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Can the Court Invalidate an Original Provision of the Constitution?

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Instead of investigating whether judges can invalidate 'unconstitutional constitutional amendments', this article seeks to inquire into how far a court can go in invaliding an amendment or how it interprets the constitution in that exercise. This article analyzes the recent decision of the High Court Division (HCD) in relation to the case of Asaduzzaman Siddiqui and others v. Bangladesh (2016), in which a majority declared unconstitutional the sixteenth amendment to the Constitution that restored an original constitutional scheme regarding the removal of Supreme Court judges. As the decision is now on appeal before the Appellate Division of the Supreme Court, this article argues that the court's decision in Siddiqui cannot be taken as an authority on the interpretations of the constitutional issues involved.

Introduction

The title of this article raises a perplexing question about the extent of judicial review power over original provisions of the constitution. The phenomenon of judicial invalidation of constitutional amendments has indeed become fairly trendy and there are many instances of such judicial invalidation across the world. The more crucial question, therefore, is not whether judges can invalidate 'unconstitutional constitutional amendments', but rather how far a court can go in invaliding an amendment or how it interprets the constitution in that exercise? Despite the trend, it would be too much to claim that judicial review of constitutional amendments has turned out to be a universal principle of

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The reader might be interested in the developments in this regard even in the United Kingdom where there arguably is no written constitution and the courts lack capacity to strike down an Act of Parliament. In a recent decision, the UK Supreme Court suggested that the UK system has certain 'constitutional fundamentals' that 'even a sovereign Parliament' cannot abolish. See Jackson v. Attorney General, 2006, 1 AC 262.UK Supreme Court, per Lord Steyn.

constitutionalism. This institution, by contrast, has more opponents than admirers, while many constitutional philosophers persistently consider the very idea of judicial review as an affront to democracy.[3]

Despite the constitution's silence in this regard, the judicial reviewability of constitutional amendments became entrenched in Bangladesh as a rule of constitutional law through the Appellate Division's famous 1989 decision in the *Eighth Amendment Case*.[4] A plurality Court there held that the Parliament by exercising its "derivative" constituent power cannot amend the Constitution in a way that destroys its basic structure. By this, the Court established the 'basic structure doctrine,'[5] which continues to remind us that constitutional law is not a set of mundane legal texts but rather about attaining a dynamic institutional balance among the organs of the State in light of both texts and history/political culture of the polity. The *Eighth Amendment* decision also serves as a pointer to the supra-constitutionality of "original constituent power" in that the impugned amendment to establishpermanent benches of the unitary High Court Division (HCD) was considered incompatible with the Constitution.

The present article is concerned with the HCD's recent decision in *Asaduzzaman Siddiqui and Others v. Bangladesh*,[6] in which a majority court declared unconstitutional the sixteenth amendment to the Constitution[7] that restored an original constitutional scheme regarding the removal of Supreme Court judges.

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[1] See, e.g., Jeremy Waldron, "The Core of the Case against Judicial Review," *Yale Law Journal* 115(6) (2006) 1346-1406.; Adam Tomkins, "In Defence of the Political Constitution", *Oxford Journal of Legal Studies*, 22 (2002)157-175.; and Gertrude Lubbe-Wolf, "Constitutional Courts and Democracy. Facets of an Ambivalent Relationship", in *Rational Lawmaking under Review: Legisprudence According to the German Federal Constitutional Court*, ed. K. Meberschmidt and AD Oliver-Lalana. (Springer, 2016) 19-32 (focusing on "the ambivalence of judicial review as a safeguard for and constraint on democracy").There are both implications and limitations of the judicial review of constitutional amendments vis-à-vis democracy. See David Landau,"Abusive Constitutionalism", *UC Davis Law Journal* 47 (2013) 189-260.

[4] *Anwar Hossain Chowdhury v. Bangladesh* (1989) BLD (Special) (AD) 1.

[5] In some other jurisdictions this is known as "constitutional replacement doctrine". See, e.g., Bernal Carlos,"Unconstitutional Constitutional Amendments in the Case Study of Colombia: An Analysis of the Justification and Meaning of the Constitutional Replacement Doctrine,"*International Journal of Constitutional Law* 11(2)(2013) 339-357.

[6] Writ Petition No. 9989 of 2014, judgment of 5 May 2016, *per* Moyeenul Islam Chowdhury and Quazi Reza-Ul Hoque JJ (M. Ashraful Kamal J dissenting). The case has been heard for 18 days (from 28 May 2015 to 10 March 2016). The judgment *(hereafter "Sixteenth Amendment Case")* is available at:<http://supremecourt.gov.bd/resources/documents/783957_WP9989of2014.pdf>. Accessed 18 September 2016.

[7] The Constitution (Sixteenth Amendment) Act 2014 (Act No. XIII of 2014).

The decision is now on appeal to the Appellate Division, and, therefore, the High Court Division's decision in *Siddiqui* cannot be taken as an authority on the interpretations of the constitutional issues involved.

Removal of the Supreme Court Judges and the Sixteenth Constitutional Amendment

The original Constitution (1972) of Bangladesh provided, in article 96(2), for the removal of a Supreme Court judge by an order of the President passed pursuant to a resolution of Parliament passed by a two-third majority and only on the ground of proven misbehaviour or incapacity. Before this provision was ever tested, the fourth amendment to the Constitution (1975) had written it off, making the judges removable without any legal process, that is, merely by an order of the President.[8] In August 1975, the Constitution itself was thwarted and a lingering period of extra-constitutional regimes installed. The first military regime extra-constitutionally amended the judicial removal clause to introduce a peer-driven removal process,[9] which was later affirmed by the Fifth Amendment (1979).[10] The new system made the judges removable by the President upon the recommendation of the Supreme Judicial Council *(hereafter* 'SJC') that was to be consisted of the Chief Justice of Bangladesh and the two most senior judges of the Appellate Division of the Supreme Court.

The Fifth Amendment that approved the provisions relating to the SJC was struck down, by the Appellate Division in 2010. Earlier in 2005, the High Court Division in the *Fifth Amendment Case*[11] controversially approved the validity of the SJC, although it invalidated most constitutional changes that were affirmed by the impugned amendment. This 'pick and choose' technique while adjudicating the validity of a constitutional amendment, which the Court thought even Parliament did not have authority to enact, probably suggests that the Court was inspired by its own value preference as to the removal process. The Court even used the term "condoned" when approving certain constitutional changes - a typology that arguably displays a supremacist voice. On appeal, the Appellate Division too initially "condoned" the amendment of article 96(2), that is, the process of judicial

[8] See s. 14 of the Constitution (Fourth Amendment) Act 1975 (Act II of 1975) (25 Jan. 1975), which replaced clause (2) of article 96.
[9] See the Second Proclamation (Tenth Amendment) Order, 1977 (Second Proclamation Order No. 1 of 1977).
[10] The Constitution (Fifth Amendment) Act 1979 (Act No. 1 of 1979) (according constitutional protection to the first martial law regime (20 August 1975 to 9 April 1979) and its actions and laws).
[11] *Bangladesh Italian Marble Works Ltd v.Bangladesh* (2006) BLT (Special) (HCD) 1. (Judgment 29 August 2005).

removal through the Supreme Judicial Council.[12] In its review decision of 29 March 2011, however, the Appellate Division modified the main judgment, subjecting its approval to the SJC to be valid provisionally and until 31 December 2012. [13]

The *Fifth Amendment* decision was politically consequential, and the government chose to enact the fifteenth amendment to remedy its consequences.[14] Interestingly, however, the fifteenth amendment, although enacted after the Appellate Division's review decision, did not do away with the SJC. It is the sixteenth amendment of 2014 that replaced the SJC and restored the original scheme of parliamentary removal of Supreme Court judges upon proven misconduct or incapacity.[15] It is interesting that this amendment is not that benign as it purports to be. Like most other constitutional amendments, the sixteenth amendment too has a story of self-serving politics of the amending regime. A couple of years before the sixteenth amendment passed the Parliament, senior political leaders threatened in Parliament that they would restore the power of Parliament to remove the judges of the Supreme Court. There emerged a tug of war between a particular judge of the HCD and the Speaker of the Parliament when the latter commented in the Parliament that the judges were quite prompt in issuing decisions that concerned their own stake. It all centered around a decision of the HCD that involved the release of a government-owned property in favour of the Supreme Court. The judge who was the leading judge in the concerned decision countered the Speaker's comment and warned that the comment might even be regarded as seditious. This sparked a fierce debate in Parliament regarding the alleged breach of the Constitution by the judge in question. Following further judicial and parliamentary exchanges on this, the issue

[12] *KhondkerDelwar Hossain v. Bangladesh Italian Marble Works Ltd.* (2010) 62 DLR (AD) 298.

[13] Civil Review Petition Nos. 17-18 of 2011. The Attorney General argued that this modified judgment meant that the Court allowed time to "the Parliament to make necessary amendment to the Constitution". *Sixteenth Amendment decision*, above n. 5, at p. 36.

[14] The Constitution (Fifteenth Amendment) Act 2011 (Act XIV of 2011).

[15] The amended article 96(2) provides that "A judge shall not be removed from his office except by an order of the President passed pursuant to a resolution of Parliament supported by a majority of not less than two-thirds of the total number of members of Parliament, on the ground of proved misbehaviour or incapacity". Clause (3) of article 96 provides as follows: "Parliament may by law regulate the procedure in relation to a resolution under clause (2) and for investigation and proof of the misbehaviour or incapacity of a Judge". See section 2 of Sixteenth Amendment Act, above n. 6.

seemingly became lost.[16] It is in this background that the sixteenth amendment was enacted.

Parliamentary Model of Judicial Removal and the Sixteenth Amendment Case

In *Asaduzzaman Siddiqui and Others v. Bangladesh,* the precise issue for the Court was whether the provision for removal of Supreme Court judges through a parliamentary process was compatible with the notion of judicial independence. The majority Court's answer to this central question was in the affirmative. The Court proceeded with the undisputed premise that the independence of the judiciary is an essential feature of the Bangladeshi Constitution ("basic structure"), which is thus impervious to a constitutional amendment by Parliament. The main rationale for the invalidation of the sixteenth amendment, that is the process of parliamentary removal of judges of the Supreme Court, was that the impugned amendment created an opportunity for Parliament to exert pressure on the judges[17] and hence incompatible with the basic structure of the Constitution. The Court sought to read into constitutional interpretations of the existing political culture in Bangladesh and the fact that, because of the Constitution's anti-defection rule in article 70, members of Parliament would be unable to freely exercise their minds when deciding on a proposal to remove a judge.

As explained below, the Court in the *Sixteenth Amendment Case* has taken too far the possibility of abuse of the restored original constitutional provisions regarding the removal of judges on the ground of proved incapacity or misconduct. Eventually, this decision led to the marginalization, indeed defiance, of the founding principles of the Constitution of Bangladesh in regard to judicial removal.

[16] To pacify the situation, the Speaker made a ruling in this regard that was remarkably wisdom-inspired and politically pragmatic. The Speaker's ruling was nevertheless challenged in the High Court Division on the ground that the ruling concerning a judge/judgment was unconstitutional despite article 78(1) of the Constitution that exempted the "validity of the proceedings in Parliament" from judicial review. In *A.K.M. Shafiuddin v. Bangladesh* (2012) 64 DLR (HCD) 508 (decision of 24 July 2012), the HCD refused to accept the challenge but unprecedentedly made a lengthy rejection decision. The Court effectively held that the ruling of the Speaker was unlawful and against the principles of separation of power and the independence of judiciary.

[17] *Sixteenth Amendment Case,* above n. 5, at p. 140 ("a sort of situation has been created to dominate the higher Judiciary in an indirect manner").

A particularly interesting aspect of this case has been the unconstitutionality arguments advanced by two *amici curiae*- Dr. Kamal Hossain and Mr. M. Amir-Ul Islam - who happened to be, respectively, the Chairman and a member of the Constitution Drafting Committee that proposed the original article 96(2). What is it in the restored judicial removal clause that made these two drafters of the Constitution to argue against the system that they recommended for the Constituent Assembly to adopt? Mr. Islam suggested that in 1972 "there was no other option" but to entrust the Parliament with power to remove judges on proven misbehaviour. Mr. Islam further submitted that they would not have recommended the same system today, and that "the historical perspective" together with "our experience and judicial observations in various cases" point to the view that the argument of restoration of article 96(2) is "not a plausible argument in the present scenario of Bangladesh".[18] Mr. Islam did not, however, mention that parliamentary process of removing judges has never been tested in Bangladesh and hence we did not have any bad experience in this particular regard. On the other hand, Dr. Hossain argued that the sixteenth amendment has rendered the tenure of the judges "insecure" by subjecting them "to the whims and caprices of the Members of Parliament" and thereby creating "an opportunity to undermine the independence of the Judiciary".[19] His consequential argument was that the sixteenth amendment is, therefore, violative of articles 94(4) and 22 of the Constitution. It needs to be mentioned that these provisions which Dr. Hossain argued have been breached by the sixteenth amendment and were all present in the original Constitution alongside article 96(2). Dr. Hossain's argument did not explain how the restored article 96(2) has become 'unconstitutional' later, particularly when there were no constitutional legislative improvements on the provisions concerning the independence of the judiciary on the basis of which to judge the validity of the change.

The Court seems to have placed a lot of weight on the arguments of the two learned counsels, leaving thereby a question of the proper method of finding out the "original intention" of the framers of the Constitution. Another amicus curiae, Mr. Ajmalul Hossain, began acknowledging that it would be an "uphill job" for him to assail the amendment as it restored an original provision of the Constitution. Mr. Hossain however assailed the amendment indirectly on the grounds that it might entail the Member of Parliament (MPs) in the abuse of their

[18] *Sixteenth Amendment Case,* above n. 5, at pp. 46-47.
[19] *Sixteenth Amendment Case,* above n. 5, at p. 42.

power in removing judges from office, and that the amendment was a "colourable piece of legislation" and thus defeated "public interest".[20]

It is quite arguable that the sixteenth amendment power has the potential of abuses in the future. As indicated above, this is also true that like the other amendments to the Constitution, sixteenth amendment is underpinned by selfish party-motivations of the amending regime.[21] However these factors do not unmake the truth that the parliamentary process of judicial removal is what the people of Bangladesh enacted into the Constitution through the exercise of their original constituent power. Importantly, all the above arguments against the impugned amendment are in effect based on an apprehension of abuse of a constitutional provision, an apprehension that might not actually occur. Moreover, there is a chance to mitigate the perceived apprehension by predicating the parliamentary removal scheme on the recommendations of an independent, peer-driven commission or a body.

Seen from this perspective, the most logical argument seems to come from the fourth amicus curiae, Mr. Rokanuddin Mahmud, who argued that there was nothing unconstitutional with the sixteenth amendment and that whether or not the judicial independence was compromised by this amendment turned on the legal mechanism, to be developed by an Act of parliament, to assess the allegations of misbehaviour against judges. Although he viewed the impugned amendment as constitutional, Mr. Mahmud strongly supported the peer-trial of allegations of judicial misconduct or incapacity as the best method.[22] This stance seems to be a pragmatic response to the constitutionality challenge against the parliamentary mechanism of judicial removal, because an Act of Parliament pursuant to the amended article 96(3) of the Constitution can still introduce a peer-trial process to evaluate allegations of incapacity or misconduct against judges.[23]

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[20] *Sixteenth Amendment Case,* above n. 5, particularly at p. 47 and p. 51.

[21] On politics of constitutional amendments in Bangladesh see, Adeeba A. Khan,"The Politics of Constitutional Amendments in Bangladesh: The Case of the Non-political Caretaker Government," *International Review of Law* 9 (2015) 1-16. See further, Salma Akhter, *Amendments to the Constitution of Bangladesh* 1973-2011: *Background, Politics and Impacts.* Unpublished MPhil Thesis, (Dhaka: University of Dhaka, Department of Political Science, 2016).

[22] *Sixteenth Amendment Case,* above n. 5, at p. 47.

[23] The government has already drafted a bill to provide for the mechanism of proving allegations of misconduct against judges, and deliberations and consultations regarding the suitability of the mechanism are currently in place.

The Attorney-General argued that the original article 96(2) of the Constitution was enacted by the Constituent Assembly in exercise of its constituent power and the Sixteenth Amendment has simply restored that original provision, which cannot therefor be considered invalid.[24] This has been an argument of high legal value, but the Attorney-General seems to be not taking this argument further. The Attorney-General could have argued that there is virtually no instance globally of judicial invalidation of original constitutional provisions. It is relevant here to note that there seems to be only one rare instance of judicial invalidation of original provisions of the constitution, coming from Honduras.[25] The Honduran Constitution of 1982 limited presidential term and made the prohibition of President's re-election an unamendable clause.[26] In the wake of politicization of the judiciary, the Constitutional Chamber of Honduran Supreme Court in a recent decision annulled the original constitutional provisions that prohibited presidential re-election.[27] Commentators critiqued this decision as "troubling" and also as an instance of "abusive constitutionalism" by the judiciary.[28]

Based on the principle of popular supremacy enshrined in article 7(1), the Attorney-General also made a consequential argument that the sixteenth amendment sought to comply with the notion that judges are "accountable to the people through their representatives". This latter argument was not strategically a practical argument in the sense that judges in Bangladesh have in the past generally showed reluctance to engage with the important issue of judicial accountability to the people. In this case too, as a response to this argument, the Court remarked that "nowhere in [the] Constitution there is a provision to the

[24] *Sixteenth Amendment Case,* above n. 5, at p. 36.

[25] As far as my knowledge goes, this had been the only instance of judicial trumping of original constituent power. There was a case in Nicaragua, similar in effect to that of Honduran case, but in that case the constitutional provisions limiting Presidential re-election were inserted into the Nicaraguan Constitution through an amendment. *Ortega et al. v. the Supreme Electoral Council of the Republic of Nicaragua,* (Case No. 602-09, in the Amparo Writ), Supreme Court of Justice of Nicaragua, 19 October 2009 (http://content.glin.gov/summary/224071.)

[26] See, respectively, articles 239 and 274 of the Constitution of Honduras 1982.

[27] In a unanimous decision of 22 April 2015, available (in Spanish) at:<http://www.poderjudicial.gob.hn/Documents/FalloSCONS23042015.pdf>. Affirmed by the full Supreme Court of 15 judges by an Order of 19 August 2016.

[28] See David Landau and Brian Sheppard, "The Honduran Constitutional Chamber's decision erasing presidential term limits: Abusive constitutionalism by judiciary?,"*International Journal of Constitutional Law Blog,* May 2015. Available at: <http://www.iconnectblog.com/2015/05/the-honduran-constitutional-chambers-decision-erasing-presidential-term-limits-abusive-constitutionalism-by-judiciary>. Accessed: 10 September 2016.

effect that the Judiciary shall be responsible or accountable to the Parliament". [29] In a questionable counter-argument, the Court said that even if they were to accept the argument of judicial accountability to the people, "that accountability may be rendered to their appointing authority, that is to say, the President of the Republic" because, it was argued, the President was too an elected representative of the people. This line of thinking from a constitutional court undertaking the task of constitutional interpretation in a direct or parliamentary democracy is, at its best, polemic, and is seemingly deficient in a proper understanding of popular sovereignty. That this is so evident in the language and the sweeping comments that the Court next made. It held as follows:

> *"In our opinion, the poking of the nose of the Parliament into the removal process of the Judges of the Supreme Court by virtue of the sixteenth amendment is violative of the doctrine of separation of powers among the 3(three) organs of the State. [...] The rule of law will certainly get a serious jolt by the sixteenth amendment. In fact, the sixteenth amendment is hanging like a Sword of Damocles over the heads of the Judges of the Supreme Court of Bangladesh threatening their independence in the discharge of their judicial functions. So the Sword of Damocles must be removed by this Court."* [30]

By supporting this sort of judicial accountability, the Court was trying to justify the method of judicial removal by the President on the recommendation of the Supreme Judicial Council (SJC). In so doing, what the Court did not consider is that in a system in which there is no independent judicial appointments commission to recommend appointment of Supreme Court judges, the method of judicial removal through the SJC of three judges may be ingeniously abused by the judges' appointing authorities. Least attractive was the Court's rebuttal of the argument that they lacked power to invalidate a provision of the Constitution enacted in the exercise of the people's original "constituent power". The Court refused to see the sixteenth amendment as an exercise of the original constituent power, taking it as merely expressive of 'derivative' constituent power. To better understand the fallacy of the Court's reasoning (or lack of it), it is beneficial to cite its words:

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[29] *Sixteenth Amendment Case,* above n. 5, at p. 144.
[30] *Sixteenth Amendment Case,* above n. 5, at pp. 144-145, per Chowdhury J (emphasis mine).

> *It is true that the provisions of Article 96 of the Constitution as framed by the Constituent Assembly were restored (as is often called) by the sixteenth amendment. But by the same token, it should be borne in mind that [article 96] as framed by the Constituent Assembly lost its original identity and character with the enactment of the Constitution (Fourth Amendment) Act, 1975. In the present case, we are not examining the constitutionality of the Fourth Amendment of the Constitution which, inter alia, took away the Parliament's power of the removal of the Judges of the Supreme Court and vested the same absolutely in the hands of the President. Anyway, it may be reiterated that in the Fifth Amendment Case, the Appellate Division condoned the provisions relating to the Supreme Judicial Council and our Parliament accepted and incorporated the same in Article 96 through the Constitution (Fifteenth Amendment) Act, 2011. [Therefore,] ... the Chief Justice-led Supreme Judicial Council cannot be stigmatized as a legacy of the Martial Law regime of General Ziaur Rahman.*[31]

An analysis of the above observation is due here. The Court evidently conceded to the view that an original provision framed by the Constituent Assembly lost its character because of the fourth amendment. What is troubling is that the Court impliedly endorsed the legitimacy and validity of this fundamental change regarding the removal of Supreme Court judges although it said that it was not going to determine the fourth amendment's constitutionality. This implication is supported by the Court's comment that the changed process of judicial removal wasendorsed by the Appellate Division in the Fifth Amendment Case through a 'condonation' of the provisions relating to the Supreme Judicial Council. This is highly contradictory as it became clear in the course of hearing that the Appellate Division in its review decision in the *Fifth Amendment Case withdrew* its earlier endorsement of the SJC. When the Court's attention was drawn to this fact of the latest opinion of the Appellate Division, the Court argued that the Appellate Division in the main *Fifth Amendment* decision viewed the provisions relating to the peer-driven mechanism of judicial removal as more "transparent" and protective of independence of the Judiciary.

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[31] *Sixteenth Amendment Case,* above n. 5.

The plurality in this sixteenth amendment decision did not explain at all how this earlier view of the Appellate Division about the appropriateness of the SJC-provisions would trump over its clear directive in a later decision to remove the unconstitutionality, in the context of the fifth amendment, of the provisions of the SJC.[32] A more interesting fact is that when the Appellate Division was appreciating the SJC as "more transparent", it was comparing in particular with the "the provision of Article 96 as existed in the Constitution on August 15, 1975 [that] provided that a Judge of the Supreme Court of Bangladesh may be removed from the office by the President on the ground of 'misbehaviour or incapacity'".[33] This important factor went missing from the observation of the majority Court in the *Sixteenth Amendment* decision. It should be mentioned here that the dissenting judge clearly argued that the sixteenth amendment was a restoration of the original constitutional scheme of judicial removal and an act of compliance with the Appellate Division's review decision of 29 March 2011, and hence it would not be right to invalidate the amendment.[34]

The Court additionally argued that Parliament "incorporated" the SJC-provisions through the Constitution (Fifteenth Amendment) Act 2011. This argument is anything but convincing. The Fifteenth Amendment to the Constitution did not incorporate the SJC-provision, but rather skipped compliance with the Appellate Division's directive of 29 March 2011 to remove within 31 December 2012 constitutional inconsistencies of the SJC. This may be regarded as somewhat tacit parliamentary approval of the SJC, but the sixteenth amendment, in addition to restoring an original constitutional scheme, clearly complied with the Appellate Division's review decision in the *Fifth Amendment Case.* Further curiously, the Court sought to emphasise that the sixteenth amendment was not enacted within the given time-frame of 31 December 2012. Does this fact of belated enactment make the sixteenth amendment worth less than the fourth and fifteenth amendments, of which the Court seem to be appreciative and approving? If the institutional capacity and legitimacy is any issue, all these amendments are actions of Parliament representing the people of Bangladesh.

The Court, however, rightly held that no amendment to the Constitution can be

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[32] *Sixteenth Amendment Case,* above n. 5, at pp. 141-142 (contradictorily observing as follows: "the Appellate Division did not change its stance vis-a-vis the Supreme Judicial Council [...], though it condoned the provisions pertaining thereto provisionally till 31st December, 2012").
[33] Quoted from para.232 of the Appellate Division's judgment in the *Fifth Amendment Case,* above n. 11.
[34] *Sixteenth Amendment Case,* above n. 5, at p. 289.

made by parliament in the exercise of its "derivative power" violating the existing provisions of the Constitution and the limitations imposed by it.[35] It, however, seems that the Court misapplied this proposition. First, although it was an immediate exercise of the "derived" constituent power, the sixteenth amendment was in effect a re-affirmation of the original constituent power of the first Constitution of Bangladesh. By invalidating the sixteenth amendment the Court has indeed struck down an original constitutional scheme that was adopted in 1972 through the exercise of the original constituent power.

At their founding moment, the people of Bangladesh wrote into their constitution that the Supreme Court judges could be removed pursuant to a parliamentary resolution on the ground of proven misconduct or incapacity. As such, this provision cannot be deemed 'unconstitutional', nor judicially invalidated. During the founding moment of a nation, "sovereignty, people and constitution-making" become mutually constituted at that single moment.[36] The founding moment, therefore, "gives the constitution a normative priority over later actions".[37]

Quite ironically, although the Court failed the founding people when striking down the sixteenth amendment for contravening the "spirit" of the principle of judicial independence,[38] it sought to derive some measure of legitimacy by invoking (i) the popular sovereignty through elected representatives and (ii) public opinion. First, the Court cited the newly enacted constitutional eternity clause, article7B, to hold that an amendment against any basic structure of the constitution would be unconstitutional. This citation can be taken as its selective support for the wisdom of the representative branch that entrenched constitutional unamendability rule in article 7B enacted by the fifteenth amendment of 2011. Paradoxically, this appreciation was made only to strike down the political wisdom expressed on another occasion, that is, through the sixteenth amendment. Second, the Court made a reference to perceived, not real, public opinion about the independence of the judiciary and the acceptability of judicial removal through a parliamentary process. It argued that the provision of judicial removal pursuant

[35] *Sixteenth Amendment Case,* above n. 5, at p. 10.

[36] Catherine Dupreand Jiun-rong Yeh, "Constitutions and legitimacy over time," in *Routledge Handbook of Constitutional Law,* ed. Mark Tushnet and Thomas Fleiner et al.(London and New York: Routledge, 2015), 51-52.

[37] Dupre and Yeh, "Constitutions and Legitimacy".

[38] As the Court said, it found it hard to discard the argument of the petitioner's counsel that "the Sixteenth Amendment blatantly [...] destroys the spirit and essence of the provisions of article 22 of the Constitution." See, *Sixteenth Amendment Case,* above n. 5, at p. 131.

to a parliamentary process would undermine the judiciary's position in the public estimation. In this regard, the Court had observed that:

> *In public perception, the independence of the Judiciary has been curbed by the sixteenth amendment. We must attach topmost importance to public perception when it comes to the question of independence of the Judiciary. If according to public perception, the Judiciary is not independent, then it cannot [...] sustain[.] at all.*[39]

The Court did not make it clear how it did read the public perception about the judicial removal process, or why the "public perception" was so important only with regard to the issue of judicial independence and not with regard to other equally important constitutional issues.

Another important aspect of the *Sixteenth Amendment* decision of the High Court Division is that, in order to buttress its reasoning, the Court sought help from comparative experiences of the Commonwealth nations. It found that only sixteen Commonwealth jurisdictions (33%) were following the Westminster model of parliamentary removal of judges, whereas the model of judicial removal upon the recommendation of an independent disciplinary body such as the Supreme Judicial Council that existed in Bangladesh was being followed in 62.5% of the cases (30 jurisdictions).

Looking at Commonwealth jurisdictions for comparative insights instead of only Western jurisdictions is appreciable, but the Court's use of comparative experiences is not yet free from the limitation of invidious comparison. It would have beenmore profitable for the Court to have a look at other systems in South Asia. In this region, India, Maldives, Nepal, and Sri Lanka have a parliamentary model of judicial removal. Pakistan has the system of Supreme Judicial Council as was the case with Bangladesh, but that has been an original system introduced in the 1973 Constitution of Pakistan.[40] For the Court, "experience" is more compelling than the "logic" in the assessment of law. It sought to indicate that the Indian system of judicial removal is susceptible to problems, and drew upon the practical complicacy of this system in Sri Lanka where the recent removal of the country's Chief Justice was politically-motivated.

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[39] Ibid, p. 139.

[40] This has been the case in Bhutan where judges can be removed by the King upon recommendation of the national Judicial Commission. See article 21 of the Bhutanese Constitution.

Ordinarily, the Supreme Court of Bangladesh has generally used the Indian Supreme Court decisions extensively in constitutional adjudications. In this case, the Court provides no strong reasoning why it shied away from the Indian experience with regard to the removal of judges. Also, what the Court did not consider is that the other system of judicial removal may too be abused by the regime. Consider, for example, the 2014 case of judicial removals in Maldives (which follows a mixed model of parliamentary and peer-driven removal), where the Judicial Service Commission had to recommend to the Maldivian Parliament names of two Supreme Court judges for removal.[41]

Conclusion

As this article has shown, the HCD's decision seems to be deeply troubling in that the Court has in effect struck down an original constitutional scheme regarding the removal of the Supreme Court judges. The Court arguably misunderstood the nature of original constituent power of the first Constitution of Bangladesh. Neither the Court's analyses, nor the arguments of the counsel and amici curiae who opposed the vires of the sixteenth amendment, could show that the parliamentary mechanism of judicial removal was not a choice of the founding constituent people. The *Sixteenth Amendment* decision, on this count, seems to be incompatible with the ratio decidendi or the basic premise of the *Eighth Amendment* Case in which the Appellate Division invalidated the eighteenth amendment for contravening an original constitutional scheme established by people through the original constitution. The *Sixteenth Amendment* decision is also directly in conflict with the Appellate Division's review decision in the *Fifth Amendment Case* involving constitutional inconsistency of the Supreme Judicial Council provisions.

It is undisputable that the independence of the judiciary is a basic-structure norm of the Constitution of Bangladesh, and the judicial removal process is what lies at the core of this normative concept. There are, however, no set formulas of how to achieve and maintain judicial independence. Despite some measure of commonality among them across the world, means and processes of ensuring

[41] On 10 December 2014, the Maldivian parliament enacted a law reducing the number of Supreme Court judges from seven to five. The law required that the Judicial Service Commission to recommend names of two Supreme Court judges for removal by a two-thirds majority votes of members present and voting.

judicial impudence are indeed society-specific. In the *Sixteenth Amendment Case,* the Court in reality engaged in an exercise of which mode of judicial removal is more suitable and conducive for judicial independence in the Bangladeshi context. This is a matter of choice and judgment to be exercised by the people through their elected representatives. Both the system of Supreme Judicial Council and the parliamentary process of judicial removal are constitutional, provided that there is an objective legal process of proving the allegations of misconduct or incapacity of the concerned judge. What was not addressed by the plurality in the *Sixteenth Amendment* decision is the fact that the impugned parliamentary process of judicial removal is to be preceded by a positive legal determination of the guilt of the concerned judge, where a peer-driven mechanism can be introduced.

Last, but not the least, the Court cannot invalidate an original provision of the Constitution even if that be what an amicus curie termed "unsuitable, outdated, [and] obsolete" in the Bangladeshi context.[42] The job of changing an outdated system is allocated by the Constitution to "the people". From this perspective, the *Sixteenth Amendment* decision seems to have misapplied the basic-structure doctrine. I have elsewhere argued that the theories of constitutional supremacy and popular sovereignty require the judges to apply the doctrine of 'unconstitutional constitutional amendment' extremely cautiously and rarely, and only for the cause of preserving the 'identity' of the Constitution or the State.[43]

In South Asia generally, the role of constitutional courts in dealing with issues of judicial autonomy is criticized as self-serving under the garb of a constitution-reinforcing role. It remains to be seen whether the superior courts of the region would act enough in the future to prove this criticism wrong.

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[42] Argument of Mr. Amir-Ul Islam, as in above n. 5, at p. 135.

[43] See Ridwanul Hoque, "Judicialization of Politics in Bangladesh: Pragmatism, Legitimacy and Consequences," in *Unstable Constitutionalism: Law and Politics in South Asia,* ed. Mark Tushnet et al. (New York: Cambridge University Press, 2015), 261-290, at 287. On this see further Teresa S. Collett, "Judicial Independence and Accountability in an Age of Unconstitutional Constitutional Amendments", *Loyola University Chicago Law Journal* 4 (2010)327-49; and Rosalind Dixon and David Landau, "Transnational Constitutionalism and a Limited Doctrine of Unconstitutional Constitutional Amendment", *International Journal of Constitutional Law,* 13(3) (2015) 605-638.