

# 16th Amendment Controversy between Legislature and Judiciary: An Analysis

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### ABSTRACT

The constitution is the guide that leads a nation to prosperity. We cannot think of a modern state without it. So, after nine months of long blood-shedding battle in 1971, Bangladesh achieved her long-awaited independence and, therefore, made an instant effort to formulate a constitution rapidly, based on the ideological spirit of the war of independence. However, to accommodate the demands and will of the people and even sometimes to fulfill the narrow interests of the rulers, Bangladesh Constitution has been amended several times. Except for a few cases, almost every amendment; has a tremendous political impact on the constitution. Bangladesh's Constitution was recently revised to include a parliamentary procedure for judicial discipline for high court judges. The previous one supported judicial independence and separation of powers. The current system compromises judicial independence with accountability. As a result, the judiciary seems to fail to maintain its dignity and discharge its sacred responsibility.

**Keywords:** Constitution of Bangladesh, Political impact, Judicial independence, Judicial accountability

### INTRODUCTION

Bangladesh is a third-world country where the major institutions have been undergoing systematic reconstruction processes since its inception. Three state organs have not been seen performing their respective duties properly due to no precisely defined code of rules and the absence of a culture of responsibility and obligation (Haque, 1992). Despite the fact that Bangladesh was blessed with a contemporary and well regarded constitution in 1972, both the people of Bangladesh and the constitutional institutions in the country are frequently denied the dues that are rightfully theirs (Ahmed, 1993). For their personal benefit, elected administrations and military usurpers have manipulated the constitution and altered it sixteen times in a relatively short period of time. This has occurred throughout the history of the country. The most recent amendment to the Constitution, the sixteenth, gives the parliament of Bangladesh the authority to conduct disciplinary action against judges serving on the Supreme Court of Bangladesh, which is the highest court in the country (Ahmed, 2002). People who are involved in the country's civil society as well as academicians, jurists, and lawyers are opposing the current procedure because they believe it undermines the independence of the judiciary (Agarwal, 2003).

In contrast, the government is trying to substantiate the amendment in the line of accountability of the constitutional court judges to the representatives of the people named to the parliament (Ahmed, 1979). The High Court Division of the Supreme Court has already ruled that the Amendment is invalid due to the negative impact it will have on judicial independence and the fact that it goes against the spirit of the constitution. In response to this ruling, the government has decided to file an appeal against it with the Appellate Division of the Supreme Court. As a consequence of this, the current amendment has placed the top judiciary in a precarious situation, one in which the members are always worried about being harassed by the parliament (Almond & Coleman, 1960). As such, the concept of independence of the court has been compromised in the name of accountability to the people.

## STATEMENT OF THE PROBLEM

The article topic is "16<sup>th</sup> amendment controversy between legislature and judiciary". The main statement of the matter is that it examines people's opinions on why and how the controversy may influence the local politics of our country. What will be the future impact of it as well as the present conditions and victims of it?

### Aims and objectives of the study

- To find out the leading causes behind this amendment
- The main reason behind the controversy of this
- Find out its influence on local politics
- Who will be beneficial from this?
- On the question of the independence of the judiciary branch
- Is the legislative branch take control over the judiciary?

### The usefulness of this study

- Bring out the usefulness of the independence branch
- Make people aware of the local political system
- Make a clear concept of today's politics
- Find out the way to finish this controversy

### Research questions

- Is this amendment make a deviation from the government branch?
- Is it a question of the independence of the judiciary branch?
- Should the judiciary be accountable to the legislature?
- Is this amendment make the legislature more powerful?
- Is this amendment will be the cause the future political problems?
- Is the government handling this issue correctly?
- Is it a threat to democracy?
- Is the government party want to take control over the judiciary?
- Is this amendment seeming a threat to the state?
- Do the citizens

Support this?

- Does civil society support it?
- Are general people of the country more concerned about it?
- How many people know about it?

## METHODOLOGY

There are three types of studies descriptive, causal, and exploratory. This intended research is descriptive, for the present research preferable. This research is illustrative, and descriptive research involves collecting data to test hypotheses or answer questions concerning the status of the subject of the study. The method of this research is both qualitative and quantitative. Qualitative research is a formal, objective, systematic process in which numerical data utilizes to obtain information about the world. I use both the interviewed and survey methods and the observable methods for collecting primary data. I collect data from primary and secondary sources. I collected preliminary data by questionnaire and secondary data from various articles, journals, and the internet. Before conducting the survey, the researcher must predicate a model identifying the expected relationships among these variables. The survey gets constructed by testing this model against observations of the phenomena. The questionnaire consisted of both open and close-ended questions. The selected universe for the study got conducted on teachers, students, intellectuals, journalists, politicians, service holders, and business people.

### Research Area

I have selected the area of my home district, Mymensingh because I do it during my vacation. I collected Primary data for my research from this area and made this monograph.

### Population

The population was various people, mainly some students of BAU, some students of Anandamahan University College, and some well-known teachers of this divisional city.

### Sampling Procedure

All of the students are not chosen as respondents. Hence stratified Random Sampling will be used to select the respondents. The strata of subscribers are, for example, students of all faculties, both male and female, and their opinion about the existence of extremism using youth in Bangladesh.

### Sampling Size

A total of 20 respondents from 3 faculties, Arts, Social Sciences, and Sciences, chose to use the abovementioned methods. Students studying in different departments in different years are preferred as respondents.

### Collection of Data

For the monograph and to get the proper answers to the research questions, both primary and secondary data were used in the research.

- A: Primary Data: Primary data got collected by survey and interviewee method of data collection.
- B: Secondary Data: Secondary data had collected from different kinds of books, articles, Government records, documents, etc.

I analyze the collected data in two ways such as quantitative and qualitative methods. First, in the quantitative analysis process, respondents must give an immediate answer to the question. On the other hand, in the qualitative analysis process, respondents must provide open-ended responses to questions.

## REMOVAL OF THE JUDGES BEFORE AND AFTER THE 16TH AMENDMENT

### The Constitution of -1972

The Constitution of 1972, popularly known as the original constitution, contained the provisions of removal of the judges of the Supreme Court by order of the President following the resolution of parliament; passed by a two-thirds majority on the ground of proved misbehavior and incapacity (Firozee, 2011).

### Fourth Amendment of the Constitution

The well-known Fourth Amendment to the Constitution brought about a significant shift in the way that the judicial system enforces its rules of conduct (Halim, 2013). It leaves the more superior levels of the judiciary open to attack. In accordance with this modification, the judges could be removed from their positions on the authority of the President for reasons including misbehavior and incapacity without any judicial process other than a notice to show cause.

### Fifth Amendment of the Constitution

In August 1975, the military intervened and assassinated President Bangabandhu Sheikh Mujibur Rahman, suspending the constitution until a modified version was reinstated (Ahmed, 1987; Ahmed, 1983). By the fifth amendment, a new method for disciplining Supreme Court judges was implemented. It constituted the Supreme Judicial Council (SJC), consisting of the Chief Justice and two senior Supreme Court judges. The SJC prepares a Code of Conduct for Supreme Court judges and reports to the President after an allegation is made against a Supreme Court judge. It replaced 'misconduct' with 'severe misconduct and incompetence. Legal commentators praised this method as better than the previous one, which gave the president unchecked removal power. This formula lasted a long time, but it didn't remove any judges; it created a Judges' Code of Conduct. The Supreme Court then found the Fifth Amendment illegal and annulled it, accepting SJC's provision as compatible with judicial independence.

### Sixteenth Amendment of the Constitution

In 2014, the legislature approved the Sixteenth Amendment to the Constitution, which removed the provision of the Supreme Judicial Court and gave the legislature the authority to remove judges from the Supreme Court. This section of the original constitution, which provided for a framework for parliamentary discipline, has been reaffirmed by this amendment. Under this scheme, a delinquent judge can be removed by order of the President according to the resolution passed by the two-thirds majority members of the parliament on the grounds of proven misbehavior and incapacity.

[Ref: The Constitution (Sixteenth Amendment) Act, 2014].

The amendment also allows the parliament to regulate investigations of judicial allegations and resolution procedures. However, the High Court Division of the Supreme Court has recently declared the sixteenth amendment unconstitutional and void, against which the government files an appeal in the Appellate Division of the Supreme Court.

[Ref: Asaduzzaman Siddiqui and Ors. v. Bangladesh Represented By 14<sup>th</sup> Cabinet Secretary, Cabinet Division, Bangladesh Secretariat and Ors., LEX/ BDHC/ 0021/2016]

This amendment has sparked criticism from jurists, commentators, and lawyers that the country's higher judiciary has become subservient to parliament, violates separation of powers.

## THE INCIDENT BEHIND THE SCENE

Interestingly, the current government has suddenly changed its stance regarding the removal procedure of the judges, reporting that the concerned ministers expressed their views in favor of the continuance of SJC earlier despite the invalidation of the Fifth Amendment. [Ref: Staff Correspondent, *Reversal Stance in case of Removal of Judges*, THE DAILY PROTHOM ALO, (September 17, 2014)].

The government passed the Fifteenth Amendment of the Constitution in compliance with the judgment popularly known as the Fifth Amendment case. It retained the SJC intact, which indicated that government was not willing to make any change. In point of fact, in a dispute over a very unimportant matter, the Supreme Court and Parliament came into conflict, which may or may not have convinced the administration to bring forward the measure for the sixteenth amendment. In 2012, a match was discovered between an author judge of the High Court Division and the then-Speaker of the Parliament. This occurred when the latter commented in the house that the judges are quick in taking a decision that involves their interests. The match came to light because of a comment made by the former Speaker of the Parliament. The issue that was being litigated in this particular case was that a state-owned institution, namely the Road and Highways Department, was illegally situated on land that belonged to the Supreme Court. As a result, the Supreme Court rendered a verdict ordering the institution to return the land to the Supreme Court's ownership. However, the leading judge of the decision refuted the Speaker's comment and said that the Speaker's statement amounted to contempt of court and was liable to be seditious, which dragged to the issuance of a ruling by the Speaker. The dispute was settled once and for all through negotiations held in both the judicial and parliamentary systems; however, it paved the ground stone of the initiation of the sixteenth amendment, which ultimately brought the judiciary under the government's grip. Debating this issue in the parliament, its members threatened the higher court to restore the power of removing it in the hands of parliament (Hasanuzzaman, 1998). It would appear that this particular event was one of the driving forces behind the abrupt transition that the government made from the SJC to a parliamentary procedure.

## CONSTITUTION

The term 'constitution' originates from the Latin word 'constitution', used for regulations or order. In modern days 'constitution' refers to a set of rules and principles that define the nature and extent of government. The constitution is 'supreme' as the solemn expression of the people and the sole authoritative symbol of ... sovereignty. It is the embodiment of the supreme will of the sovereign people. It includes the fundamental objectives of the state and declares the basic rights guaranteed to the people. There is no specific time frame for the constitution's beginning. Some might say it began over 2500 years ago in the city-states of ancient Greece. Others might place its beginnings nearly three-quarters of a millennium back in the fields of Runnymede. Still, others might say the constitution had its origins three centuries or so ago during the tumultuous years of the seventeenth-century English revolutions. Or others, more patriotic perhaps, might date the beginnings of the constitution from events in the Western Hemisphere, from the Mayflower Compact, the Massachusetts Charter of 1629, or from any number of charters and constitutional documents that the colonists resorted to during the first century and a half of American history (Alder, 1989).

### Constitution: A Few Scholars' View

A state or other organization can be governed according to a set of fundamental principles or long-standing precedents that are outlined in the organization's or state's constitution. These guidelines, when taken as a whole, comprise, or make up, what the entity actually is. If these ideas are written down in a single comprehensive document, then that document is said to reflect a codified constitution. If these principles are put down in a series of legal papers, then those

legal documents may be said to constitute a written constitution. According to Rousseau, the most important of all laws, "which is not graven on tablets of marble or brass but the hearts of the citizens", gets embodied in what he calls "the real constitution." "It takes on every day new powers, when other laws decay or die out, restores and takes their place, keeps a whole people in how it meant to go, and insensibly replaces authority by the force of habits."

### Amendments

An amendment is a change in a legal document made by adding, altering, or omitting a specific part or term. Amended documents, when properly executed, retain the legal validity of the original document. According to the Oxford Dictionary, 'Amendment is a minor change or addition designed to improve a text, piece of legislation, etc.'" Each country has a separate constitution of its own. Each country also has a different process of amending its constitution. It has been included in this paper to understand the various method of amending the constitution undertaken by other states.

### Arguments the Favor of the Amendment

The article of the original constitution that was ratified in 1972 is being brought back into effect as the primary goal of the sixteenth amendment.

Other types of informal debates include:

- to respect Article 7 of the Constitution, which states that all powers of the Republic belong to the people and that judges of the constitutional court should be made accountable to members of parliament who are representatives of the people; (2) to ensure that all constitutional amendments are approved by a two-thirds majority of the members of both houses of parliament; and (3) to ensure that constitutional amendment.
- to protect the impartiality of the judiciary by establishing clear protocols for judicial dismissal.
- to adopt the democratic culture that is prevalent in countries such as the United States, the United Kingdom, Canada, India, and South Africa.
- In order to demonstrate the validity of the idea that a creature should be governed by the institution that was responsible for its creation, in this case parliament, the judiciary must be subject to the authority of parliament.
- to uphold the public confidence in the transparent and independent judicial system.

### CHALLENGES OF JUDICIARY: INDEPENDENCE VS. ACCOUNTABILITY

Maximum people think that the higher judiciary seems like a doll to the Member of Parliament by the name of this kind of accountability. The Prime minister, as the head of the executive, enjoys unfettered power as the judiciary is under his palm.

[Foot note 1: *Independence Judiciary: Independent and impartial judiciary is a sine qua non for a democratic society where ordinary people can enjoy basic fundamental rights. There are some well-settled parameters for measuring the existence and extent of the independence of a country's judiciary. There are three well-known international instruments in this regard, in addition to the respective constitutions and subordinate laws of each country, namely (1) Universal Declaration on the Independence of Justice (Montreal Declaration 1983) and (2) Basic Principles on the Independence of the Judiciary (The UN Basic Principles 1985) (3) Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region (Beijing Statement 1995).*

[Foot note 2: *Accountability of public institutions in a democratic society is essential for bringing transparency and appropriateness in governance. Judiciary, an important public institution, must be made accountable, but the nature and extent of the account may not be identical to that of other government institutions. Despite appearing incompatible, judicial independence and accountability are complementary. Public confidence is a pillar of the judiciary, and the court's strength and weakness depend on it. Judicial accountability strengthens the court's authority and acceptability through boosting public confidence.*].

There is no inherent contradiction between the concepts of judicial independence and accountability; instead, accountability works as a catalyst for increasing judicial independence. For example, accountability 'for the judges' failure, errors, or misconduct is essential for an effective judiciary's sustainability. Critics of the judicial decisions by the jurists, academicians, and lawyers and reactions by the ordinary people help the court attain public confidence and restrict untoward external pressure. Despite the fact that the ultimate goal of judicial accountability is to maintain and strengthen public confidence in the legal system, there are also dangers associated with judicial independence being diminished, and these risks vary depending on the mechanisms used for judicial accountability. The ways in which responsibility is exercised might vary from society to society, and the method that is most appropriate in one nation may be ineffective in another nation when it comes to resolving the conflict that exists between two opposing ideas—judicial independence and judicial account.

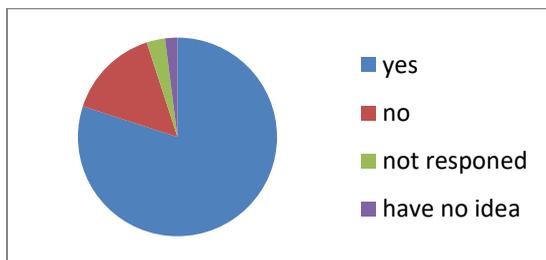
### OPINIONS OF THE RESPONDENTS (A QUALITATIVE ANALYSIS)

I knocked 20 persons for my sampling. Among them, few from arts, social sciences, and sciences backgrounds. Six of them were female, and the rest were male. The quantitative analysis and interpretation of data are given below:

#### Interpretation of Data

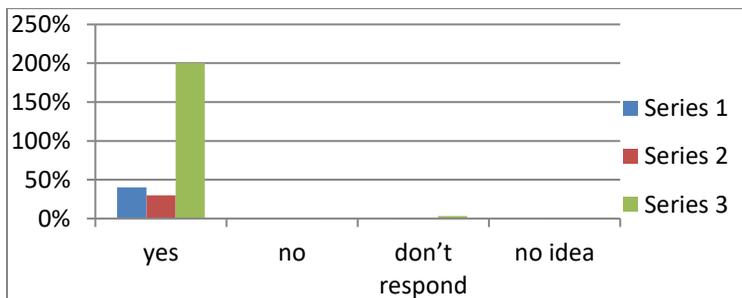
The analyzed data are interpreted through various bar diagrams and charts mentioned below:

The 16<sup>th</sup> amendment: The controversy between judiciary and legislature. Is government want to take control of the judiciary? 80% said yes, 15% no, and the rest did not answer, while 2 % had no idea.



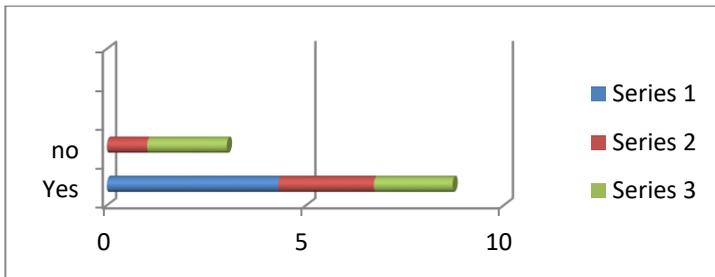
**Figure 1:** Response to the question of whether the government wants to take control of the judiciary.

On the question of diminishing the independence of the judiciary, 90% say yes, 2 % no, 5% do not respond, and the rest had no idea about it.



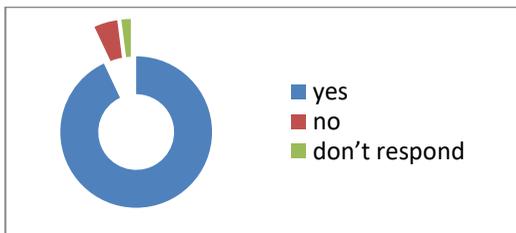
**Figure 2:** Response to the question of diminishing the independence of the judiciary.

On the question of the threat to democracy, most of the respondents say yes meanwhile a few percentages say no.



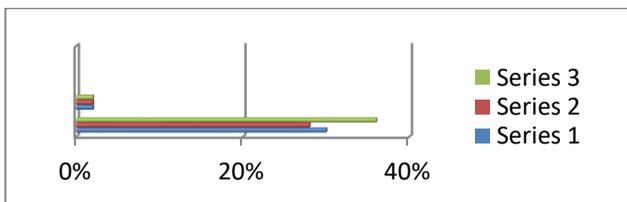
**Figure 3:** Response to the question of threat to democracy.

On the question of more legislative power by this amendment, the response is given below using the chart.



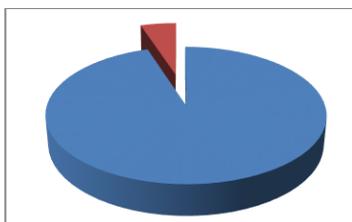
**Figure 4:** Response to this amendment's question of more legislative power.

Again, when it is a question about its influence on politics, a response like long series is yes, and a little series is no.



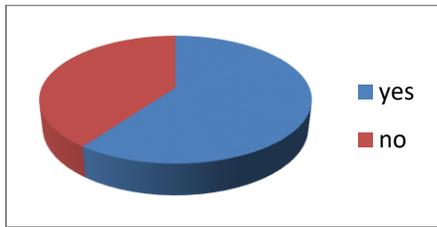
**Figure 5:** Response to the question of influence on politics.

Most of the answer is optimistic about the abuse of this amendment.



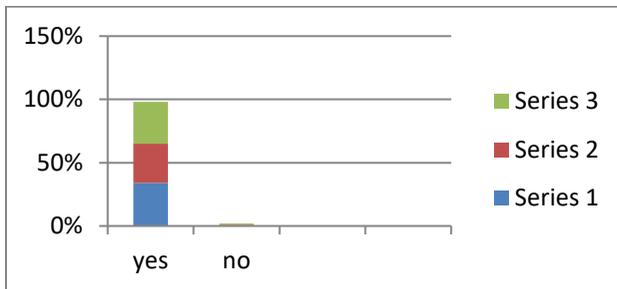
**Figure 6:** Response to the question of abuse of this amendment.

The response is divided into two parts on the question of the legislative's superiority by this amendment.



**Figure 7:** Response to the question of the legislative by this amendment.

Furthermore, it seems a politically important issues question the responds opinion is nearly identical.



**Figure 8:** Response to the question of politically important issues.

There are some distinctive opinions about the reasons behind the 16<sup>th</sup> amendment and controversy between the two branches. Most of the participants believe that some proper guidelines can reduce this problem. However, most of the opinion says that continuing this situation will hamper the country. They thought that formal negotiations, respect for each other, respect for democracy, and proper practice of democracy could solve this problem (Firoj, 2012).

After Bangladesh was freed from British domination, democratically elected lawmakers wrote a constitution for the newly independent nation, relying on neighboring and industrialized nations' norms (Ahmed, 1995). The constitution ensures a democratic, equitable, and people-focused society. This was done to construct a government that would protect the people from exploitation. Each arm of government's authorities and responsibilities were spelled out, and the highest judicial branch was given the position of the constitution's primary watchdog. The originator of the constitution did not, in principle, separate the executive and legislative, but left the judiciary separate. The court's independence is protected by requirements for nomination and constitutional restrictions on terms and conditions. The Supreme Court got increased power to uphold the constitution and review executive and legislative actions (Ahmed, 1969). Separation of powers safeguarded the Supreme Court from the legislative and executive branches, aside from the parliamentary removal procedure. In its first version, the constitution outlined a plan for an independent judiciary, including provisions for the selection and appointment of judges, tenure security, remuneration and other privileges, removal by parliament, independence in judicial functions, compliance with court decisions, and judicial review. The final version of the constitution removed judicial decision compliance. The constitution was modified over time, losing its basic essence. Changing appointment and removal procedures and appointing judges to other offices are ways the Supreme Court and its judges are targeted.

## CONCLUSION

It is imperative that this delicate and vulnerable aspect of society be safeguarded at all costs, since the independence of the judicial system is the foundation upon which a just and livable society may be built and developed. Blind following of other examples may lead to disastrous consequences. Due to historical and cultural differences, different mechanisms may be used in different societies. It's possible that the parliamentary discipline of some countries is effective, whereas in other countries it might not be appropriate. For instance, the parliamentary procedure that was implemented in Bangladesh has dealt a significant blow both to the idea of judicial independence and to the judges' ability to carry out their jobs in a fair and impartial manner. Under the pretense of ensuring accountability, the executive branch makes an effort to encroach on the territory of the judicial branch. In this research, I had to face some problems. Depicted as follows:

- I had not enough budget for this research,
- Difficult to find out the participant for this research,
- Time is also a big reason because I also have some courses at the same time,
- The topic is too complex for people to respond to.

So, these are the significant limitations of this research. The study finds recommendations like showing respect to every branch of government, following the independence of each unit, respecting the basics of democracy, and having a good practice of liberal democracy.

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