking its independence. On the basis of the public legitimacy doctrine installed in the constitution,[253] the judges' accountability is eventually before the people that can be realized through the legislatures. In this context, the Sixteenth Amendment can be seen an endeavor to revive the original norms of removing judges by the Parliament which is officially named as the House of Nation.[254]

The grounds of 'misbehaviour' and 'incapacity', and the requisite of two-third majority of the total number of the members of the parliament can be apparently considered as a moderate edition. However, the Sixteenth Amendment has been contentious firstly because it abrogated the previous mechanism of removing judges by the President on the recommendation of the Supreme Judicial Council exclusively composed by the judges of the Supreme Court. No clarification has been made what was the problem of the previous mechanism. Moreover, it has been adopted in the ages when the contemporary international norms are requiring more judicial involvement in disciplinary mechanisms. For example, the failure of administration of justice is



[250] John Evans, "Adjudicative Independence: Canadian Perspective," in *On Judicial and Quasi-Judicial independence* (ed.) Suzanne Comtois, and Kars Jan Graff (Hague: Eleven International Publishing, 2013) 103-104.
[251]Peter M. Shane, "Interbranch Accountability in State Government and the Constitutional Requirement of Judicial Independence." *Law and Contemporary Problems* 61, no. 3 (1998): 22.
[252] Ibid, 23.
[253] Article 7(1) of Bangladesh Constitution, "All powers in the Republic belong to the people, and their exercise on behalf of the people shall be effected only under, and by the authority of, this Constitution."
[254] Since it was inserted in Article 96 of the original Constitution, 1972.

now suggested as the liability of the state and the exemption of personal liability for erroneous decisions is underpinned to devoting the independent working environment for judges.[255] Additionally, the powers of both constitutional review and judicial review may be considered as the reasons of adopting revenging power in the hands of parliament because out of sixteen amendments, seven were declared *ultra vires* by the Supreme Court.

Following the latest amendment, the ground of misbehavior can draw excessive academic and pragmatic arguments. In the US, the life tenure of the federal judges complying 'good behavior' has not been incomprehensible because of the clear wording of 'treason, bribery, and other high crimes and misdemeanors'. Canadian provision of 'good behaviour' with the evolutionary explanation and supplemented by the Ethical Principles for Judges has reduced the risk of abusing the security of the judges' tenure and controversial removal. In Bangladesh, the undefined 'misbehaviour' carries a potential risk of political abusing the judicial independence. The American instance of inserting the three particular grounds may be exemplar for Bangladesh. Construing 'misbehaviour' the policymakers may explicitly include breach of constitutional provision, sedition, bribery or other criminal offences to circumvent the confusion or misinterpretation. The Code of Conduct, 2000 for the superior judges, therefore, is required to be adjusted and updated with the ground of 'misbehaviour'.

The American and Canadian practices though adopted the parliamentary resolution to remove the judges, the bicameral parliamentary proceedings have curbed the avenue of reflecting the political whims. The single-house parliament of Bangladesh has deprived the upper judiciary of Bangladesh of availing such advantage. The parliamentarians in Bangladesh have now engaged

[255] Paragraph 59 of the Venice Commission Report on the Independence of Judicial System, 2010, Part I: the Independence of Judges.

in different extra-legal activities which they are not allowed to do. Moreover, they remain very dormant in performing the actual functions inside of the house.[256] This contaminated position of the MPs has intensified the probability of being aggrieved by the judicial activism of the judges. An MP's privilege to bring the matter for the further process leading to removal would have two edges to pierce the independence. The ultimate fate of removal or the continuity of discussion on the judge's behavior may convulse his working freedom and lower his reputation down. Thus, the process of parliamentary resolution can be rearranged by enacting the laws relating to the arrangement of *ad hoc* council to receive, investigate and inquire the allegations and make recommendation either to the parliament or the executive.[257] Introducing the judicial committee to receive and examine complaints before passing the impeachment resolution of the House of Representative of the US may not reduce the tension of political manipulation because of the lack of further check in the trial level since parliament of Bangladesh consists of a single chamber. Therefore, the Canadian practices of invoking the Supreme Judicial Council exclusively composed of the judges of a big number may be worthier to follow whereas it completes all the tasks of trial and can recommend to the parliament before the final resolution. It is pertinent to mention that before adopting this discussed Sixteenth Amendment, Bangladesh was accustomed to conduct the removal process through the Supreme Judicial Council formed with the Chief Justice and two next senior judges of the Supreme Court.[258] This exclusive judicial body was empowered to receive and investigate the complaints against a judge but



[256] M. Ahram Shahzada. (on behalf of Transparency International Bangladesh). Positive and Negative Roles of the Members of the 9th Parliament: A Review. (Dhaka, 2012) 3 and 7.

[257] Bahamas, Singapore, Botswana, Malaysia, Papua New Guinea etc. Attributed by The Commonwealth. The Appointment, Tenure and Removal of Judges under Commonwealth Principles: A Compendium and Analysis of Best Practice. (BINGHM CENTRE FOR RULE OF LAW) 92-93.

[258] It was the provision of Article 96(3) before the Sixteenth Amendment of Bangladesh Constitution.

lacked sanctioning powers.[259] It could merely recommend to the President about the findings and the ultimate decision was taken by the executive according to the advice[260] of the Prime Minister.

The risk of disciplinary action by the parliament against a judge intensifies whereas the recruitment of judges focuses on the political involvement of the prospective judges. This party politics of parliament may manipulate the attempt of disciplinary actions.[261] Besides a well-defined threshold of substantive grounds, procedural rules encompassing the norms of fair trial like the right to notice, hearing, representation and defense are required during the trial of judges. Furthermore, the removal crisis of the judges of the Supreme Court in Bangladesh takes the serious attention due to the persistent provisional appointment instead of the permanent recruitment. Thus, in Bangladesh, another category of removal process is found when a certain portion of temporary judges are not allowed to be permanent with their fellow fortunate colleagues. The practice of provisional appointment, therefore, needs to be practiced infrequently, especially, in case of actual necessity. In general, the judges need to be permanently appointed in order to alleviate their fear of removal in the near feature. Thus, it is only the independence in all terms that can secure the integrity and impartiality of the judges.[262]

The nation (Bangladesh) needs to move forward, especially, towards the sustainable independence for judiciary by maintaining the best possible safeguards. In this regard, the priority should be given on the evasion of party politics or partisanship, maintaining confidentiality until formal hearing, employing permanent staffs to deal with complaint and investigation, and invoking all the requisites of procedural fairness. Furthermore, according to



[259] It was the provision of Article 96(4) before the Sixteenth Amendment of Bangladesh Constitution.
[260] Article 48(3) of Bangladesh Constitution.
[261] In 2000, the Government did not take action against Justice Lotifur Rahman who had a telephone conversation with the former Presiden HM Ershad who availed a favorable judgment in the *Janata Tower case* from a division bench of the High Court Division of Bangladesh Supreme Court where Justice Rahman participated.
[262] *Secretary Ministry of Finance v Masdar Hossain* 52 DLR (AD) 82.

international standards, judicial review can be another guarantee of judicial independence albeit, this scheme can be compromised if the total process is conducted through the effective operation of judicial committee. Nonetheless, as the informal checks, the active role of the bar, media and academics may signify this projection.

### 4.2: Essential Contextual Legal Considerations to Praising Judicial Independence

The constitutional rule (Article 70) of preventing floor crossing stigmatizes the debate on Sixteenth Amendment. If parliamentarians cannot tender their opinions beyond the decisions of political parties, the process of removing judges may cease to have its objectivity and fairness. Thus, this provision needs to be removed from the Constitution of Bangladesh for confirming impartial and unbiased decisions on national and sensitive issues like the removal of superior judges. The provision of two-third majority of the mandates of parliamentarian seems a rational safeguard since it requires the consensus among the ruling party and the oppositions.[263] However, the last three parliaments experienced the two-third majority of one political alliance has made this safeguard ineffective completely.

The culture of 'managed democracy' in Bangladesh is also an impediment towards the integration of political opinions from all major political parties. This culture weakens the institutional capacities of constitutional institutions including judicial independence for the absence of strong informal institutions and networks.[264] Therefore, the restitution of democracy through the fair, impartial, credible and inclusive election to forming a strong parliament can help to boost up the independence of judiciary. The proposition of ensuring the presence and strong role of the opposition is a must for Bangladesh whereas the existing parliamentary system

[263] *Judicial Tenure, Removal, Immunity, and Accountability*. (International Institute for Democracy and Electoral Assistance, 2014) 5.

[264] Gordon M. Hahn, "Managed democracy? Building stealth authoritarianism in St. Petersburg." *DEMOKRATIZATSIYA-WASHINGTON*- 12, no. 2 (2004): 196-197.

maintains zero-gap between the cabinet and parliament's key-players. In the Westminster government, any means of parliamentary projection seems as the harpoon of the executive to hunt the targeted fish by using the boat of parliament. Thus, the Sixteenth Amendment is not out of such suspicion. Evidently, the mandate in passing the Sixteenth Amendment Bill[265] as 327-0[266] does not show any strong argumentative positions among the parliamentarians.

The apprehension of risk centering on the removal of judges through the parliamentary mandate is rooted in the appointing culture of the judges for the Supreme Court. It becomes more susceptible when the government appears reluctant to bring reform in the defective appointing procedures but finds interest to make experiments on the removal mechanism of superior judges. Putting emphasis on the political affiliation instead of the merit criteria according to the international standard and not disclosing the facts on the basis of what merits the judges are appointed have disrupted the objective, fair and non-political recruitment. This process of recruiting superior judges should be modified immensely where the independent commission will work by replacing the culture of politically motivated recommendation of the Ministry of Law, Justice and Parliamentary Affairs to the President.The vigor of the debate on removal process crashing the independence may be reduced if the skilled and intellectually sound judges are appointed.[267] Moreover, contemplating the doctrine of checks and balances, other two branches should cautiously interact with the judiciary. Any unjustified political interference of executive and legislature in Bangladesh like some other Asian countries[268] would scandalize the scheme of removal by the parliamentary resolution as fixed by the Sixteenth Amendment.



[265] The Constitution (Amendment) Act, 2014
[266] The New Age, Bangladesh, 18/09/2014.
[267] Eric Rasmusen, "Judicial Legitimacy as a Repeated Game," *Journal of Law, Economics, & Organization* 10, no. 1 (1994): 66.
[268] Cyrus Das, "THE THREATS TO JUDICIAL INDEPENDENCE", in SHETREET, SIMON AND FORSYTH, CHRISTOPHER. *THE CULTURE OF JUDICIAL INDEPENDENCE* (Leiden; Boston: Martinus Nijhoff Publishers, 2002) 140-143.

## Conclusion

Paul D Carrington famously observed that "[p]ublic trust and acceptance of the deployment of government's power are the proper concern for all but are a special concern for the judges and the courts"[269]. Democratization conventionally contemplates lofty to the post-independent governments that already received the lessons of political suppression from the previous undemocratic leadership failed to maintain the constitutional bounds in state practices.[270] During the journey towards democracy and constitutionalism as a new-born country, Bangladesh faced- within one decade since its first democratic constitution adopted- two usurpations.[271] As a result, the unelected occupying governments ruptured all the regular political practices and remained in the power for 16 years either directly or indirectly.[272] Recalling such genesis of a new nation, the role and security of judiciary could have been a potential safeguard to boost up democracy as it to other newly democratizing countries.[273] Frequent experiments to designing the removal process are perceived potential challenge to develop a stable and consensus policies around judicial independence. The unnecessary experiments with removal process of superior judges have also menaced the foundation of popular sovereignty of Bangladesh [274] because they hardly care the common good of people. Thus, the facet of the removal proceedings of the judges of the Supreme Court is not the concern of judiciary alone; rather it is concerned with the guardianship of constitution, due process, accountability of the government, rule of law and democracy.



[269] Paul D. Carrington, "Judicial independence and democratic accountability in highest state courts." *Law and contemporary problems* 61, no. 3 (1998): 80.
[270] Christopher M.Larkins, "Judicial Independence and Democratization: A Theoretical and Conceptual Analysis." *The American Journal of Comparative Law* 44, no. 4 (1996): 606.
[271] Muhammad Dawood, "The Causes of Military Interventions in Politics: A Case Study of Pakistan and Bangladesh", *European Scientific Journal*, August, (2014): 283-293.
[272] Mubashar Hasan, "THE GEOPOLITICS OF POLITICAL ISLAM IN BANGLADESH." *Harvard Asia Quarterly* 14 (2012): 60-69.
[273] Christopher M. Larkins, "Judicial Independence and Democratization: A Theoretical and Conceptual Analysis." *The American Journal of Comparative Law* 44, no. 4 (1996): 606.
[274] Article 7(1) "All powers in the Republic belong to the people…".

Under the Sixteenth Amendment, the constitutional commitment to the separation of judiciary from the executive may be materialized a little since the entire cabinet resides amongst the parliamentarians. Notwithstanding any other safeguards adopted, only the independent commission consists of judges for the removal of superior judges may reduce the probability of political invasion on judiciary. It might either act alone or work jointly with the parliament. This accountability mechanism for judges will initially advance the functions of fair and impartial adjudication. However, eventually, it will signify the supremacy of the constitution[275], preserve the separation of powers among the three staple branches[276] and promote the implementation of fundamental rights of the people.[277] Without both the strong upper judiciary composing of independent judges, and well-structured of accountable mechanism, the aforesaid sacred constitutional impetus would be cumbersome. Therefore, a balanced removal model capable of applying substantive norms and invoking all fair trial proceedings, and uninhabited by political adversity is indispensable in Bangladesh for the eventual persuasion of constitutionalism[278].

The policy makers of the country while framing the rules of removing judges for the lack of accountabilities, they should act duly by observing their pledge of accountability to the people.[279] They, need to perceive the sense that all the branches are working for public good and their position is not to control rather to coordinate each other in undertaking their constitutional obligations. Consequently, an apolitically designed accountability mechanism against the senior judges and its objective practice will formalize the independence of judiciary and independent judiciary will ensure the credible and trustworthy performance of the government.



[275] Article 7(2) of Bangladesh Constitution.
[276] Articles 22, 26, 55, 65, 94(4), 107, 109 & 116A of Bangladesh Constitution.
[277] Articles 26, 27, 44 and 102 of Bangladesh Constitution.
[278] Hugh E. Willis, "The Doctrine of the Supremacy of the Supreme Court," *Ind. LJ* 6 (1930): 224-258, pp.225-227.
[279] Morris Christopher W. "The very idea of popular sovereignty: "we the people" reconsidered." *Social Philosophy and Policy* 17, no. 01 (2000): 7-8.

## Bibliography

### Books


1. Ahmed, N. "Parliamnet" in *Routledge Handbook of Contemporary Bangladesh.* edited by Ahmed Riaz and M Rahman New York: Routledge, 2016.
2. Akkas, S.A. *Independence and Accountability of Judiciary: A Critical Review*. Dhaka: Center for Rights and Governance, 2004.
3. Badie, Bertrand., Berg-Scholsser, Dirk, and Morlino, Lionardo. edited by *International Encyclopedia of Political Science, Vol. 5.* Los Angeles, London, New Delhi, Singapore, Washington D.C.: Sage Publications, 2011.
4. Berger, Raoul. *IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS.* Boston: Harvard University Press, 1974.
5. Burbank, Stephen B and Friedman, Barry. "Reconsidering Judicial Independence" In *Judicial Independence at the Crossroads: An Interdisciplinary Approach*. edited by Burbank, Stephen B and Friedman, Barry. London: SAGE Publications, 2002.
6. Das, Cyrus. "THE THREATS TO JUDICIAL INDEPENDENCE". In. *THE CULTURE OF JUDICIAL INDEPENDENCE.* edited bySHETREET, SIMON AND FORSYTH, CHRISTOPHER. Leiden; Boston: MartinusNijhoff Publishers, 2002.
7. Dubois, L. Philips. *From Ballot to Bench: Judicial Elections and the quest for Accountability.* Texas: University of Texas Press, 1980.
8. Evans, John. "Adjudicative Independence: Canadian Perspective". In *On Judicial and Quasi-Judicial independence.*edited by Suzanne Comtois, and Kars Jan Graff. Hague: Eleven International Publishing, 2013.
9. Friedland, Martin L. "Appointment, discipline and removal of Judges in Canada" in Lee, H.P. *Judiciaries in Comparative Perspective.* The UK: Cambridge University Press, 2011.
10. Friedland, Martin L. *A Place Apart: Judicial Independence and Accountability in Canada*. Ottawa, Canada: Canadian Judicial Council, 1995.
11. Friedland, Martin L. *A Place Apart: Judicial Independence and Accountability in Canada*. Canada: Canadian Government Publishing, 1995.
12. Gandhi, B.M. *V.D. Kulshreshtha's Landmarks in Indian Legal and Constitutional History*. Lucknow: Eastern Book Company, 2007.
13. Gerhardt, Michael J. *The Federal Impeachment Process: A Constitutional and Historical Analysis*. Chicago: University of Chicago Press, 2000.
14. Ginsburg, Tom and Dixon, Rosalind. (eds.) *Comparative Constitutional Law.* Northampton, USA: Edward Elgar Publishing, 2011.
15. Ginsburg, Tom. *Judicial Review in New Democracies: Constitutional Courts in Asian Cases*. New York: Cambridge University Press, 2003.
16. Guarneiri, Carlo and Piana, Daniela. "JUDICIAL INDEPENDENCE AND THE RULE OF LAW: EXPLORING THE EUROPEAN EXPERIENCE" in *THE CULRURE OF JUDICIAL INDEPENDENCE.* edited by Shetreet, Shimon and Forsyth, Christoper. Leiden; Boston: MartinusNijhoff Publishers, 2012.
17. Hoffer, Peter Charles, and Hull, N.E.H. *Impeachment in America 1635-1805*. New Heaven, CT: Yale University Press, 1984.
18. Hogg, P. *Constitutional Law of Canada.* Toronto: Carswell, 1977.

19. Hoque, R. "Courts and adjudication system in Bangladesh: in quest of viable reforms" in *Asian Courts in Context.*edited by Yeh, J-R and Chang, W-C. The UK: Cambridge University Press, 2014.
20. Huda, Shamsul, AKM. *The Constitution of Bangladesh Vol. II.*(Chittagong: Rita Court, 1997) 809.
21. Kaplan, William. *Bad Judgment*. Toronto: University of Toronto Press, 1996.
22. Kulshreshtha, V. D. and Malik, Shumit. *Landmarks in Indian Legal History and Constitutional History*. Lucknow, India: Eastern Book Company, 1975.
23. Locke, John. *The Second Treatise of Government*. New York: Bobbs-Merrill, 1952.
24. McLaren, John. DEWIGGED, BOTHERED, AND BEWILDERED: BRITISH COLONIAL JUDGES ON TRIAL, 1800-1900. Toronto: Osgoode Society for Canadian Legal History and University of Toronto Press, 2011.
25. McWHINNEY, EDWARD. *SUPREME COURTS AND JUDICIAL LAW-MAKING: CONSTITUTIONAL TRIBUNALS AND CONSTITUTIONAL REVIEW*. DORDECHT/ BOSTON/ LANCASTER: MARTINUS NIJHOFF PUB. 1986.
26. Morton, Lee Fredrick. *Law, Politics and Judicial Process in Canada.* Montreal: University of Calgary Press, 2002.
27. Morton, Lee Fredrick. *Law, Politics and the Judicial Process in Canada*. Montreal: University of Calgary Press, 1984.
28. Mutaleb, M.A., 'Bangladesh'. In *Judicial Independence*, edited by Shetreet, S. and Deschenes, J. Boston: MartinusNijhoff Publishers, 1985.
29. NoRm, KEllY and SEFAkoRAshiAGboR. *Political Parties and Democracy in Theoretical and Practical Perspectives: Developing Party Politics*, Washinton, D.C.: National Democratic Institute (NDI), 2011.
30. Puri, B.N., Chopra, P.N., Das, M.N. *A Comprehensive History of India: Ancient India, Mediaval India, Modern India V.3.* India: Sterling Publishers Pvt. Ltd. 2003.
31. R. Dworkin, *Law's Empire*, Cambridge: Mass- Belknap Press, 1986.
32. Rahman, Taiabur. *Parliamentary Control and Government Accountability in South Asia: A comparative analysis of Bangladesh, India and Sri Lanka.* London and New York: Routledge, 2008.
33. Russell, Peter H. "Toward a General Theory of Judicial Independence" In *Judicial independence in the age of democracy: Critical perspectives from around the world*, edited by Russell, Peter H. and David M. O'Brien. Virginia: University of Virginia Press, 2001.
34. Shapiro, Martin. "Judicial Review in Developed Democracies". In *Democratization and the Judiciary: The Accountability Function of Courts in New Democracies.* Edited by Gloppen, Siri, Gargarella, Roberto and Skaar, Elin. London: Frank Cass, 2004.
35. Shetreet, Shimon and McCormack, Wayne. *The Culture of Judicial independence in the Globalised World.* Leiden; Boston: Brill Nijhoff, 2016.
36. Shetreet, Shimon. *Judges on Trial.* New York: North-Holland, 1976.
37. Smelcer, Susan Navarr. *Role of the Senate in Judicial Impeachment Proceedings.* US: DIANE Publishing, 2010.
38. Smelcer, Susan Navarro. *The Role of the Senate in Judicial Impeachment Proceedings: Procedure, Practice, and Data*. US: Congressional Research Service, 2010.
39. Tarique, Mohammad. *Modern Indian History*. New York: Tata-McGraw Hill Education, 2007.

40. Tarr, G. Alan. *Without Fear or Favor: Judicial Independence and Accountability in the States*. California: Stanford University, 2012.
41. Venkataramanaiah. V. *Essays on Constitutional Law*. New York: State Mutual Book & Periodical Service, Limited, 1990.
42. Waltman, Jerold and Holland, Kenneth M. (ed.) *The Political Role of Law Courts in Modern Democracies.* USA: Palgrave and McMillan, 1988.
43. White, G. Edward. *The American judicial Tradition: Profiles of American Leading Judges.* New York, Oxford: Oxford University Press, 1988.

**Journal Articles**

1. Arnot, Raymond H. "The Judicial System of the British Colonies." *The Yale Law Journal* 16, no. 7 (1907): 504-13.
2. Atchinson, Amy B., Lawrence Tobe Liebert, and Denise K. Russell. "Judicial Independence and Judicial Accountability: A Selected Bibliography." *S. Cal. L. Rev.* 72 (1998): 723-810.
3. Barr, Carl. "The Emergence of the Judiciary as an Institution". *Journal of Judicial Administration* 8 (1999) 216-239.
4. Bermant, Gordon, and Russell R. Wheeler. "Federal Judges and the Judicial Branch: Their Independence and Accountability." *Mercer L. Rev.* 46 (1995): 835-1575.
5. Binnie, Ian. "Judicial Independence in Canada." *Observatório da JurisdiçãoConstitucional* 1, no. 1 (2010)1-34.
6. Burbank, Stephen B. "Judicial Independence, Judicial Accountability, and Interbranch Relations." *Geo. LJ* 95 (2006): 909-927.
7. Burke, Louis H. "Judicial Discipline and Removal-The California Story." *J. Am. Jud. Soc.* 48 (1964):167-172.
8. Carrington, Paul D. "Judicial independence and democratic accountability in highest state courts." *Law and contemporary problems* 61, no. 3 (1998): 79-126.
9. Charles Gardner Geyh. "Rescuing Judicial Accountability from the Realm of Political Rhetoric." *Case Western Reserve Law Review* 56, no. 4 (2006): 911-935.
10. Chowdhury, Md. Yasin Khan. "Removal of Judges under 16th Amendment of Bangladesh Constitution: A Euphemism to Curb on Judiciary", *DIU Journal of Humanities and Social Science*, 3 (2015): 89-102
11. Christopher W. "The very idea of popular sovereignty:"we the people" reconsidered." *Social Philosophy and Policy* 17, no. 01 (2000): 1-26.
12. Cole, Charles D. "Judicial Independence in the United States Federal Courts." *J. Legal Prof.* 13 (1988): 183-204.
13. Contini, Francseco, and Richard Mohr. "Reconciling independence and accountability in judicial systems." *Utrecht L. Rev.* 3 (2007): 26-43.
14. Cox, Archibald. "The Independence of the Judiciary: History and Purposes." *University of Dayton Law Review* 21.3 (1996): 565-584.
15. D'Amato, Anthony. "The ultimate injustice: when a court misstates the facts." *Cardozo L. Rev.* 11 (1989): 1313-1348.
16. Dawood, Muhammad, "The Causes of Military Interventions in Politics: A Case Study of Pakistan and Bangladesh", *European Scientific Journal*, August, (2014): 283-293.

17. Ervin, Sam J. "Separation of Powers: Judicial Independence." *Law and Contemporary Problems* 35, no. 1 (1970): 108-127.
18. Fallon Jr, Richard H. "Legitimacy and the Constitution." *Harvard Law Review* (2005): 1787-1853.
19. Feerick, John D. "Impeaching Federal Judges: A Study of the Constitutional Provisions." *Fordham L. Rev.* 39 (1970): 1-58.
20. Ferejohn, John. "Independent judges, dependent judiciary: explaining judicial independence." *S. Cal. L. Rev.* 72 (1998): 353-384.
21. Ferejohn, John. "Independent judges, dependent judiciary: explaining judicial independence." *S. Cal. L. Rev.* 72 (1998): 353-384.
22. Gélinas, Fabien. "Judicial Independence in Canada: A Critical Overview." *Judicial Independence in Transition*. Springer Berlin Heidelberg, (2012): 567-600.
23. Gerhardt, Michael J. "Rediscovering Nonjusticiability: Judicial Review of Impeachments After Nixon." *Duke Law Journal* 44, no. 2 (1994): 231-276.
24. Geyh, Charles Gardner. "Rescuing Judicial Accountability from the Realm of Political Rhetoric." *Case Western Reserve Law Review* 56, no. 4 (2006): 911-935.
25. Geyh, Charles Gardner. "The Dimensions of Judicial Impartiality." *Fla. L. Rev.* 65 (2013): 493-552.
26. Gloppen, Siri. "5. Courts, corruption and judicial independence." *Corruption, Grabbing and Development: Real World Challenges* (2013): 68-79.
27. Gur-Arie, Mira, and Russell Wheeler111. "F. Judicial Independence in the United States: Current Issues and Relevant Background Information." *Center for State Courts* 25, no. 2 (1999). 133-147.
28. Hadfield, Gillian K. "Judicial Competence and the Interpretation of Incomplete Contracts." *The Journal of Legal Studies* 23, no. 1 (1994): 159-84.
29. Hahn, Gordon M. "Managed democracy? Building stealth authoritarianism in St. Petersburg." *DEMOKRATIZATSIYA-WASHINGTON*- 12, no. 2 (2004): 195-232.
30. Hasan, Mubashar. "THE GEOPOLITICS OF POLITICAL ISLAM IN BANGLADESH." *Harvard Asia Quarterly* 14 (2012): 60-69.
31. Hayo, Bernd, and Stefan Voigt. "Explaining de facto judicial independence." *International Review of Law and Economics* 27, no. 3 (2007): 269-290.
32. Holloman, John H. "The Judicial Reform Act: History, Analysis, and Comment." *Law and Contemporary Problems* 35, no. 1 (1970): 128-150.
33. Islam, M.M. "The Politics behind the Passage of Fourth Amendment to the Constitution of the People's Republic of Bangladesh and Its Provisions: A Modest Analysis." *Public Policy and Administration Research*, 4-9 (2014) 55-57.
34. Kang, Michael S., and Joanna Shepherd. "The Long Shadow of Bush V. Gore: Judicial Partisanship in Election Cases." *Stanford Law Review* 69 (2016). 1411-1452.
35. Kate Malleson, *The New Judiciary*. London: Ashgate, Aldershot, 1999.
36. Landes, William M., and Richard A. Posner. "The independent judiciary in an interest-group perspective." *The Journal of Law and Economics* 18, no. 3 (1975): 875-901.
37. Larkins, Christopher M. "Judicial Independence and Democratization: A Theoretical and Conceptual Analysis." *The American Journal of Comparative Law* 44, no. 4 (1996): 605-26.
38. Law, David S. "A theory of judicial power and judicial review." *Georgetown Law Journal* 97 (2009): 723-801.

39. Le Sueur, Andrew. "Developing Mechanisms for Judicial Accountability in the UK." *Legal Studies* 24.Issues 1-2 (2004): 73-98.
40. Lubet, Steven. "Judicial discipline and judicial independence." *Law and contemporary problems* 61, no. 3 (1998): 59-74.
41. Matlosa, Khabele, and Victor Shale. "Impact of floor-crossing on party systems and representative democracy: the case of Lesotho." In *a Workshop on 'Impact of Floor Crossing on Party Systems and Representative Democracy in Southern Africa,'Co-hosted by EISA and KAS, The Vineyard Hotel, Cape Town, South Africa*, vol. 15. 2006.
42. Melton, Buckner F. Jr. "Federal Impeachment and Criminal Procedure: The Framers' Intent." *Maryland Law Review* 52.2 (1993): 437-457.
43. Randazzo, Kirk, Douglas M. Gibler, and Rebecca Reid. "Examining the Development of Judicial Independence."*Political Research Quarterly* 69-3 (2015) 583-593.
44. Rasmusen, Eric. "Judicial Legitimacy as a Repeated Game." *Journal of Law, Economics, & Organization* 10, no. 1 (1994): 63-83.
45. Redish, Martin H. "Judicial Discipline, Judicial Independence, and the Constitution: A Textual and Structural Analysis." *S. Cal. L. Rev.* 72 (1998): 673-706.
46. Robertson, Geoffrey QC. "Judicial Independece: Some Recent Cases" International Bar Association's Human Rights Institute (Thematic Paper 4).
47. Schoenbaum, Edward J. "A Historical Look at Judicial Discipline." *Chicago-Kent Law Review* 54.1 (1977): 1-28.
48. Shaman, Jeffrey M. "Bias on the Bench: Judicial Conflict of Interest." *Georgetown Journal of Legal Ethics* 3.2 (1989): 245-290.
49. Shaman, Jeffrey, "Introduction (Issue on Judicial Conduct, Discipline and Independence), 69 Judicature 64 (1985)." (1985). *College of Law Faculty Publications.* Paper 399.
50. Shane, Peter M. "Interbranch Accountability in State Government and the Constitutional Requirement of Judicial Independence." *Law and Contemporary Problems* 61, no. 3 (1998): 21-54.
51. Shane, Peter M. "Who May Discipline or Remove Federal Judges? A Constitutional Analysis." *University of Pennsylvania Law Review* 142, no. 1 (1993): 209-242.
52. Slaughter, Louise (United States Representative) "Supreme Unaccountability: The Nine Federal Judges to Whom No Code of Ethics Applies" *Stanford Law & Policy Review*, accessed on January 01, 2017, https://journals.law.stanford.edu/stanford-law-policy-review/online/supreme-unaccountability-nine-federal-judges-whom-no-code-ethics-applies#fn1
53. Stolz, Preble. "Disciplining Federal Judges: Is Impeachment Hopeless?." *California Law Review* 57, no. 3 (1969): 659-670.
54. Sutherland, S. L. "Responsible Government and Ministerial Responsibility: Every Reform Is Its Own Problem." *Canadian Journal of Political Science / Revue Canadienne De Science Politique* 24, no. 1 (1991): 91-120.
55. Tushnet, Mark. "The possibilities of comparative constitutional law." *The Yale Law Journal* 108, no. 6 (1999): 1225-1309.
56. Vermeule, Adrian. "The Constitutional Law of Official Compensation." *Columbia Law Review* 102, no. 2 (2002): 501-38.
57. W. P. M. K. "Removal and Tenure of Judges." *The University of Toronto Law Journal* 6, no. 2 (1946): 463-67.

58. Willis, Hugh E. "The Doctrine of the Supremacy of the Supreme Court." *Ind. LJ* 6 (1930): 224-258.

**Articles from newspapers or popular magazine**

1. Liton, Shakhawat. "Justice Manik and image of Judiciary." In *The Daily Star, Bangladesh*, September 21, 2015. Accessed on December, 22, 2016. http://www.thedailystar.net/frontpage/justice-manik-and-image-judiciary-146344.
2. Mannan, Sadiat. "Striking balance between the parliament and judiciary." In *The Daily Star, Bangladesh*, October, 20, 2014. Accessed on March 03, 2017. http://www.thedailystar.net/parliament-and-judiciary-striking-a-balance-46452.
3. Rahman, Anisur. "16th Amendment of Bangladesh Constitution: Another View" The Daily Star, Bangladesh. September 23, 2014.

**Reports**

1. Commonwealth Secretariat. *1996 Meeting of Commonwealth Law Ministers, Memoranda.* London: Commonwealth Secretariat, 1996.
2. Court. Julius, Hyden, Goran, and Mease, Ken. "The Judiciary in and Governance in 16 Developing Countries." *World Governance Survey Discussion Paper* 9. Prepared in May 2003. Accessed November 28, 2016. https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/4108.pdf.
3. *Guide to Congress* (Washington: CQ Press, 2012).
4. *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers* (New York, Geneva: United Nations, 2003).
5. Judicial Accountability" mentioned in The Appointment, *Tenure, and Removal of Judges under Commonwealth Principles: A Compedium and Analysis of Best Practice* (London: British Institute of International and Comparative Law, 2015) 79.
6. The Judicial Appointments Annual Report (2000-2001) prepared by Lord Chancellor's Department in the UK.
7. The Report of 2003 prepared by American Bar Association.
8. The Venice Commission Report, 2010 on the Independence of Judicial System.
9. The Venice Commission Report, 2010 on the Independence of Judicial System.
10. The Year End Report of the Federal Judiciary, the US, 2011.

**International Principles/Agreements/Declarations/Conventions**

1. The American Convention of Human Rights, 1969.
2. The International Bar Association (IBA) Minimum Standard, 1982.
3. The Universal Declaration on the Independence of Justice, 1983.
4. The United Nations Basic Principles on the Independence of Judiciary, 1985.
5. The Beijing statement of Principles of the Independence of the Judiciary in the LAWASIA Region, 1995.
6. The Bangalore Principles on Judicial Conduct, 2002.
7. The Commonwealth Principles on March 12, 2004 (modified in 2009), for determining the relations among the parliament, judiciary and the executive for the member states.

8. The Commonwealth (Latimer House) Principles, 2009.

**Websites**

1. Bangladesh Supreme Court Website for the judgment given by the High Court Division of Bangladesh Supreme Court, accessed on December 24, 2016. http://www.supremecourt.gov.bd/resources/documents/783957_WP9989of2014.pdf.
2. International Commission of Jurist. *Bangladesh: ICJ urges Parliament to ensure laws governing impeachment of Supreme Court judges respect the independence of Judiciary* (September24, 2014). Accessed on http://www.courts.gov.bc.ca/about_the_courts/Judicial%20Independence%20Final%20Release.pdf.
3. Supreme Court of British Colombia, *Statement on Judicial Independence*, March 15, 2012, Access on February 04, 2017.
4. Website of Amar desh, http://amardesh.com/electionHome.php. Accessed on December 23, 2016.

.