IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION
(SPECIAL ORIGINAL JURISDICTION)

WRIT PETITION NO. 9989 OF 2014

IN THE MATTER OF:

An application under Article 102 of the Constitution of the People's Republic of Bangladesh.

-AND-

IN THE MATTER OF:

Advocate Asaduzzaman Siddiqui and others
..... Petitioners.

-Versus-

Bangladesh represented by the Cabinet Secretary, Cabinet Division, Bangladesh Secretariat, Police Station Shahbag, Dhaka-1000 and others
.....Respondents.

Mr. Manzill Murshid with
Mr. Moyeen A. Firozze and
Mr. Sanjoy Mandal, Advocates
.....For the petitioners.

Mr. Mahbubey Alam, Attorney General with
Mr. Md. Motaher Hossain (Sazu), DAG,
Ms. Purabi Rani Sharma, AAG,
Mr. A.B.M. Mahbub, AAG and
Ms. Purabi Saha, AAG
….For the respondent no. 1.

Mr. Murad Reza, Additional Attorney-General with
Mr. Amit Talukder, DAG
….For the respondent no. 4.

1) Dr. Kamal Hossain, Senior Advocate
2) Mr. M. Amir-ul Islam, Senior Advocate

3) Mr. Rokanuddin Mahmud, Senior Advocate
and
4) Mr. Ajmalul Hossain QC, Senior Advocate
…. Amici Curiae

Heard on 28.05.2015, 18.06.2015, 02.07.2015, 30.07.2015, 06.08.2015, 19.08.2015, 20.08.2015, 02.09.2015, 03.09.2015, 09.09.2015, 11.11.2015, 01.12.2015, 02.02.2016, 03.02.2016, 04.02.2016, 23.02.2016, 03.03.2016 and 10.03.2016.
Judgment on 05.05.2016.

Present:
Mr. Justice Moyeenul Islam Chowdhury,
Mr. Justice Quazi Reza-Ul Hoque
-And-
Mr. Justice Md. Ashraful Kamal

MOYEENUL ISLAM CHOWDHURY, J:

On an application under Article 102 of the Constitution of the People's Republic of Bangladesh filed by the petitioners, a Rule Nisi was issued calling upon the respondents to show cause as to why the Constitution (Sixteenth Amendment) Act, 2014 (Act No. 13 of 2014) (Annexure-'A' to the Writ Petition) should not be declared to be colourable, void and ultra vires the Constitution and/or such other or further order or orders passed as to this Court may seem fit and proper.

The case of the petitioners, as set out in the Writ Petition, in short, is as follows:

The petitioners are the practising Advocates of the Supreme Court of Bangladesh. They are also working under the umbrella of an organization under the name and style "Human Rights and Peace for Bangladesh"

(HRPB) which is engaged in promoting and defending human rights and establishing the rule of law in the country. As officers of the Court, they are very conscious of the independence of the Judiciary. By virtue of the Constitution (Sixteenth Amendment) Act, 2014 (hereinafter referred to as the Sixteenth Amendment), Article 96 of the Constitution has been amended which contains the provisions relating to the power and procedure of the removal of the Judges of the Supreme Court of Bangladesh. The background of the initiative to amend the relevant provisions relating to the removal of the Judges of the Apex Court emanated from some incidents which took place in the recent past. One of them is that our Parliament passed a law of Contempt of Court in 2013 wherein some people were given undue privilege and exempted from the charge of Contempt of Court in a discriminatory manner and the vires of that law was challenged by way of a Public Interest Litigation. After hearing the parties, the High Court Division declared the said law of Contempt of Court of 2013 void and ultra vires the Constitution. Another step was taken to protect public servants from the charge of corruption and accordingly an amendment was made in the Anti-Corruption Commission Act of 2004. By the amendment, a provision was inserted in the Anti-Corruption Commission Act of 2004 to take permission from the Government in case of prosecuting any public servant thereunder. This amendment was also challenged by way of a Public Interest Litigation in the High Court Division and ultimately after hearing the parties, the High Court Division declared the amendment void and ultra vires the Constitution. Thereafter in a seven-murder case in Narayanganj, repeated allegations were made in both electronic and print media about the involvement of some

personnel of the law-enforcing agencies; but no concrete step was taken against them. Eventually in this regard, a Public Interest Litigation was filed before the High Court Division and the High Court Division directed the concerned authorities to arrest those personnel of the law-enforcing agencies. However, in accordance with the order of the High Court Division, those personnel were arrested and the entire scenario of killing of seven persons by them was exposed to the public. Soon thereafter an evil move was taken by the political executives to amend Article 96 of the Constitution through the Parliament. This move was crystallized by the passing of the Sixteenth Amendment at the behest of the political executives with the mala fide intention of interfering with the independence of the Judges of the Supreme Court of Bangladesh in the discharge of their judicial functions.

It is the duty of the Members of Parliament to enact necessary laws. But at present, they are also performing functions relating to all development activities in their respective constituencies and the whole administration is under their thumb. In most of the cases (Writ Petitions), the Government is the respondent; but the Members of Parliament are vitally interested in those cases arising out of the development activities in their local areas. Moreover, in the present context of Bangladesh, most of the Members of Parliament are from business sectors and by that reason, they have personal interest in those cases. Against this backdrop, the Judges of the Apex Court would suo motu be restrained from passing any order in the cases in which the Members of Parliament are interested. In view of the Sixteenth Amendment, any Member of Parliament can bring a motion against any Judge of the Supreme Court and discuss the same therein and due to this reason, no Judge will be able to

perform his duties impartially and independently. In the long run, justice will be frustrated and administration of justice will collapse in no time. In India and other developed countries, the Judges of the Apex Courts may be removed by the resolutions of their respective Parliaments; but in our country, the influential people including the Members of Parliament ignore the law for their personal interest and that being so, the situation in Bangladesh is quite different. The primary objective of the Sixteenth Amendment is to destroy the principle of independence of the Judiciary and to render the Judiciary impotent and ineffective. Independence of the Judiciary is one of the basic features of the Constitution as expounded in *Anwar Hossain Chowdhury and others…Vs…Bangladesh and others* (popularly known as Eighth Amendment Case) [1989 BLD (SPL) 1] which has been reiterated and reaffirmed in Masdar Hossain's Case [52 DLR (AD) 82]; but that independence has been compromised by the Sixteenth Amendment giving overwhelming authority to the Executive through the Parliament to remove the Supreme Court Judges. This is, no doubt, a death blow to the independence of the Judiciary and a blatant interference with the administration of justice.

The Sixteenth Amendment is ultra vires the Constitution as it is in direct conflict with and contradictory to the spirit of the Preamble of the Constitution. The power conferred upon the Parliament by the Sixteenth Amendment is beyond its scope and jurisdiction and is contrary to the basic features of the Constitution as investigation into misbehaviour or incapacity and recommending to the President for removal of the Judges of the Supreme Court is neither a legislative function, nor it is an act of scrutiny of

the Executive action. The role of each organ of the State is clearly defined and deliberately and carefully kept separate under the Constitution to maintain its harmony and integrity and to maximize the effectiveness of the functionality of the organs of the State in their respective spheres. The Sixteenth Amendment has opened up the door for manipulation and exertion of control over the Judges of the Supreme Court of Bangladesh in their judicial functions. It is violative of Article 7B of the Constitution as no provisions relating to the basic structures of the Constitution shall be amendable by way of insertion, modification, substitution, repeal or otherwise. The Sixteenth Amendment blatantly destroys the spirit and essence of the provisions of Article 22 of the Constitution and thereby blurs the separation of powers among the different organs of the State and clearly establishes the domination of the Executive through the Parliament over the Judiciary which will create a great imbalance within the constitutional bodies and thereby make the Judiciary a mockery and a toothless and tearful silent witness. The principle of independence of the Judiciary and separation of powers are basic structures of the Constitution and as such the same can not be touched upon or taken away in any manner whatsoever. The Sixteenth Amendment is also ultra vires the Constitution as by dint of Article 70, the Members of Parliament can not express their independent views/opinions against their partyline and as a natural corollary thereto, the removal of the Judges of the Apex Court of Bangladesh will be prejudiced by its direct implication. Furthermore, the Sixteenth Amendment is ultra vires the Constitution as it has undermined the authority and dignity of the Apex Court because of the fact that the validity of the proceedings in the

Parliament can not be questioned in any Court by virtue of Article 78 of the Constitution. As such the Judiciary will be at the mercy of the Executive through the Legislature and it will not be able to safeguard itself. The Supreme Court of Bangladesh being the guardian of the Constitution must not allow any inroad upon the Constitution; but the Sixteenth Amendment is an inroad upon the independence of the guardian of the Constitution. This is why, the same can not be sustainable and must be struck down as being unconstitutional. In such a posture of things, the petitioners have impugned the vires of the Sixteenth Amendment.

In the Supplementary Affidavit dated 26.11.2014, it has been stated by the petitioners that in the Fifth Amendment Case, the High Court Division declared the Constitution (Fifth Amendment) Act, 1979 (Act No. 1 of 1979) illegal and void abinitio subject to certain condonations. The Appellate Division in the Fifth Amendment Case endorsed those condonations with some modifications. As per the judgment of the Appellate Division passed in the Fifth Amendment Case, the provisions relating to the Supreme Judicial Council were kept intact in the Constitution of Bangladesh. So the provisions of removal of the Judges of the Supreme Court of Bangladesh by the Supreme Judicial Council can not be substituted by the authority of the Parliament violating the verdict of the Appellate Division. The Judges of the Apex Courts in the UK, USA and India are removed by the resolutions of their respective Legislatures. Those countries have bicameral Legislatures, that is to say, two Houses each in their National Legislatures. The removal of the Judges of the Apex Courts by the Legislatures of the UK, USA and India is not only complicated, but also

balanced by the two Houses of the Legislatures. But on the contrary, Bangladesh has a Parliament (to be known as the House of the Nation) consisting of only one House which may lead to impairment of judicial independence by way of removal of the Judges of the Supreme Court by its single House. Moreover, as the social and democratic practices of those countries are different from those of Bangladesh, the removal of the Judges of the Supreme Court of Bangladesh by our Parliament will endanger the independence of the Judiciary; because there is every possibility of using the weapon of the Sixteenth Amendment being politically motivated.

In the Supplementary Affidavit dated 27.05.2015, it has been mentioned by the petitioners that the Sixteenth Amendment is inconsistent with and violative of Article 147 (2) of the Constitution which provides that the remuneration, privileges and other terms and conditions of service of a person holding or acting in any office to which this Article applies shall not be varied to the disadvantage of any such person during his term of office. As per Article 147(4) of the Constitution, this Article (Article 147) applies, amongst others, to the office of a Judge of the Supreme Court. The Sixteenth Amendment has undoubtedly varied the removal mechanism of the sitting Judges of the Supreme Court of Bangladesh for their misconduct or incapacity to their disadvantage. As such the Sixteenth Amendment is illegal and void.

The Sixteenth Amendment will also directly affect the Election Commissioners, Comptroller and Auditor-General, Members of the Public Service Commission as well as Members of the Anti-Corruption Commission. By virtue of this Amendment, they will be removed in like

manner as a Judge of the Supreme Court according to Articles 118(5), 129(2) and 139(2) of the Constitution of Bangladesh and Section 10(3) of the Anti-Corruption Commission Act, 2004 respectively. The independence of the Commissioners of the Anti-Corruption Commission and the Comptroller and Auditor-General of Bangladesh will be in jeopardy inasmuch as they will not be able to act impartially and effectively against the misdeeds of the concerned Members of Parliament who are their real bosses. One of the main components of judicial independence is strong protection against removal from office. That international standard on judicial removal has been emphasized in the "UN Basic Principles On The Independence Of the Judiciary" as adopted by the General Assembly in 1985. The Judges of the Supreme Court can not be removed without proven misconduct or incapacity by a fair, unbiased, independent and impartial body who is free to conduct the inquiry and make a determination on its own from the influence of the other branches of the State. The Sixteenth Amendment by way of giving power of removal of the Judges of the Supreme Court to the Members of Parliament is definitely against the spirit of the independence of the Judiciary. This amendment has been made in exercise of the derivative power of the Constitution and this will not automatically make the amendment immune from challenge by way of judicial review. No amendment to the Constitution can be made in exercising derivative power violating the existing provisions of the Constitution and the limitations imposed by it. So the Sixteenth Amendment is ultra vires the Constitution.

The respondent no. 1 has contested the Rule by filing an Affidavit-in-Opposition. The case of the respondent no. 1, as set out in the Affidavit-in-Opposition, in short, runs as follows:

In the Fifth Amendment Case, all martial law proclamations, martial law regulations, martial law orders made/promulgated during the period between 20th August, 1975 and 9th April, 1979 which were validated by the Act No. 1 of 1979 was declared illegal, void abinitio and ultra vires; but those were provisionally condoned until 31st December, 2012 so as to enable the Parliament to make necessary amendment to the Constitution (vide judgment and order dated 11th May, 2011 passed by the Appellate Division in Civil Review Petition Nos. 17-18 of 2011). So it is totally a misconceived idea that in the Fifth Amendment Case, the Appellate Division of the Supreme Court by its observation favoured to retain or condone the provisions of the Supreme Judicial Council which were introduced by General Ziaur Rahman. Thereafter the Constitution (Fifteenth Amendment) Act was passed in 2011 which endorsed the system of the Supreme Judicial Council which may be considered as a departure from the original provisions of the Constitution relating to removal of the Judges of the Supreme Court by the Parliament. Finally it was thought expedient and necessary to restore/revive the original provisions of the Constitution about removal of the Supreme Court Judges through the Parliament which were introduced in Article 96 of the original Constitution and therefore, the Sixteenth Amendment was passed in 2014 reviving the relevant provisions (provisions of Article 96) of the original Constitution. The Sixteenth Amendment is not intended to dominate the Judiciary by the Executive through the Legislature

undermining its independence. In the instant Writ Petition, no public interest is involved for which the Sixteenth Amendment can be challenged in the form of judicial review of any legislative action nor the same is amenable to judicial review. The Sixteenth Amendment is not ultra vires; rather it is intra vires the Constitution which can not be called in question by way of judicial review in that the same has revived and restored the original provisions of Article 96 of the Constitution (barring age limit) relating to removal of the Supreme Court Judges. As the Parliament has restored the original provisions of Article 96 of the Constitution, the Sixteenth Amendment can not be subjected to judicial scrutiny. No provision of the original Constitution as enacted and adopted by the Constituent Assembly in 1972 can be judicially reviewed.

Public perception regarding the functions of the Supreme Judicial Council is that it is not effective and vibrant so as to investigate and remove a Judge on the ground of proved incapacity or misbehaviour. Besides, in the recent past, the conduct of two sitting Judges of the High Court Division, as reported in the media, was not taken into account and dealt with properly by the Supreme Judicial Council. The Minister for Law, Justice and Parliamentary Affairs raised all those issues while making his address in the Legislature in connection with the passing of the Sixteenth Amendment and he also clarified the intention of the Legislature in this respect. By enacting the Sixteenth Amendment, the Government has taken the necessary initiative to maintain the high judicial standard of the Supreme Court Judges and to keep their jobs secured following the best practices of the contemporary world. The system of parliamentary removal of Judges has a long history. It

was developed in the 18th century in England to ensure that the King could only dismiss a Judge if both Houses of Parliament passed a resolution or "address" calling for the removal of the Judge. Parliamentary removal procedure is in place in 33% Commonwealth jurisdictions. The Westminster model of parliamentary removal of Judges as has been reintroduced in Bangladesh through the Sixteenth Amendment is a standard mechanism of removal of Judges of the Supreme Court of Bangladesh for their proved misbehaviour or incapacity. The Government is committed to restore and revive the provisions of the original Constitution of 1972 in phases and as a part of this initiative, Article 96 of the original Constitution has been revived and restored through the Sixteenth Amendment.

It is not true that the Members of Parliament have been empowered to perform the functions of all development activities of their local areas and the whole administration is under their control. Though the Government has made them advisers to the Upazilla Parishads, yet it does not necessarily mean that they control the whole of the local administration. The Members of Parliament have no scope to act arbitrarily and illegally. There is not a single instance that exposes the interest of the Members of Parliament in any case where the Judges of the Supreme Court have restrained themselves from passing any order in connection therewith. There is rule of law in the country. Separation of powers among the 3(three) organs of the State is a unique feature of our Constitution so that one organ of the State can not encroach upon the domain of another. In fact, the petitioners have virtually admitted that in India and other developed countries, the Judges of the Apex Courts are removed by a resolution of the Parliament which is one of the

fundamental structures of the Constitution of a democratic country. Bangladesh being a democratic country also upholds the spirit of democracy and the rule of law. So the Sixteenth Amendment has not destroyed the independence of the Judiciary in any way. Rather it has changed the process of removal of the Judges of the Supreme Court of Bangladesh on the ground of proved misbehaviour or incapacity shifting from the Supreme Judicial Council to the Parliament. The Preamble of the Constitution is not in conflict with Article 96 of the original Constitution. Besides, the Sixteenth Amendment is not violative of Article 7B of the Constitution. In the UK, USA, Australia, Canada, India, South Africa and others countries, the same mechanism of parliamentary removal of the Judges of the higher Judiciary has been in place. In all those countries, the question of undermining the independence of the Judiciary and hampering the separation of powers among the 3(three) organs of the State has not arisen at all.

It is not correct that by reason of Article 70 of the Constitution, the Members of Parliament can not express their independent views and opinions against the stance of their respective parties. Every Member of Parliament has the right to express his/her opinion in the Parliament. Removal of Judges is not a political issue; rather it is a delicate constitutional issue that demands a debate in the Parliament among all the members irrespective of their political identity. Parliament does not generally involve itself in investigation and inquiry process on the allegation of misbehaviour or incapacity of any Supreme Court Judge. Almost in all jurisdictions, a separate, independent and impartial authority has been created to investigate or inquire into any allegation levelled against any

Judge of the Apex Court by an Act of Parliament for the sake of fairness, transparency and objectivity and the said investigating or inquiring authority is quite distinct and separate from the Legislature or the Executive organ of the State. An accused Judge will be fully entitled to defend himself during investigation or inquiry, as the case may be. That being so, he will not suffer any prejudice on any count.

The statement made in the Writ Petition that the Sixteenth Amendment has undermined the authority and dignity of the Apex Court because of the fact that the validity of the proceedings in the Parliament can not be called in question in any Court by reason of Article 78 of the Constitution is quite meaningless and unwarranted. The Constitution itself has given the mandate that the validity of the Parliamentary proceedings shall not be called in question in any Court of law. Being the sovereign law-making body, Parliament's proceedings are immune from judicial interference. This is a universal practice prevailing all over the world. Had Article 96 of the Constitution not been unconstitutionally and illegally amended by the unconstitutional military regime introducing the system of the Supreme Judicial Council, the Sixteenth Amendment would not have been required to restore Article 96 to its original position of 1972. The Supreme Court is the guardian of the Constitution, but not the supervisor of the whole Governmental process. The Sixteenth Amendment is a valid piece of legislation. So the Rule is liable to be discharged.

In the Supplementary Affidavit-in-Opposition filed on behalf of the respondent no. 1, it has been stated that the respondent no. 4 by a Memo being No. 55.00.0000.105.53.001.15-68 dated 01.03.2016 forwarded a draft

bill prepared under Article 96 (3) of the Constitution titled "বাংলাদেশ সুপ্রীম কোর্টের বিচারকগণের অসদাচরণ বা অসামর্থ্য (তদন্ত ও প্রমাণ) আইন, ২০১৬" to the Registrar-General of Bangladesh Supreme Court, Dhaka for the considered opinion of the Supreme Court of Bangladesh.

The case of the respondent no. 4, as set out in the Affidavit-in-Opposition, in brief, is as follows:

The Writ Petition has been filed by the petitioners invoking Article 102 of the Constitution as Public Interest Litigation (PIL) for the purpose of challenging the vires of the Constitution (Sixteenth Amendment) Act, 2014. Admittedly the petitioners are not "persons aggrieved." As the petitioners are not aggrieved persons, the Writ Petition in the nature of Public Interest Litigation is not maintainable. It has been provided in Section 2(3) of the Constitution (Sixteenth Amendment) Act, 2014 that the 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. As the Parliament is yet to make any law pursuant to clause (3) of the amended Article 96 of the Constitution, the Writ Petition is premature. In other words, no cause of action has arisen to file the Writ Petition and that being so, the Writ Petition is incompetent. However, the Sixteenth Amendment has not undermined the basic principles of separation and independence of the Judiciary. On the contrary, it has brought back the main spirit of the original Constitution which the sovereign people of Bangladesh conferred upon themselves in 1972 through their elected representatives who formed the Constituent Assembly. In fact, Article 96 of the Constitution, as it stands after the Sixteenth Amendment, is the same as Article 96 of the original

Constitution of 1972. It may be mentioned that the usurper of power suspended, subverted and mutilated the Constitution illegally by the Second Proclamation (Tenth Amendment) Order, 1977 (Second Proclamation Order No. 1 of 1977), so far as it relates to insertion of Clauses (2), (3), (4), (5), (6) and (7) of Article 96 i.e. provisions relating to the Supreme Judicial Council which were subsequently endorsed and ratified by the Constitution (Fifth Amendment) Act, 1979. As the Sixteenth Amendment has restored the original provisions of Article 96 of the Constitution, the same can not be declared void and ultra vires the Constitution. In *Italian Marble Works…Vs…Bangladesh, 2006 (Special Issue) BLT (HCD) 1*, the High Court Division declared the Constitution (Fifth Amendment) Act, 1979 null and void. Thereafter on appeal, the Appellate Division affirmed the decision of the High Court Division with some modifications and condonations in *Khondker Delwar Hossain Secretary, BNP and another…Vs…Bangladesh Italian Marble Works and others, 62 DLR (AD) 298*. In particular, the provisions embodied in Clauses (2), (3), (4), (5), (6) and (7) of Article 96 were condoned by the Appellate Division in the case of Khondker Delwar Hossain (Fifth Amendment Case). Subsequently on review of its own decision, the Appellate Division, by its judgment and order dated 29th March, 2011 passed in Civil Review Petition Nos. 17-18 of 2011(*Bangladesh represented by the Secretary, Ministry of Industries and others…Vs…Bangladesh Italian Marble Works Limited and others)* held, inter alia, that the Second Proclamation (Tenth Amendment) Order, 1977 (Second Proclamation Order No. 1 of 1977) inserting Clauses (2), (3), (4), (5), (6) and (7) in Article 96 and also clause (1) in Article 102 of the

Constitution were provisionally condoned till 31st December, 2012. The condonation of the provisions relating to the Supreme Judicial Council in Article 96 of the Constitution was a provisional one for a very limited period. But the Parliament in its own wisdom has reverted to the original Article 96 of the Constitution by passing the impugned Sixteenth Amendment. So it is an absurd proposition that the Sixteenth Amendment is contrary to the Constitution.

By the Sixteenth Amendment, no situation has been created to dominate the judiciary indirectly and the justice-seekers will not be prejudiced in any way in getting fair play from the Supreme Court of Bangladesh. No petition for judicial review can be entertained on mere assumptions and surmises that the administration of justice will be obstructed by the Sixteenth Amendment. The statements made in the Writ Petition with reference to the background of the initiative to amend the provisions of removal of the Judges of the Supreme Court resulted from some incidents which occurred in the recent past such as passing of the Contempt of Courts Act, 2013 which was ultimately declared null and void by the High Court Division; the amendment of the Anti-Corruption Commission Act of 2004 allegedly brought in to protect the Government officers from the charge of corruption which was also declared null and void by the High Court Division and a direction from the High Court Division to arrest the concerned officers of the law-enforcing agencies in a seven-murder case in Narayanganj etc. are vehemently denied. Such kind of wild, imaginary and baseless propositions on the part of the petitioners are nothing, but a deliberate insult upon the wisdom and integrity of the

Legislature which voices the will of the sovereign people. Such statements also go against the principle of law that all the Judges of the Supreme Court of Bangladesh are oath-bound to perform their duties without fear or favour and affection or ill-will. According to Article 7 of the 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, the Constitution. Those powers of the people have been reflected in Article 52, 57, 74 and 96 of the original Constitution relating to the impeachment of the President, resignation of the Prime Minister and removal of the Speaker and a Judge of the Supreme Court by the resolutions of the Parliament respectively. Although the provisions of Article 52, 57 and 74 of the Constitution still remain unchanged, the usurper, that is to say, the Martial Law Authority inserted the provisions of removal of a Judge of the Supreme Court by the Supreme Judicial Council which runs counter to the spirit of Article 7. The usurper i.e. the then military ruler in so doing by way of a Martial Law Proclamation purported to Act as 'holier than the Pope', but in fact, his very intention was to take away the power of the people who are entitled to exercise through their elected representatives in the Parliament. In most democratic countries of the world, such as the United Kingdom, United States of America, Canada, Australia, Ireland, India etc., the principle of accountability of the Judges of the superior Courts to the people through their elected representatives in the Parliament is maintained. So in our instance, the Sixteenth Amendment has not affected the principles of separation of powers and independence of the Judiciary at all. These basic structures of the Constitution, precisely speaking, have remained unaffected.

The wisdom of the Parliament in passing the Sixteenth Amendment is not subject to judicial review. However, the Sixteenth Amendment was passed by the Parliament by virtue of the power provided in Article 142 of the Constitution. This amendment does not curtail the independence of the Judges of the Supreme Court of Bangladesh in discharging their judicial functions. The apprehension of the petitioners that the Judges of the Apex Court will suo motu be restrained from passing any orders in the cases in which the Members of Parliament are interested is unfounded and baseless. The Judges of the Supreme Court will preserve, protect and defend the Constitution and the laws of Bangladesh in view of their oath of office. The further apprehension of the petitioners that in accordance with the amended Article 96 of the Constitution, a Member of Parliament can bring a motion against a Judge and discuss it in the Parliament and because of this reason, the Judge will not be able to perform his duties independently in respect of the case concerned is ill-conceived. Anyway, there is a presumption of constitutionality in favour of the impugned Sixteenth Amendment. Consequently the burden of rebuttal of the presumption of constitutionality of the Sixteenth Amendment lies on the shoulder of the petitioners. This burden can not be discharged by mere speculations, surmises, conjectures and apprehensions.

Like India, Bangladesh follows the Westminster type of democracy and our Parliament is democratic which consists of democratically elected representatives of the people. In the Parliament, every proceeding is initiated and completed democratically pursuant to the Constitution and the Rules of Procedure of Parliament by following democratic norms, practices, customs

and traditions. Against this backdrop, there is no basis for suspecting that the Members of Parliament may create obstruction to the administration of justice. Furthermore, it is an absurd proposition on the part of the petitioners that unlike the Members of Parliament in other countries, our Members of Parliament are influential people and in most cases, they ignore law for their personal interest and that the overall scenario in this regard is different in Bangladesh. In our subcontinent, only in Pakistan, there is a provision in its Constitution for removal of the Judges of the higher Judiciary by the Supreme Judicial Council. In Bangladesh, our Parliament in its wisdom preferred to revive the original provisions of removal of the Judges of the Supreme Court of Bangladesh by the orders of the President passed pursuant to the resolutions of the Parliament supported by a majority of not less than two-thirds of the total Members of the Parliament on the ground of their proved misbehaviour or incapacity which the Constituent Assembly originally adopted in 1972 following the constitutional provisions of the developed countries of the world. The Sixteenth Amendment has upheld the most important basic structure of the Constitution i.e. sovereignty of the people and implementation of their desire through their elected representatives. In addition, an amendment of the Constitution is always tested by the touchstone of the spirit of the original Constitution which is the sovereign will of the people. Besides, Article 70 of the Constitution is designed to strengthen democracy and ensure discipline among the Members of Parliament belonging to different political parties. This Article (Article 70) is not a roadblock to the independence of the Judiciary. So the Sixteenth Amendment is valid and intra vires the Constitution.

At the outset, Mr. Manzill Murshid, learned Advocate appearing on behalf of the petitioners, submits that the petitioners are all Advocates of the Supreme Court of Bangladesh and in this perspective, they are interested in the independence of the Judiciary and the rule of law and by that reason, they have come up with the present Writ Petition in the nature of Public Interest Litigation and as such the Writ Petition is maintainable.

Mr. Manzill Murshid also submits that although no law has yet been enacted by the Parliament in accordance with the amended Article 96(3) of the Constitution, yet the fact remains that the petitioners have the locus standi to challenge the vires of the Sixteenth Amendment independently on its own merit and the challenge of the constitutionality of the Sixteenth Amendment has no nexus with the contemplated law to be framed by the Parliament in the future and this being the landscape, the Writ Petition is not premature.

Mr. Manzill Murshid further submits that the people are very much concerned with the independence of the Judiciary and the rule of law inasmuch as these are 2(two) basic structures of the Constitution and the petitioners have voiced the concern of the people thereabout by filing the Writ Petition in the nature of Public Interest Litigation in view of the fact that the petitioners being Advocates of the Supreme Court of Bangladesh are the officers of the Court and they have great stakes in the rule of law through the administration of justice and from this point of view, this Public Interest Litigation is very much competent under Article 102 of the Constitution. In this context, the decision in the case of *National Board of Revenue…Vs…Abu Saeed Khan and others reported in 18 BLC (AD) 116*

adverted to both by the Attorney General Mr. Mahbubey Alam and the Additional Attorney-General Mr. Murad Reza has no manner of application to the facts and circumstance of the case before us.

Mr. Manzill Murshid also submits that through the Sixteenth Amendment, the power of removal of the Judges of the Supreme Court has been shifted to the Parliament which is a separate independent organ of the State in the scheme of the Constitution and by this amendment, a sort of situation has been created to dominate the higher Judiciary in an indirect manner which will ultimately affect the justice-seekers and this indirect control of the higher Judiciary by the Executive through the Parliament is contrary to the independence of the Judiciary and the rule of law and considered from this standpoint, the Sixteenth Amendment is ultra vires the Constitution.

Mr. Manzill Murshid next submits that if any amendment to the Constitution does not fit in with the Constitution itself, then the amendment is to be declared void and ultra vires in that the Constitution is a logical whole and if by exercising the amending power, one of the basic pillars of the Constitution is sought to be demolished, it is the constitutional duty of the Supreme Court to restrain it and when the Parliament and the Executive, instead of implementing the independence as well as separation of the Judiciary, follow a different course not sanctioned by the Constitution, the higher Judiciary will be within its jurisdiction to bring back the Parliament and the Executive from constitutional derailment and to pass necessary orders to declare Article 96 of the Constitution as inserted by the Sixteenth Amendment as void.

Mr. Manzill Murshid further submits that the primary objective of the Sixteenth Amendment is to destroy the principle of independence of the Judiciary and to make the Judiciary subservient to the Executive through the Parliament and the principle of independence of the Judiciary is one of the basic features of the Constitution as expounded in the case of *Anwar Hossain Chowdhury and others…Vs…Bangladesh and others* (popularly known as Eighth Amendment Case) [*1989 BLD (SpI) 1*] which has been reiterated and reaffirmed in Masdar Hossain's Case [*52 DLR (AD) 82*]; but the Sixteenth Amendment has given overwhelming authority to the Executive through the Parliament to remove the Judges of the Supreme Court which is a vicious blow to the independence of the Judiciary.

Mr. Manzill Murshid also submits that the power to frame the Constitution belongs to the people alone– that is 'constituent power' and it is original power, but the power to amend the Constitution is a 'derivative power' derived from the Constitution itself which is to be exercised subject to certain limitations and the people after making the Constitution gave the Parliament the power to amend it in exercise of its legislative power following certain special procedures and even if the constituent power is vested in the Parliament, that power is a derivative one and an amendment made in exercise of the derivative constituent power will not automatically make the said amendment immune from challenge by way of judicial review and no amendment to the Constitution can be made in exercise of the derivative power violating the existing provisions of the Constitution and the limitations imposed thereby.

Mr. Manzill Murshid next submits that the Sixteenth Amendment is violative of Article 7B of the Constitution as no provisions relating to the basic structures of the Constitution shall be amendable by way of insertion, modification, substitution, repeal or otherwise and as the Sixteenth Amendment has affected the independence of the Judiciary and separation of powers, two basic structures of the Constitution, the same is liable to be struck down as being unconstitutional.

Mr. Manzill Murshid further submits that the power conferred upon the Parliament by the Sixteenth Amendment is beyond the scope and jurisdiction of the Parliament on the score that causing of any investigation of misbehaviour or incapacity of any Judge of the Supreme Court and recommending to the President for his removal from office are neither legislative functions nor those are acts of scrutiny of the Executive actions; rather those functions are judicial in nature and the Constitution does not allow or contemplate any judicial role by the Parliament and the role of each organ of the State is clearly defined and carefully kept separate under the Constitution to maintain its harmony and integrity and to maximize the effectiveness of the functionality of the 3(three) organs of the State, that is to say, the Executive, the Legislature and the Judiciary and the assumption of the judicial role by the Parliament in the matter of removal of the Judges of the Supreme Court derogates from the theory of separation of powers as enshrined in our Constitution and this is why, the Sixteenth Amendment is unconstitutional.

Mr. Manzill Murshid also submits that the Sixteenth Amendment is ultra vires the Constitution as it blatantly and shockingly destroys the spirit

and essence of the provisions of Article 22 of the Constitution and clearly establishes the dominance of the Executive over the Judiciary through the Parliament which will create a great imbalance within the constitutional bodies and thereby make the Judiciary a toothless and tearful silent witness to the dismantling of the constitutional fabric.

Mr. Manzill Murshid further submits that the Sixteenth Amendment is unconstitutional in view of the fact that by virtue of Article 70, the Members of Parliament can not exercise their voting right independently against their partyline and given this position, the removal of the Judges of the Apex Court will certainly be prejudiced by the direct implication of Article 70 of the Constitution and this Article 70 has virtually fastened the hands of the Members of Parliament in the matter of exercise of their voting right and hence in case of voting for taking any resolution for removal of a Judge, they will have to toe the partyline leading to the politically motivated resolution frustrating the independence of the higher Judiciary.

Mr. Manzill Murshid also submits that the Supreme Court of Bangladesh being the guardian of the Constitution should not countenance any inroad upon its independence as it shall alone have overall control, supervision and management over the powers, functions and jurisdictions of its own as well as those of the subordinate Courts as an independent institution and the legislators and the political executives shall have no control, supervision and management over them in any manner whatsoever and hence the Sixteenth Amendment is ultra vires the Constitution.

Mr. Manzill Murshid next submits that the independence of the Judiciary, especially its institutional independence, as affirmed and declared

particularly by Articles 94(4) and 116A, is one of the basic pillars of the Constitution and it can not be demolished, whittled down, curtailed or diminished in any manner whatsoever and the Constitution does not give the Parliament or the Executive any authority to curtail or diminish the independence of the Judiciary by having recourse to any amendment of the Constitution, other legislation, subordinate legislation, rules or in any other manner as found by the Appellate Division in Masdar Hossain's Case (supra) and since the Sixteenth Amendment is an implied violation of Article 94(4) of the Constitution, the same should be struck down.

Mr. Manzill Murshid further submits that as per Article 112 of the Constitution, all authorities, whether executive and judicial, in the Republic shall act in aid of the Supreme Court and from this point of view, the Parliament can not make any law bypassing the binding effect of the judgment rendered by the Appellate Division in the Fifth Amendment Case (*Khondker Delwar Hossain Secretary, BNP and another…Vs…Bangladesh Italian Marble Works and others, 62 DLR (AD) 298*) whereby the Appellate Division declared the Constitution (Fifth Amendment) Act, 1979 (Act No. 1 of 1979) illegal and void subject to some modifications and condonations, holding, inter alia, that the Second Proclamation (Tenth Amendment) Order, 1977 (Second Proclamation Order No. 1 of 1977), so far as it relates to insertion of Clauses (2), (3), (4), (5), (6) and (7) of Article 96 i.e. provisions relating to the Supreme Judicial Council are condoned, and therefore, the provisions of removal of the Judges of the Supreme Court of Bangladesh by the Supreme Judicial Council can not be substituted by the authority of the Parliament violating the verdict of the Appellate Division and what is more,

the condonation as regards the provisions of the Supreme Judicial Council was also maintained by the Appellate Division in the judgment of the Civil Review Petition Nos. 17-18 of 2011.

Mr. Manzill Murshid also submits that in the case of *People's Union For Civil Liberties (PUCL) and another…Vs…Union of India and another, (2003) 4 SCC 399,* the Supreme Court of India held in paragraph 34 that 'the Legislature has no power to review the decision and set it at naught except by removing the defect which is the cause pointed out by the decision rendered by the Court and if this is permitted, it would sound the death knell of the rule of law' and the Supreme Court also held in paragraph 37 that 'the Legislature also can not declare any decision of a court of law to be void or of no effect' and that the Legislature can not encroach upon the judicial sphere and hence the Supreme Court also held in paragraph 112 that 'the Legislature can not overrule or supersede a judgment of the Court without lawfully removing the defect or infirmity pointed out by the Court because it is obvious that the Legislature can not trench on the judicial power vested in the Courts'.

Mr. Manzill Murshid further submits that in the case of *Cauvery Water Disputes Tribunal, In re, 1993 Supp (1) SCC 96 (2) and in Municipal Corpn. of the City of Ahmedabad…Vs…New Shrock Spg. and Wvg. Co. Ltd., (1970) 2 SCC 280*, the Indian Supreme Court also held similar views as in *Civil Liberties* and given this scenario, it is manifestly clear that by the Sixteenth Amendment, the Parliament has undermined the authority of the Supreme Court of Bangladesh which has kept the Supreme Judicial Council intact in the Constitution in its judgment in the Fifth Amendment Case and

thereby the Parliament has destroyed one of the basic structures of the Constitution, namely, independence of the Judiciary.

Mr. Manzill Murshid also submits that the background of the initiative to amend the provisions of removal of Judges dates back to some recent incidents, namely, declaring the Contempt of Courts Act, 2013 illegal and void, declaring an amended provision of the Anti-Corruption Commission Act, 2004 purporting to give protection to the Government officers unlawful and void and the directive issued to the concerned authority to arrest some accused officers of the law-enforcing agencies in a seven-murder case in Narayanganj by the High Court Division and such being the state of affairs, the Executive, at the instance of some interested quarters, took steps for the enactment of the Sixteenth Amendment and accordingly the same was enacted with a view to interfering with the freedom of the Judges in the discharge of their judicial functions with the ulterior motive of creating undue pressure upon the administration of even-handed justice to the litigant people and by this reason, the Sixteenth Amendment is definitely a colourable legislation.

Mr. Manzill Murshid next submits that the Judges of the superior Courts of the UK, USA, Canada, Australia and India are removed by their National Parliaments and in those countries, the Members of Parliaments do not perform any administrative functions as are being performed by the Members of Parliament in our country and furthermore, the social and democratic practices of those countries are quite different from those of Bangladesh and as such the Parliamentary removal mechanism in

Bangladesh is inappropriate and unsuitable; rather the possibility of misuse of this weapon being politically motivated can not be brushed aside at all.

Mr. Manzill Murshid further submits that there are many countries in the world where Judges are removed without the intervention of the Legislature and the modes of removal of the Judges of some of those countries are: (a) In Pakistan, the Supreme Judicial Council functions vide Article 209 of the Constitution of Pakistan, 1973 for removal of Judges. The said Supreme Judicial Council also functions under the Supreme Judicial Council Procedure of Enquiry, 2005 and the Code of Conduct for Judges of the Supreme Court and the High Courts of Pakistan. (b) By Article 98, the Constitution of Zambia Act provides that the President shall remove a Judge of the Supreme Court from his office upon having a report and /or advice from a Three-Member-Tribunal formed in that behalf headed by a Chairman. (c) The Constitution of the Republic of Fiji by its Article 111 provides that the President of the Republic must act on the advice of the Tribunal or the Medical Board in case of removal of the Chief Justice or the President of the Court of Appeal. In the similar way, Article 112 provides that the President of the Republic must act on the advice of the Tribunal or the Medical Board in case of removal of the other Judges/Judicial officers. (d) The Constitution of the Republic of Namibia also has similar provisions in its Article 84; as per Article 84(1), a Judge may be removed from office before expiry of his or her tenure only by the President acting on the advice of the Judicial Service Commission. (e) By Article 98, the Constitution of Singapore provides that the President may, on the recommendation of the Tribunal, remove any Judge of the Supreme Court from his/her office. (f) The

Constitution of Republic of Bulgaria provides in its Article 129(1) that Judges, Prosecutors, and Investigating Magistrates shall be elected, promoted, demoted, transferred and removed from office by the Supreme Judicial Council. In this connection, Mr. Manzill Murshid claims that all those countries have similar types of procedures for removal of Judges which the Constitution of Bangladesh had earlier in the form of the Supreme Judicial Council and the independence of the Judiciary will be best guaranteed if the Judges of the Supreme Court of Bangladesh are removed in accordance with the provisions of Article 96 as incorporated in the Constitution by the Constitution (Fifteenth Amendment) Act, 2011 (Act No. 14 of 2011).

Mr. Manzill Murshid next submits that the Sixteenth Amendment is inconsistent with and violative of Article 147(2) of the Constitution which provides that the remuneration, privileges and other terms and conditions of service of a person holding or acting in any office to which this Article applies shall not be varied to the disadvantage of any such person during his term of office and as per Article 147(4) of the Constitution, this Article, amongst others, applies to the office of the Judge of the Supreme Court and the Sixteenth Amendment has undoubtedly affected the terms and conditions of service of the incumbent Judges of the Supreme Court and they have been prejudiced thereby because of variation of their terms and conditions to their disadvantage while in service and the Sixteenth Amendment is liable to be knocked down as being unconstitutional on this count also.

Mr. Manzill Murshid further submits that for impeachment and removal of the President of the Republic, detailed provisions have been spelt

out in Articles 52 and 53 of the Constitution; but for removal of the Judges of the Supreme Court under the amended Article 96(2), details have been left to the Parliament to be worked out in the form of a law pursuant to the amended Article 96(3) and that is incongruous and even if an ordinary law is passed pursuant thereto, it will be subject to frequent changes by simple majority of the Members of Parliament in the interest of the party-in-power jeopardizing the independence of the Judiciary.

Mr. Manzill Murshid next submits that the Sixteenth Amendment contains an inherent weakness, that is to say, the amended Article 96(2) requires a resolution to be passed by a majority of not less than two-thirds of the total number of Members of Parliament and in the absence of such majority, there may arise a complication in passing the resolution, which may ultimately provide the concerned Judge with a blank cheque for his misbehaviour or incapacity and in India, a motion was lost in Lok Sabha in 1992 in spite of a finding of guilt by a committee formed under the Judges (Inquiry) Act, 1968 against one V. Ramaswami J, the then Chief Justice of Punjab and Haryana High Court because of not having the required votes in the House since the members of a major political party, namely, Congress were absent therein (*Mrs. Sarojini Ramaswami…Vs…Union of India and others, AIR 1992 SC 2219*) and in our instance, the same may be replicated if the Sixteenth Amendment is maintained by this Court.

Mr. Manzill Murshid further submits that the tenure of the Judge is very vital in maintaining the integrity of the Judiciary and is pivotal in maintaining and upholding the independence of the Judiciary as expounded by the Appellate Division in Masdar Hossain's Case and in that context, the

removal of the Judges of the Apex Court must be by an appropriate process for the sake of fairness, transparency and avoidance of arbitrariness and since the process of voting in the Parliament is a political process, the amended Article 96(2) is against the fundamental principle of rule of law and in such view of the matter, the Sixteenth Amendment will make the Judges susceptible to a capricious political process of voting in the Parliament which may pass a resolution for removal of an innocent Judge on the one hand, or may not do so in the case of a guilty Judge on the other hand and in any case, a Judge may be left at the mercy of the Parliament impairing the independence of the Judiciary.

Mr. Manzill Murshid next submits that though the duty of the Members of Parliament is to frame laws; but in the present context, they are also performing the functions of all development activities in their local areas and the whole local administration is under their control and as such they will not hesitate to act arbitrarily or illegally as a result of which the powerless people will be compelled to resort to the High Court Division and in most of the cases (Writ Petitions), the Government is the respondent and that being so, the Members of Parliament will be interested in those cases and by virtue of the Sixteenth Amendment, a Member of Parliament can bring a motion against any Judge in any case and discuss it therein necessitating his character-assassination and consequently the Judge may not be able to perform his duties independently to the great detriment of public interest.

Mr. Manzill Murshid also submits that the Sixteenth Amendment shall have far-reaching negative impact on the discharge of the functions of the

Members of the Public Service Commission, Comptroller and Auditor-General, Election Commissioners as well as Commissioners of the Anti-Corruption Commission inasmuch as they will be removable in the like manner as a Judge of the Supreme Court of Bangladesh as per Articles 139 (2), 129(2), 118 (5) of the Constitution of Bangladesh and Section 10(3) of the Anti-Corruption Commission Act, 2004 respectively and if the power of removal of the Judges of the Supreme Court is retained in the hands of the Members of Parliament, in particular, the Anti-Corruption Commission will not be able to act independently against them which will eventually frustrate the purpose of the Anti-Corruption Commission Act and the Comptroller and Auditor-General will also be self-restrained from acting independently while auditing the accounts of the Parliament Secretariat and as such the Sixteenth Amendment should go.

Per contra, Both Mr. Mahbubey Alam, learned Attorney General appearing on behalf of the respondent no. 1 and Mr. Murad Reza, learned Additional Attorney-General appearing on behalf of the respondent no. 4, contend that the Sixteenth Amendment is not intended to dominate the Judiciary by the Executive through the Legislature and as the provisions relating to the Supreme Judicial Council were introduced in Article 96 of the Constitution by the Second Proclamation (Tenth Amendment) Order, 1977 (Second Proclamation Order No. 1 of 1977) by General Ziaur Rahman during the period of Martial Law mutilating the Constitution, the Sixteenth Amendment was enacted by the Parliament restoring Article 96 of the original Constitution of 1972 and that being so, it can not be said at all that the Sixteenth Amendment is violative of the independence of the Judiciary,

one of the basic features of the Constitution as held by the Appellate Division in the Eighth Amendment Case.

Both Mr. Mahbubey Alam and Mr. Murad Reza further contend that admittedly the petitioners are not aggrieved persons, though they are the Advocates of the Supreme Court of Bangladesh and as they are not aggrieved persons within the meaning of Article 102 of the Constitution, they can not come up with the instant Writ Petition in the nature of Public Interest Litigation and as such the Writ Petition is not maintainable. In support of this submission, they have referred to *National Board of Revenue…Vs…Abu Saeed Khan and others, 18 BLC (AD) 116*.

Both Mr. Mahbubey Alam and Mr. Murad Reza next contend that the Sixteenth Amendment has not been made effective and operative as yet in the absence of a law to be framed pursuant to the amended Article 96(3) of the Constitution and as the Sixteenth Amendment without any corresponding law is ineffective and dysfunctional, the Writ Petition is premature and this is why, the Rule is liable to be discharged on this ground alone.

Both Mr. Mahbubey Alam and Mr. Murad Reza further contend that the Fifth Amendment of the Constitution was declared void and ultra vires by the final judgment of the Appellate Division in the case of *Khondker Delwar Hossain Secretary, BNP and another…Vs…Bangladesh Italian Marble Works and others (Fifth Amendment Case) reported in 62 DLR (AD) 298* and eventually the Parliament thought it appropriate in its wisdom to restore the original provisions of Article 96 of the Constitution by way of amendment under Article 142 of the Constitution and it is well-settled that the wisdom of the Parliament can not be questioned in any manner by any

Court and from this standpoint, the Sixteenth Amendment is immune from challenge.

Both Mr. Mahbubey Alam and Mr. Murad Reza also contend that as per Article 7(1) of the 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, the Constitution and as the people are the source of all powers of the Republic, Judges are consequentially accountable to the people through their representatives in the House of the Nation and the Sixteenth Amendment has been made in order to ensure the accountability of the Judges of the Supreme Court to the people and by that reason, the Sixteenth Amendment is a valid piece of legislation.

Both Mr. Mahbubey Alam and Mr. Murad Reza also contend that it is true that in the Fifth Amendment Case, the Appellate Division affirmed the judgment of the High Court Division subject to some modifications and the Appellate Division condoned the Second Proclamation (Tenth Amendment) Order, 1977 (Second Proclamation Order No. 1 of 1977), so far as it relates to insertion of Clauses (2), (3), (4), (5), (6) and (7) of Article 96 i.e. provisions relating to the Supreme Judicial Council and also Clause (1) of Article 102 of the Constitution; but in Civil Review Petition Nos. 17-18 of 2011, the Appellate Division modifying its earlier stance condoned the Second Proclamation (Tenth Amendment) Order, 1977 (Second Proclamation Order No. 1 of 1977) in respect of insertion of Clauses (2), (3), (4), (5), (6) and (7) of Article 96 and also Clause (1) of Article 102 of the Constitution provisionally till 31st December, 2012 in order to enable the Parliament to make necessary amendment to the Constitution and to enact

the laws anew promulgated during the period of Martial Law of General Ziaur Rahman and because of this provisional condonation, the Parliament passed the Sixteenth Amendment in 2014, that is to say, long after expiry of 31st December, 2012; but in any event, the Sixteenth Amendment is intra vires the Constitution.

Both Mr. Mahbubey Alam and Mr. Murad Reza next contend that there is a presumption of constitutionality in favour of the Sixteenth Amendment and the onus is upon the petitioners to rebut that presumption of constitutionality. In support of this contention, they have drawn our attention to the decision in the case of *Sheikh Abdus Sabur…Vs…Returning Officer, District Education Officer in-Charge, Gopalganj and others, 41 DLR (AD)30*.

Both Mr. Mahbubey Alam and Mr. Murad Reza also contend that the Constitution is the supreme law of the land and as per the Constitution, there are 3(three) organs of the State, namely, the Executive, the Legislature and the Judiciary and all the 3(three) organs of the State are to function within the parameters set by the Constitution, though the Supreme Court is the guardian of the Constitution and the original Article 96 of the Constitution was made by the Constituent Assembly in exercise of its constituent power and the Sixteenth Amendment has simply restored the original Article 96 of the Constitution by way of amendment and this being the panorama, the Sixteenth Amendment can not be found fault with.

Both Mr. Mahbubey Alam and Mr. Murad Reza further contend that supremacy of the Constitution, judicial review, separation of powers, independence of the Judiciary etc. are some of the basic features of the

Constitution and the Sixteenth Amendment is not violative of either the principle of separation of powers or the principle of independence of the Judiciary and the Parliamentary procedure of removal of the Judicature is also sanctioned by the Constitutions of the United Kingdom, United States, India, Canada, Australia, Sri Lanka etc. and in particular this Parliamentary procedure of removal of the Judges of the Supreme Court of Bangladesh was there in the original Constitution of 1972 too till the Second Proclamation (Tenth Amendment) Order, 1977 (Second Proclamation Order No. 1 of 1977) came into force and ultimately the Parliament enacted the Sixteenth Amendment restoring the original Article 96 of the Constitution verbatim and in such a posture of things, it can not be said at all that the Sixteenth Amendment is repugnant to Article 7B of the Constitution.

Both Mr. Mahbubey Alam and Mr. Murad Reza also contend that the provisions relating to the Supreme Judicial Council were inserted in Article 96 of the Constitution by General Ziaur Rahman through the Fifth Amendment importing the same from the Constitution of Pakistan of 1973 and the Supreme Judicial Council being a legacy of the Martial Law regime does not fit in with the democratic set-up of the People's Republic of Bangladesh and by enacting the Sixteenth Amendment, our Parliament said good bye to this Martial Law legacy for ever.

Both Mr. Mahbubey Alam and Mr. Murad Reza next contend that by passing the Sixteenth Amendment, Parliament has restored the provisions of the original Article 96 of the Constitution and by that reason, the constitutionality of the Sixteenth Amendment is beyond the scope of the judicial review under Article 102 of the Constitution.

Both Mr. Mahbubey Alam and Mr. Murad Reza further contend that Article 70 of the Constitution is designed to maintain discipline and prevent horse-trading among the Members of Parliament belonging to different political parties and this Article 70 has nothing to do with the independence of the Judiciary as guaranteed by the Constitution.

Both Mr. Mahbubey Alam and Mr. Murad Reza also contend that the privileges and other terms and conditions of service of the incumbent Supreme Court Judges have not been varied to their disadvantage as postulated by Article 147(2) by the Sixteenth Amendment; rather those have been fortified by the restoration of the original Article 96 of the Constitution.

Both Mr. Mahbubey Alam and Mr. Murad Reza next contend that the Sixteenth Amendment has not affected the independence of the Judiciary in any way as guaranteed by Articles 94(4) and 147(2) and by way of elaboration of this contention, they assert that in the UK, USA, India, Sri Lanka, Canada and Australia, Judges are removed from office through the intervention of the Legislature and in those countries, Judges are fully independent in discharge of their judicial functions. They further assert that the two relevant basic structures of the Constitution in this case, namely, separation of powers and independence of the Judiciary are to be considered with reference to the provisions of the original Constitution of 1972 and not otherwise and if the Court appreciates this stand of the contesting respondents, then it can not be conceived that the Sixteenth Amendment is violative of Article 7B of the Constitution.

Dr. Kamal Hossain, learned Amicus Curiae, argues that the independence of the Judiciary is the foundation stone of the Constitution as

contemplated by Article 22 and it is one of the fundamental principles of State policy and the significance of the independent Judiciary, free from the interference of the other 2(two) organs of the State, has been emphasized in Articles 94(4), 116A and 147 of the Constitution and in the Eighth Amendment Case, it has been held that Democracy, Republican Government, Unitary State, Separation of Powers, Independence of the Judiciary, Rule of Law, Fundamental Rights etc. are basic structures of the Constitution.

Dr. Kamal Hossain next argues that the independence of the Judiciary was further strengthened in the historic decision of the Appellate Division in Masdar Hossain's Case, where the Appellate Division re-affirmed the constitutional mandate of independence of the Judiciary and laid out a roadmap to achieve separation of the lower Judiciary from the Executive organ of the State.

Dr. Kamal Hossain also argues that the consensus appears to be that the constitutional principle of independence of the Judiciary is intended to exclude any kind of partisan exercise of power by the Legislature in relation to the Judiciary, in particular, the power of the Legislature to remove the Judges of the Supreme Court of Bangladesh.

Dr. Kamal Hossain next argues that in the original 1972 Constitution, removal of Judges of the Supreme Court was entrusted to the Parliament on the premise that the Parliament being constituted by the elected representatives of the people, when in exercising its power, would do so conscientiously and independently, free from any party directive and this is how it was perceived when a similar provision was adopted in the Indian

Constitution and both in the Indian Constitution and in the original 1972 Constitution of Bangladesh, the power of removal of any Judge would only be exercised after an inquiry conducted by an independent Judicial Inquiry Committee; but H. M. Seervai has expressed his concern in his book "The Position of the Judiciary under the Constitution of India" (published by Bombay University Press) at page 109 that political and party considerations have come into play in impeachment proceedings.

Dr. Kamal Hossain also argues that independence of the Judiciary is a sine qua non of modern democracy and so long as the Judiciary remains truly distinct from the Legislature and the Executive, the general power of the people will never be endangered. In this connection, Dr. Kamal Hossain adverts to *The State…Vs…Chief Editor, Manabjamin and others, 57 DLR (HCD) 359.*

Dr. Kamal Hossain next argues by referring to *Idrisur Rahman (Md) and others…Vs…Secretary, Ministry of Law, Justice and Parliamentary Affairs, Government of the People's Republic of Bangladesh, 61 DLR (HCD) 523* that independence of the Judiciary is an indispensable condition of democracy and if the Judiciary fails, the Constitution fails and the people might opt for some other alternative.

Dr. Kamal Hossain also argues that although the independence of the Judiciary is an essential element of the rule of law, yet by enacting the Sixteenth Amendment, the Parliament is prone to exercise control over the Judiciary by way of preserving a right to take decisions on the question of removal of the Judges of the Supreme Court.

Dr. Kamal Hossain next argues that the security of tenure of the Judges is one of the essential conditions for ensuring effective independence of the Judiciary and this has been emphatically spelt out in *Walter Valente…Vs…Her Majesty The Queen and another, [1985] 2 R. C. S. 673 and S. P. Gupta and others…Vs…President of India and others, 1982 AIR (SC) 149.*

Dr. Kamal Hossain further argues that the Judges can not perform their solemn duties unless their independence is guaranteed and protected by securing their tenure as underlined in the United Nation's Instrument on "Basic Principles on the Independence of the Judiciary" and in a number of authoritative International Instruments, such as the "Beijing Statement of Principles of the Independence of the Judiciary", the "Universal Charter of the Judge", and the "Commonwealth Latimer House Principles on the Three Branches of Government" and the formal requirements of independence of the Judges include, amongst others, their security of tenure and suitable conditions of service.

Dr. Kamal Hossain also argues that Article 96 of the original 1972 Constitution relating to the removal of Judges was materially affected by the Fourth Amendment of the Constitution in 1975 which deleted Clause (3) of Article 96 and thereafter by the Fifth Amendment of the Constitution, the provisions for removal of Judges by the Supreme Judicial Council were introduced and ultimately the Fifth Amendment was held to be unconstitutional by the Appellate Division in the Fifth Amendment Case, albeit the Appellate Division condoned the provisions relating to the Supreme Judicial Council in Article 96 of the Constitution; but the

impugned Sixteenth Amendment purports to violate the judgment of the Appellate Division passed in that case.

Dr. Kamal Hossain next argues that the Parliament, in disregard of the decision of the Appellate Division rendered in the Fifth Amendment Case, has abolished the Supreme Judicial Council, which clearly compromises and weakens the independence of the Judiciary through the Sixteenth Amendment and this Sixteenth Amendment is violative of Articles 94(4) and 22 of the Constitution by way of subjecting the tenure of the Judges of the Supreme Court to the whims and caprices of the Members of Parliament.

Dr. Kamal Hossain also argues that the consequence of the Sixteenth Amendment is that it has rendered the tenure of the Judges of the Apex Court insecure and as such the Sixteenth Amendment has created an opportunity to undermine the independence of the Judiciary by making the same vulnerable to outside influences and pressures jeopardizing the rule of law in the country.

Dr. Kamal Hossain further argues that as the Sixteenth Amendment is violative of independence of the Judiciary and separation of powers, the same is in conflict with Article 7B of the Constitution and by that reason, it is liable to be struck down.

Dr. Kamal Hossain also argues that the Sixteenth Amendment has clearly varied the removal mechanism of the Supreme Court Judges for their proved misbehaviour or incapacity to their disadvantage during their term of office and in this perspective, the Sixteenth Amendment is violative of Article 147(2) of the Constitution.

Dr. Kamal Hossain next argues that in a bid to ensure the independence of the Judiciary by securing the remuneration of the Judges of the Supreme Court, the Constitution provides in Articles 88(b) and 89(1) that their remuneration is payable from the Consolidated Fund and the expenditure charged upon the Consolidated Fund can only be discussed in Parliament, but it can not be voted on and regard being had to the provisions of Articles 88(b) and 89(1) of the Constitution, it appears that the Constitution upholds the independence of the Judiciary in a way that even Parliament can not vote on their remuneration and Articles 88(b) and 89(1) do together form part of the basic structure of the Constitution as they protect the independence of the Judiciary and therefore the Sixteenth Amendment, read in the light of Articles 88(b) and 89(1), should not be allowed to stand as a valid piece of legislation.

Dr. Kamal Hossain also argues that Article 23 of the "Beijing Statement of Principles of the Independence of the Judiciary" provides that by reason of difference in history and culture, the procedure adopted for the removal of Judges may differ in different societies and removal by Parliamentary procedures has traditionally been adopted in some jurisdictions; but in other jurisdictions, that procedure is unsuitable and its use other than for the most serious of reasons is apt to lead to misuse and having regard to the socio-political conditions of Bangladesh, the provisions relating to the Supreme Judicial Council for removal of the Judges of the Supreme Court are best suited.

Dr. Kamal Hossain further argues that the American scenario of impeachment of the Judges has been criticized as an unsatisfactory process

in which “political and party influence has come into play” and thus, the risk of impeachment being highly politicized will be even more conspicuous in the current political context of Bangladesh, especially due to the presence of Article 70 in the Constitution of Bangladesh and viewed from this angle, the independence of the Judiciary will be endangered.

Mr. M. Amir-ul Islam, learned Amicus Curiae, submits that he was one of the Members of the Constitution Drafting Committee after Liberation War of Bangladesh and Dr. Kamal Hossain was the Chairman of that Committee and in the post-liberation period in 1972, there was no other option for the Members of the Committee but to assign the job of removal of the Supreme Court Judges to the Parliament and that being so, the Parliament was entrusted therewith by the original Constitution of 1972.

Mr. M. Amir-ul Islam further submits that we learn through experience and experience is the best teacher of a person and restoration of the original Article 96 of the Constitution by the Sixteenth Amendment is not backed by experience and in this regard, the Sri Lankan, Indian and Malaysian experiences are not happy. On this point, Mr. M. Amir-ul Islam has relied upon a report of the International Bar Association’s Human Rights Institute, namely, “A Crisis of Legitimacy: The Impeachment of Chief Justice Bandaranayake and the Erosion of the Rule of Law in Sri Lanka”, and a report of a Mission on behalf of the International Bar Association, the ICJ Center for the Independence of Judges and Lawyers, the Commonwealth Lawyers’ Association and the Union Internationale Des Avocats, namely, “Justice In Jeopardy: Malaysia 2000” and the decision in the case of *Lily*

Thomas (Ms), Advocate…Vs…Speaker, Lok Sabha and others reported in (1993) 4 SCC 234.

Mr. M. Amir-ul Islam next submits that separation of powers and independence of the Judiciary go hand in hand and the doctrine of separation of powers must be adhered to in making the Judiciary completely independent of the influence of the Executive or the Legislature and the Sixteenth Amendment, it goes without saying, is a blow to the independence of the Judiciary.

Mr. M. Amir-ul Islam further submits that the removal procedure of the Judges of the Supreme Court is a part of their appointment process, but unfortunately in Bangladesh, the appointment process of the Judges of the Supreme Court is not transparent, open and public and even after 45 years of our independence, Article 95(2)(c) of the Constitution relating to the other qualifications for appointment of a Judge of the Supreme Court has not seen the light of the day to the great detriment of public interest.

Mr. M. Amir-ul Islam further submits that the force of law is not logic, but experience and our experience shows that about 70% of the Members of Parliament in Bangladesh are now-a-days businessmen and litigants and for the sake of independence of the Judiciary, they should not be involved in the process of removal of the Judges of the Supreme Court of Bangladesh on the ground of proved misbehaviour or incapacity.

Mr. M. Amir-ul Islam next submits that the Parliamentary removal procedure of the Judges of the Apex Court is in vogue in some countries of the world like the UK, USA, Canada, Australia, India etc., but that has

become obsolete and outdated with the growing constitutional jurisprudence of the independence of the Judiciary.

Mr. M. Amir-ul Islam also submits that the historical perspective coupled with our experience and judicial observations in various cases, namely, Masdar Hossain's Case, Eighth Amendment Case, Fifth Amendment Case etc. militate against the Sixteenth Amendment and homecoming of Article 96 (restoration of Article 96) is not a plausible argument in the present scenario of Bangladesh.

Mr. M. Amir-ul Islam further submits that the principle of independence of the Judiciary demands that a Judge should be tried by his peers for his misbehaviour/misconduct or incapacity and that will best guarantee his independence in the discharge of his judicial functions.

Mr. M. Amir-ul Islam further submits by referring to a book captioned "The Appointment, Tenure and Removal of Judges under Commonwealth Principles: A Compendium and Analysis of Best Practice" published by the British Institute of International and Comparative Law, Charles Clore House, 17 Russell Square, London WC 1B 5JP that the Commonwealth Latimer House Principles (2003) on the Accountability of and the Relationship between the Three Branches of Government as agreed by Law Ministers and endorsed by the Commonwealth Heads of Government Meeting, Abuja, Nigeria, 2003 require that Judges are accountable to the Constitution and to the law which they must apply honestly, independently and with integrity and the principles of judicial accountability and independence underpin public confidence in the judicial system and the importance of the Judiciary as one of the three pillars upon which a

responsible Government relies [Principle VII (b)] and the removal mechanism of the Judges of the Supreme Court of Bangladesh as contemplated by the Sixteenth Amendment has virtually impaired the independence of the Judiciary.

Mr. Rokanuddin Mahmud, learned Amicus Curiae, contends that personally he does not find fault with the Sixteenth Amendment, but what is of paramount importance is that the law to be framed pursuant to the amended Article 96(3) of the Constitution must be gone into before he makes any submission on the point and unless that law is framed by the Parliament, it is difficult to say at this stage as to whether the Sixteenth Amendment has impaired the independence of the Judiciary or not.

Mr. Rokanuddin Mahmud next contends that the Judges of the Supreme Court should be tried by their peers in case of misbehaviour or incapacity and that will guarantee the independence of the higher Judiciary to the fullest extent and in this respect, the Supreme Judicial Council as introduced in Article 96 by the Fifteenth Amendment of the Constitution is the best mechanism.

Mr. Ajmalul Hossain, learned Amicus Curiae, submits that as the Sixteenth Amendment has restored the provisions of Article 96 of the original Constitution of 1972, it will be an uphill job for him to assail the constitutionality of the Sixteenth Amendment.

Mr. Ajmalul Hossain next submits that the provisions relating to the Supreme Judicial Council were introduced by the Second Proclamation (Tenth Amendment) Order, 1977 (Second Proclamation Order No. 1 of

1977) and in the Fifth Amendment Case, the Appellate Division condoned those provisions as being more transparent and safeguarding the independence of the Judiciary.

Mr. Ajmalul Hossain further submits that in Civil Review Petition Nos. 17-18 of 2011 by the order dated 29th March, 2011, the Appellate Division by modifying its earlier decision in the Fifth Amendment Case provisionally condoned the provisions relating to the Supreme Judicial Council in Article 96 of the Constitution till 31st December, 2012 and the Fifteenth Amendment endorsed the provisions relating to the Supreme Judicial Council in Article 96 and maintained the same; but thereafter all of a sudden, the Sixteenth Amendment was pushed through raising suspicions in the minds of the people about the independence of the higher Judiciary.

Mr. Ajmalul Hossain next submits that there is always a scope for abuse of the power of removal of the Judges of the Supreme Court by the Members of Parliament on the strength of the Sixteenth Amendment impairing the independence of the higher Judiciary.

Mr. Ajmalul Hossain also submits that Article 7B of the Constitution should have been at the back of the mind of the Members of Parliament before passing of the Sixteenth Amendment and the Sixteenth Amendment is hit by Article 7B of the Constitution as it has affected the independence of the Judiciary, one of the basic features of the Constitution.

Mr. Ajmalul Hossain further submits that the security of tenure of the Judges is the most essential condition of judicial independence and whether the Sixteenth Amendment has affected the security of tenure of the Judges of the Supreme Court adversely is the moot question in this case and the Court

will decide this question one way or the other, regard being had to the socio-political conditions obtaining in Bangladesh. As regards the question of essentiality of the security of tenure of the Judges, Mr. Ajmalul Hossain relies on *Walter Valente…Vs…Her Majesty The Queen and another, [1985] 2 R. C. S. 673.*

Mr. Ajmalul Hossain further submits that judicial independence encompasses both an individual and institutional dimension and the individual dimension relates to the independence of a particular Judge, and the institutional dimension relates to the independence of the Court which he mans and each of these dimensions depends on the objective conditions or guarantees that ensure the Judiciary's freedom from any outside influence or interference and the requisite guarantees are security of tenure, financial security and administrative independence. On this point, Mr. Ajmalul Hossain adverts to the decision in the case of *Ell…Vs…Alberta, [2003] 1 S.C. R. 857.*

Mr. Ajmalul Hossain also submits that judicial independence has been recognized as "the lifeblood of constitutionalism in democratic societies" and the principle of judicial independence requires the Judiciary to be independent both in fact and perception. In support of this submission, Mr. Ajmalul Hossain adverts to the self-same decision in the case of *Ell…Vs…Alberta, [2003] 1 S. C. R. 857.*

Mr. Ajmalul Hossain next submits by referring to *Provincial Court Judges' Association of New Brunswick, Honourable Judge Michael Mckee and Honourable Judge Steven Hutchinson…Vs…Her Majesty The Queen in Right of the Province of New Brunswick, as represented by the Minster of*

Justice and others, [2005] 2 S. C. R. 286 that it is a sound proposition that judicial independence is for the benefit of the judged and not for the benefit of the Judges and without considering the interest of the judged, our Parliament has passed the Sixteenth Amendment which has belittled the independence of the Judiciary in public perception.

Mr. Ajmalul Hossain further submits that the institutional independence of the Judiciary reflects a deeper commitment to the doctrine of separation of powers among the Executive, Legislative and Judicial organs of the State and although judicial independence had historically developed as a bulwark against the abuse of the Executive power, it equally applied against other potential intrusions, including any from the Legislative organ as a result of legislation. In order to buttress up this submission, Mr. Ajmalul Hossain relies upon the decision in respect of two References from the *Lieutenant Governor in Council pursuant to Section 18 of the Supreme Court Act, 1988…Vs…The Attorney General of Prince Edward Island, [1997] 3 R. C. S. 73*.

Mr. Ajmalul Hossain next submits that in this case, a question must be answered as to whether the Sixteenth Amendment has advanced public interest or defeated it and he believes that the Sixteenth Amendment has defeated it.

Mr. Ajmalul Hossain further submits that it is common knowledge that in our country, a vast majority of the legislators have criminal records; but nevertheless they will be involved in the process of removal of the Judges of the Supreme Court by dint of the Sixteenth Amendment and this may give rise to conflict of interests posing a threat to the rule of law.

Mr. Ajmalul Hossain lastly submits that the Sixteenth Amendment is a colourable piece of legislation in the facts and circumstances of the case and as such the Sixteenth Amendment should go.

We have heard the submissions of the learned Advocate Mr. Manzill Murshid and the counter-submissions of the learned Attorney General Mr. Mahbubey Alam and the learned Additional Attorney-General Mr. Murad Reza. We have also heard the submissions of the learned Amici Curiae Dr. Kamal Hossain, Mr. M. Amir-ul Islam, Mr. Rokanuddin Mahmud and Mr. Ajmalul Hossain.

Anyway, it may be mentioned that we also appointed Mr. Mahmudul Islam, a Senior Advocate of Bangladesh Supreme Court, as one of the Amici Curiae; but unfortunately he was terminally sick and died during the pendency of the Rule. So we were deprived of his able assistance in this case.

In the facts and circumstances of the case and in view of the contentions of Mr. Manzill Murshid and the counter-contentions of Mr. Mahbubey Alam and Mr. Murad Reza on the question of maintainability of the Writ Petition under Article 102 of the Constitution, I take up this issue first for adjudication.

Our Constitution is undeniably the supreme law of the land. In other words, the Constitution is the ‘suprema lex’ of the country. Under Article 102 of the Constitution except for an application for habeas corpus or quo warranto, a writ petition can be filed by a ‘person aggrieved’. Thus in order to have locus standi to invoke the Writ Jurisdiction of the High Court

Division, an applicant has to show that he is an aggrieved party in an application for certiorari, mandamus or prohibition.

The leading English case on locus standi is Exparte Sidebotham, (1880) 14 Ch. D. 458 where the Court held that a person aggrieved is a man—

> "who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongly deprived him of something, or wrongfully refused him something, or wrongfully affected his title to something."

The same view was taken in subsequent cases. The Pakistani and Indian Courts were greatly influenced by these English decisions.

In the case of *Tariq Transport Company, Lahore....Vs....Sargodha-Bhera Bus Service, Sargodha and others reported in 11 DLR (SC) 140*, the Supreme Court of Pakistan observed:

> "...a person seeking judicial review must show that he has a direct personal interest in the act which he challenges before his prayer for review is entertained."

That writ petition was filed under Article 170 of the Constitution of Pakistan, 1956. The same view was taken in respect of locus standi under Article 98 of the Constitution of Pakistan, 1962. Therefore, an association,

though registered, did not have locus standi to vindicate the personal or individual grievance of its members.

But in the case of *Mian Fazal Din.....Vs....Lahore Improvement Trust reported in 21 DLR(SC) 225*, the Pakistan Supreme Court took somewhat a liberal view stating–

> "...the right considered sufficient for maintaining a proceeding of this nature is not necessarily a right in the strict juristic sense; but it is enough if the applicant discloses that he had a personal interest in the performance of the legal duty, which if not performed or performed in a manner not permitted by law, would result in the loss of some personal benefit or advantage or the curtailment of a privilege or liberty or franchise."

The Indian Supreme Court also followed the English decisions in the matter of standing both for the enforcement of fundamental rights and for other constitutional remedies.

The traditional view of locus standi has an adverse effect on the rule of law. Schwartz and Wade commented in "Legal Control of Government" (1972 edition) at page 291:

> "Restrictive rules about standing are in general inimical to a healthy system of administrative law. If a person with a good

> case is turned away, merely because he is not sufficiently affected personally, that means that some government agency is left free to violate the law, and that is contrary to public interest."

With the increase of governmental functions, the English Courts found the necessity of liberalizing the standing rule to preserve the integrity of the rule of law. When a public-spirited citizen challenged the policy of the police department not to prosecute the gaming clubs violating the gaming law, the Court heard him, though no clear-cut and definitive answer to the standing question was given (*R.V. Metropolitan Police Commissioner ex P. Blackburn [1968] 1 All E. R. 763*). The Court also heard Mr. Blackburn challenging the action of the Government in joining the European Common Market (*Blackburn v. Attorney-General [1971] 2 All E. R. 1380*). Again, Mr. Blackburn was accorded standing in enforcing the public duty owed by the police and Greater London Council in respect of exhibition of pornographic films (*R.V. Metropolitan Police Commissioner ex P. Blackburn [1973] All E.R. 324*). In all the cases mentioned above, the duty owed by the public authorities was to the general public and not to an individual or to a determinate class of persons and the applicants were found to have locus standi as they had 'sufficient interest' in the performance of the public duty.

In India, the concept of public interest litigation (public-spirited citizens bringing matters of great public importance) was initiated by Mr. V.R. Krishna Iyer, J in the case of *Mumbai Kamgar Sabha, Bombay....Vs.... M/s. Abdulbhai and others reported in AIR 1976 SC 1455*. However, a

definite jurisprudential basis was laid down in the case of *S. P. Gupta and others Vs. President of India and others (AIR 1982 SC 149)* where several Advocates of different Bar Associations of India challenged the action of the Government in transferring some Judges of the High Courts. In that case, in according standing to the petitioners, Justice Bhagwati observed:

> "Where a legal wrong or a legal injury is caused to a person or to a determinate class of persons by reason of violation of any constitutional or legal right or any burden is imposed in contravention of any constitutional or legal provision or without authority of law or any such legal wrong or legal injury or illegal burden is threatened and such person or determinate class of persons is, by reason of poverty, helplessness or disability or socially or economically disadvantaged position, unable to approach the Court for relief, any member of the public can maintain an application... seeking judicial redress for the legal wrong or injury caused to such person or determinate class of persons."

In the case of *Bangladesh Sangbadpatra Parishad…Vs…Bangladesh and others (43 DLR (AD) 126)*, the Association of Newspaper-owners challenged an award given by the Wage Board and the High Court Division

turned down the writ petition holding that the Association had no locus standi. The Appellate Division upheld the finding of the High Court Division. Dealing with the Indian decisions regarding public interest litigation, the Appellate Division observed:

> "… In our Constitution, the petitioner seeking enforcement of a fundamental right or constitutional remedies must be a 'person aggrieved'. Our Constitution is not at pari materia with the Indian Constitution on this point. The Indian Constitution, either in Article 32 or in Article 226, has not mentioned who can apply for enforcement of fundamental rights and constitutional remedies. The Indian Courts only honour a tradition in requiring that the petitioner must be an 'aggrieved person'. The emergence of pro bono publico litigation in India, that is litigation at the instance of a public-spirited citizen espousing causes of others, has been facilitated by the absence of any constitutional provision as to who can apply for a writ. In England, various tests were applied. Sometimes it was said that a person must be 'aggrieved' or he must have 'a specific legal right' or he must have

> 'sufficient interest'. Now after the introduction of the new Rules of the Supreme Court, Order 53 Rule 3, any person can apply for 'judicial review' in England under the Supreme Court Act, 1981 if he has 'sufficient interest'. Therefore the decisions of the Indian jurisdiction on public interest litigations are hardly apt in our situation. We must confine ourselves to asking whether the petitioner is an 'aggrieved person', a phrase which has received a meaning and a dimension over the years."

In that case, public interest litigation was not involved. There was no difficulty on the part of the newspaper-owners to challenge the award themselves. So the Appellate Division denied standing to the Association of Newspaper-owners.

In the case of *Bangladesh Retired Government Employees' Welfare Association….Vs….Bangladesh (46 DLR (HCD) 426)*, the High Court Division accepted the standing of the said Association holding–

> "Since the Association has an interest in ventilating the common grievance of all its members who are retired Government employees, in our view, this Association is a 'person aggrieved'..."

In the case of *Kazi Mukhlesur Rahman.....Vs....Bangladesh and another reported in 26 DLR (AD) 44* (commonly known as Kazi Mukhlesur Rahman's Case), it was held:

> "It appears to us that the question of locus standi does not involve the Court's jurisdiction to hear a person but of the competency of the person to claim a hearing, so that the question is one of discretion which the Court exercises upon due consideration of the facts and circumstances of each case."

Article 102 of our Constitution speaks about 'person aggrieved'. What is the meaning of this expression? The Constitution has not defined the expression, nor has it mentioned 'personally aggrieved person'. An expression occurring in the Constitution can not be interpreted out of context or only by reference to the decisions of foreign jurisdictions where the constitutional dispensations are different from ours. In interpreting the expression 'person aggrieved', it can not be overlooked that the English Courts which introduced the restrictive rule of standing vastly shifted from their traditional view which was ultimately changed by legislation. The expression has to be given a meaning in the context of the scheme and objectives of the Constitution and in the light of the purpose behind the grant of the right to the individuals and the power to the Court. Any interpretation which undermines the scheme or objectives of the Constitution, or defeats

the purpose for which the jurisdiction is created is to be discarded. It has to be noted that the framers of the Constitution envisioned a society in which the rule of law, fundamental human rights and freedom, equality and justice (political, economic and social) would be secured for all citizens. They spoke about their vision in the Preamble of the Constitution in no uncertain terms. To give full effect to the rule of law, substantive provision has been made in Article 7 which states that all powers in the Republic shall be exercised only under, and by the authority of, the Constitution. The vision as to the society has been re-stated in Article 8 and elaborated in other Articles of Part II. Article 8(2) specifically states that the principles of State policy set down in Part II will be fundamental to the governance of Bangladesh. To ensure the fundamental human rights, freedom, equality and justice, the Constitution has guaranteed a host of rights in Part III as fundamental rights. And to ensure that the mandate of the Constitution is obeyed, the High Court Division has been given the wide power of judicial review. In this background, can the expression 'person aggrieved' be given a meaning in consonance with the traditional view of 'locus standi' and thereby producing a result deprecated by Schwartz and Wade as inimical to a healthy system of administrative law and contrary to public interest? The Appellate Division has answered the question in the negative in the case of *Dr. Mohiuddin Farooque…Vs… Bangladesh, 49 DLR (AD) 1* (popularly known as BELA's Case).

The expression 'person aggrieved' means a person who even without being personally affected has sufficient interest in the matter in dispute.

When a public functionary has a public duty owed to the public in general, every citizen has sufficient interest in the performance of that public duty.

In BELA's Case, his Lordship Mr. Justice Mostafa Kamal of the Appellate Division held:

> "We now proceed to say how we interpret Article 102 as a whole. We do not give much importance to the dictionary meaning or punctuation of the words 'any person aggrieved'. Article 102 of our Constitution is not an isolated island standing above or beyond the sea-level of the other provisions of the Constitution. It is a part of the over-all scheme, objectives and purposes of the Constitution. And its interpretation is inextricably linked with the (i) emergence of Bangladesh and framing of its Constitution, (ii) the Preamble and Article 7, (iii) Fundamental Principles of State Policy, (iv) Fundamental Rights and (v) the other provisions of the Constitution."

The Constitution, historically and in real terms, is a manifestation of what is called "the People's Power". The people of Bangladesh are, therefore, central, as opposed to ornamental, to the framing of the Constitution. It was further held in BELA's Case:

> "The Supreme Court being a vehicle, a medium or mechanism devised by the Constitution for the exercise of the judicial power of the people on behalf of the people, the people will always remain the focal point of concern of the Supreme Court while dispensing justice or propounding any judicial theory or interpreting any provision of the Constitution. Viewed in this context, interpreting the words "any person aggrieved" meaning only and exclusively individuals and excluding the consideration of people as a collective and consolidated personality will be a stand taken against the Constitution. There is no question of enlarging locus standi or legislation by Court. The enlargement is writ large on the face of the Constitution."

Where there is a written Constitution and an independent judiciary and the wrongs suffered by the people are capable of being raised and ventilated publicly in a Court of law, there is bound to be greater respect for the rule of law. The Preamble of our Constitution really contemplates a society where there will be unflinching respect for the rule of law and the welfare of the citizens.

In the decision in the case of *Ekushey Television Ltd. and others.....Vs....Dr. Chowhdury Mahmood Hasan & others reported in 54 DLR (AD) 130* (popularly known as the ETV Case), it was held:

> "What is meant by 'sufficient interest' is basically a question of fact and law which shall have to be decided by the Court. None of the fundamental rights like rule of law is subject to mechanical measurement. They are measured in our human institutions i.e. the Courts and by human beings i.e. the Judges, by applying law. Therefore, there will always be an element of discretion to be used by the Court in giving standing to the petitioner. From the above, it appears that the Courts of this jurisdiction have shifted their position to a great extent from the traditional rule of standing which confines access to the judicial process only to those to whom legal injuries are caused or legal wrong is done. The narrow confines within which the rule of standing was imprisoned for long years have been broken and a new dimension is being given to the doctrine of locus standi."

Article 102 is inextricably linked with the genesis of the Constitution and can not be construed independently of the scheme and objectives of the Constitution, particularly those explicated in the preamble and fundamental principles of State policy.

It is axiomatic that judicial review is the soul of the Judiciary in a written Constitution. To the extent that fundamental rights are not available to any provision of a disciplinary law (Article 45), certain laws are specifically excluded from the purview of judicial review (Articles 47 and 47A) and certain authorities are not amenable to judicial review (Article 102(5)), the power of judicial review is constitutionally restricted. These constitutional restrictions aside, the horizon of judicial review is being expanded through judicial activism with the passage of time facilitating the citizens' access to justice. A great duty is cast upon the Lawyers and Judges of the Apex Court of Bangladesh for onward march of our constitutional journey to its desired destination.

Coming back to the instant case, the petitioners are admittedly practising Advocates of the Supreme Court of Bangladesh. Needless to say, they are conscious and public-spirited persons. As Advocates of the Supreme Court of Bangladesh, they have, no doubt, a stake in the establishment of the rule of law in the country. By the way, it may be recalled that the rule of law is one of the basic structures of the Constitution as found by the Appellate Division in the Eighth Amendment Case (*Anwar Hossain Chowdhury and others…Vs…Bangladesh and others, 1989 BLD (SpI) 1*). It is the mandate of the Constitution that there must be rule of law

in the country. Although the petitioners are not directly or personally affected by the Sixteenth Amendment, yet as Advocates, they have sufficient interest in the establishment of the rule of law in Bangladesh. In this view of the matter, I find the petitioners competent enough to claim a hearing from this Court as found by the Appellate Division in Moklesur Rahman's Case (supra). Besides, in the ETV Case referred to above, there is always an element of discretion in the matter of granting standing to the petitioners. From the facts and circumstances of the present case, it transpires that the petitioners as Advocates of the Supreme Court of Bangladesh are very much concerned with the independence of the Judiciary, separation of powers and establishment of rule of law. In a word, like Judges, they are also stakeholders in the administration of justice without let or hindrance from any quarter. It is a truism that they are not busybodies or interlopers. Given this situation, I can not deny their standing in filing the Writ Petition before the High Court Division under Article 102 of the Constitution.

With regard to the alleged lack of 'locus standi' of the petitioners to file the Writ Petition, both the learned Attorney General Mr. Mahbubey Alam and the learned Additional Attorney-General Mr. Murad Reza have relied upon the decision in the case of *National Board of Revenue…Vs…Abu Saeed Khan and others reported in 18 BLC (AD) 116*. According to me, the facts and circumstances of that case are quite distinguishable from those of the present case. So that decision is of no avail to them.

It has already been observed that the petitioners being Advocates of the Supreme Court of Bangladesh are interested in the establishment of the rule of law. They are also interested in seeing that the Supreme Court of Bangladesh does function independently and impartially in public interest. It is an indisputable fact that independent and impartial functioning of the Judiciary without any hitch is essential to the establishment of the rule of law in the country. Regard being had to the facts and circumstances of the case, it seems that the petitioners have come up with the instant Writ Petition in vindication of the interest of the public. The guidelines that have been enumerated in paragraph 38 of the decision reported in 18 BLC (AD) 116, as I see them, do not obviously stand as a bar to the filing of the present Writ Petition in the High Court Division under Article 102 of the Constitution. The concern expressed by the petitioners in the Writ Petition about the independence of the higher Judiciary and separation of powers among the 3(three) organs of the State is, no doubt, a public concern vis-à-vis the Sixteenth Amendment of the Constitution. In any view of the matter, I can not shut my eyes to this public concern as ventilated by the petitioners in the Writ Petition. So in any event, this Court must uphold public interest.

In the ETV Case (supra), it was held in paragraph 74:

> "74. It must be remembered here that it is not possible to lay down in clear and precise terms what is required to give petitioner locus standi when public injury or public wrong is involved. Locus standi is not a case of

> jurisdiction of the Court, but a case of discretion of the Court, which discretion has to be exercised on consideration of facts and law points involved in each case, as already pointed out in the case of Kazi Mukhlesur Rahman. As a matter of prudence and not a rule of law, the Court may confine its exercise of discretion, taking into consideration the facts, the nature of the public wrong or public injury, the extent of its seriousness and the relief claimed. Therefore, the concern shown by the Bar, that giving locus standi to the petitioner will open the floodgates, and the Court will soon be overburdened with cases, does not hold good. The discretion to open the gates will always be with the Court, which discretion will only be exercised within the bounds mentioned above."

In this connection, it will not be out of place to mention that the Thirteenth Amendment Case (*M Saleemullah…Vs…Bangladesh, 2005 BLD (HCD) 195*) challenging the introduction of the Non-Party Caretaker Government during the period of Parliamentary election was filed as a Public Interest Litigation and both the Divisions of the Supreme Court did not find fault with the maintainability of the case.

In view of what have been stated above and in the facts and circumstances of the case, I opine that the petitioners have 'locus standi' to file the Writ Petition and accordingly the Writ Petition is maintainable under Article 102 of the Constitution. So the contention of both Mr. Mahbubey Alam and Mr. Murad Reza on the question of non-maintainability of the Writ Petition in the High Court Division under Article 102 of the Constitution stands negatived.

As to the submission on behalf of the contesting respondent nos. 1 and 4 that the Writ Petition is premature in the absence of any law yet to be framed pursuant to the amended Article 96(3) of the Constitution, I feel constrained to say that the vires of the Sixteenth Amendment can be gone into on its own merit under Article 102 of the Constitution, though the contemplated law is yet to be framed. What I am trying to emphasize is that the non-enactment of any law pursuant to the amended Article 96(3) of the Constitution will not ipso facto preclude the High Court Division from examining the constitutionality of the Sixteenth Amendment. So the submission of both Mr. Mahbubey Alam and Mr. Murad Reza in this respect stands discarded. In the result, I hold that the petitioners have cause of action for filing the Writ Petition and the same is not premature.

The system of parliamentary removal has a long history. It emerged in England as a check on the executive discretion to dismiss Judges, which various monarchs had asserted until the passage of the Act of Settlement in 1701. The Act established that this power could no longer be exercised

without joint resolution of both Houses, known formally as an ‘address’, calling upon the monarch to remove the judge in question.

Though the Westminster Parliament only once passed an address for the removal of a Judge in 1830, the issue has been debated at intervals and there is a well-established recognition of the value of an independent Judiciary. Discussing the Westminster removal system and its adoption in other parts of the Commonwealth, Sir Kenneth Roberts-Wray described the parliamentary removal system as ‘an accident of history’ which could lead to serious constitutional conflicts if it was put into action, despite the procedures which were widely regarded by parliamentarians as appropriate [Roberts-Wray (n19) 491].

Besides, the UN Special Rapporteur has noted that parliamentary control over the disciplining of Judges is a matter of concern, and has argued that an independent body is required in such circumstances in order to ensure that the Judges receive a fair trial [Report of the Special Rapporteur on the Independence of Judges and Lawyers, Leandro Despouy, UN Doc A/HRC/11/41(2009)].

Another fundamental concern from the point of view of judicial independence is that the parliamentary removal mechanism may be abused by the Executive Government if it enjoys the support of a sufficient number of legislators. The concern expressed by the Chief Justices of Asia-Pacific Jurisdictions in the Beijing Statement on the Independence of the Judiciary in the LAWASIA Region is particularly relevant as the majority of the 18 Commonwealth states with a parliamentary removal mechanism are located in this region.

Removal by parliamentary procedure has traditionally been adopted in some societies. In other societies, that procedure is unsuitable; it is not appropriate for dealing with some grounds for removal; it is rarely, if ever, used; and its use other than for the most serious of reasons is apt to lead to misuse [Article 23 of the Beijing Statement of Principles of the Independence of the Judiciary].

When the Commonwealth Heads of Governments at their meeting in Abuja, Nigeria in 2003 adopted the Commonwealth Latimer House Principles on the Accountability of and the Relationship between the Three Branches of Government, they demonstrated continuing Commonwealth commitment to advancing respect for the separation of powers including judicial independence, and a collective determination to raise levels of practical observance. Bangladesh is indisputably a Commonwealth country. The Commonwealth Charter states:

> "We believe in the rule of law as an essential protection for the people of the Commonwealth and as an assurance of limited and accountable government. In particular, we support an independent, impartial, honest and competent judiciary and recognize that an independent, effective and competent legal system is integral to upholding the rule of law, engendering public confidence and dispensing justice."

The Commonwealth Latimer House Principles declare that 'appropriate security of tenure and protection of levels of remuneration must be in place' in relation to the Judiciary. Such guarantees serve to shield the Judges from external pressures and conflicts of interest when they hold powerful individuals or Government bodies legally to account, and thereby contribute to sustaining an independent Judiciary, which is an essential element of the rule of law.

Principle IV of the Commonwealth Latimer House Principles of 2003 states:

> "An independent, impartial, honest and competent judiciary is integral to upholding the rule of law, engendering public confidence and dispensing justice. The function of the Judiciary is to interpret and apply national constitutions and legislation, consistent with international human rights conventions and international law, to the extent permitted by the domestic law of each Commonwealth country."

The question of when a Judge may be removed from office is of vital importance to the rule of law. In general, states need a removal mechanism, though a rigorous judicial selection process and high standards of ethical conduct may help to minimise the need for its use. Besides the risk that a Judge may become mentally or physically incapacitated while in office, there is always the danger of the rare Judge who engages in serious

misconduct and refuses to resign when it becomes clear that his or her position is untenable. On the other hand, there is the threat to judicial independence when the removal process is used to penalise or intimidate Judges. The challenge for legal systems is to strike the correct balance between these concerns.

Both sides of the problem are reflected in the Commonwealth Latimer House Principles. Principle IV- Independence of the Judiciary indicates that there are only very limited circumstances in which a Judge may be removed from office:

> "Judges should be subject to suspension or removal only for reasons of incapacity or misbehaviour that clearly renders them unfit to discharge their duties."

The reasons that may justify removal of a Judge are set out more fully in Principle VII (b)─Judicial Accountability:

> "Judges are accountable to the Constitution and to the law which they must apply honestly, independently and with integrity. The principles of judicial accountability and independence underpin public confidence in the judicial system and the importance of the Judiciary as one of the three pillars upon which a responsible Government relies.
>
> In addition to providing proper procedures for the removal of Judges on grounds of

> incapacity or misbehaviour that are required to support the principle of Independence of the Judiciary, any disciplinary procedures should be fairly and objectively administered. Disciplinary proceedings which might lead to the removal of a judicial officer should include appropriate safeguards to ensure fairness."

Removal from office is, by no means, the only way in which Judges are held accountable, and should not be the first demand of those dissatisfied with a judicial decision. The basis of judicial accountability more generally is implicit in the opening sentence of Principle VII (b), which refers to Judges being accountable to the Constitution and to the law. The principal way in which Judges are expected to account for the performance of their legal and constitutional duties is by giving reasoned judgments and rulings in open court. Appeal mechanisms serve as a further check in many cases. A Judge acting in good faith should incur no personal sanction if his or her decision is overturned on appeal. Indeed, the rule of law will suffer if Judges are deterred from applying the law as they see it, and such a situation will be particularly detrimental to the independence of the Judiciary, of which the decision-making autonomy of individual Judges is a vital part.

The Commonwealth Latimer House Principles declare, briefly and succinctly, that the mechanism for determining whether a Judge is to be removed from office 'should include appropriate safeguards to ensure

fairness'. This raises two important questions which need to be addressed in practice:

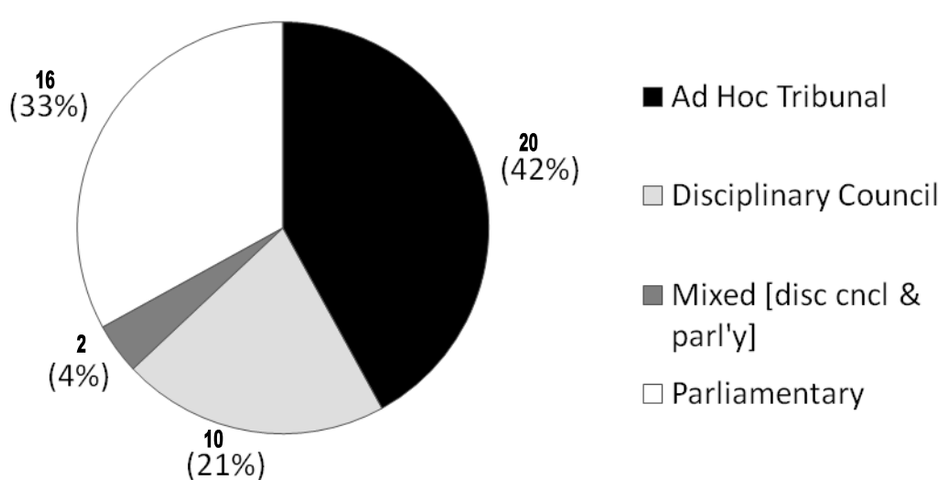
(a) Which body, or combination of bodies, should be responsible for the removal process; and
(b) What safeguards such bodies should adopt to ensure fairness.

The Latimer House Guidelines provide an important starting-point in both respects:

> "In cases where a judge is at risk of removal, the judge must have the right to be fully informed of the charges, to be represented at a hearing, to makes a full defence and to be judged by an independent and impartial tribunal." [Guideline VI. 1(a)(i)]

The removal mechanisms that have been established in Commonwealth jurisdictions have different models. The following Diagram provides an overview of how the 48(forty-eight) independent Commonwealth jurisdictions have approached this issue:

Diagram: Removal Mechanisms



(a) There are no Commonwealth jurisdictions in which the Executive has the power to dismiss a Judge. (It is still common for the Executive to be responsible for formally revoking a Judge's appointment after another body has determined that the Judge should be removed).

(b) The Westminster model of parliamentary removal is the standard mechanism of removal in only 16 jurisdictions (33% of the total), namely, (Australia (federal), Bangladesh, Canada, India, Kiribati, Malawi, Malta, Maldives, Nauru, New Zealand, Samoa, Sierra Leone, South Africa, Sri Lanka, Tuvalu and the United Kingdom, In Nigeria and Rwanda, Judges who hold certain positions are subject to parliamentary removal, but others are subject to removal by a disciplinary council).

(c) In 30 jurisdictions (62.5%), a disciplinary body that is separate from both the Executive and the Legislature decides whether Judges should be removed from office. The most popular model found in 20 jurisdictions (41.7%) is the ad hoc tribunal, which is formed only when the need arises to consider whether a Judge should be removed. Those Commonwealth jurisdictions are Bahamas, Barbados, Botswana, Fiji, Jamaica, Ghana, Guyana, Kenya, Lesotho, Malaysia, Mauritius, Papua New Guinea, the Organisation of Eastern Caribbean States, Seychelles, Singapore, Solomon Islands, Tanzania, Trinidad and Tobago, Uganda and Zambia. The Australian States of Victoria and Queensland, and the Australian Capital Territory, also provide the ad hoc tribunals to be

formed to consider the removal of a state judge. In 10 other jurisdictions (20.8%), the decision is entrusted to a permanent disciplinary council, namely, Belize, Brunei Darussalam, Cameroon, Cyprus, Mozambique, Namibia, Nigeria, Rwanda, Pakistan, Swaziland, Tonga and Vanuatu.

(d) In two further jurisdictions, Judges holding certain senior positions are subject to parliamentary removal, while a permanent disciplinary council is responsible for removal decisions in respect of the rest of the higher Judiciary. Nigeria and Rwanda are two examples in this regard.

It is encouraging that there is no Commonwealth jurisdiction in which the legal framework permits the Executive to dismiss Judges, albeit this does not mean that opportunities for abuse do not exist. However, it is interesting to note that the Westminster system of parliamentary removal has not proved to be the most popular among Commonwealth jurisdictions.

It is ex-facie clear from the above Diagram that the Parliamentary removal procedure is in force in 33% Commonwealth jurisdictions whereas ad hoc tribunals are formed in 42% Commonwealth jurisdictions, as and when necessary, and permanent disciplinary councils are in vogue in 21% Commonwealth jurisdictions. The mixed procedure (permanent disciplinary council-cum-parliamentary removal system) is operative in 4% Commonwealth jurisdictions. The ad hoc tribunals and permanent disciplinary councils are akin to the Chief Justice-led Supreme Judicial Council of Bangladesh to a great extent which has already been abolished by

the Sixteenth Amendment. Anyway, these calculations show that in 42%+21%= 63% Commonwealth jurisdictions, either ad hoc tribunals, or permanent disciplinary councils hold the field. [Reference: "The Appointment, Tenure and Removal of Judges under Commonwealth Principles: A Compendium and Analysis of Best Practice" (supra)]. So it is crystal clear that the parliamentary removal mechanism has not been preferred by the majority Commonwealth jurisdictions obviously for upholding the separation of powers among the 3(three) organs of the State and for complete independence of the Judiciary from the other two organs of the State. What I am driving at boils down to this: from the above analysis, it is easily comprehensible that in 63% Commonwealth jurisdictions, Judges are removed from office for their misconduct/misbehaviour or incapacity without the intervention of the Legislature. Hence it is easily deducible that the majority Commonwealth jurisdictions are on high alert about separation of powers and independence of the Judiciary in their respective jurisdictions.

Each Commonwealth country's Parliament, Executive and Judiciary are the guarantors in their respective spheres of the rule of law, the promotion and protection of fundamental human rights and the entrenchment of good governance based on the highest standards of honesty, probity and accountability. The relationship between the Parliament and the Judiciary should be governed by respect for the Parliament's primary responsibility for law-making on the one hand and for the Judiciary's responsibility for the interpretation and application of the law on the other hand. Both the Parliament and the Judiciary should fulfill their respective but critical roles

in the promotion of the rule of law in a complementary and constructive manner.

It is undisputed that the Constitution is the supreme law of the land. According to the Constitution, there are 3(three) organs of the State, namely, the Executive, the Legislature and the Judiciary. In the scheme of our Constitution, both the Executive and the Legislature are manned by elected people; but the Judiciary is manned by unelected people. So it leaves no room for doubt that the task of administration of justice has been entrusted to the Judges who are unelected people. Article 7(1) of the Constitution provides that 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. So the Judges exercise the sovereign judicial power of the people only under, and by the authority of, the Constitution.

The scheme of our Constitution clearly provides that the people are sovereign and that the Constitution is supreme. The executive power of the Republic is vested in the Executive. The legislative power of the Republic is vested in the Legislature. The judicial power of the Republic is necessarily vested in the Judiciary. The Constitution has placed the Supreme Court of Bangladesh as the guardian of the Constitution. Being the guardian of the Constitution, the Supreme Court is empowered to interpret and expound the provisions of the Constitution, as and when required, and the interpretations and expositions of various provisions of the Constitution given by the Supreme Court are binding upon all concerned. As the guardian of the Constitution, it is the duty of the Supreme Court to see that the other 2(two)

organs of the State, namely, the Executive and the Legislature do function within the limits set by the Constitution. In his preface to the book, "The Changing Law", Lord Denning wrote—"People think that the law is certain and that it can be changed only by Parliament. In theory, the Judges do not make law. They only expound it. But as no one knows what the law is until the Judges expound it, it follows that they make it." Judge-made law, it is well-settled, is also a source of law. Both the statutory and judge-made laws stand on the same plane. However, if any piece of legislation is found to be inconsistent with and repugnant to the provisions of the Constitution, then that piece of legislation will be struck down by the High Court Division as being void and ultra vires the Constitution.

The Constitution mandates that both the Executive and the Legislature will function under the authority of the elected people. All sovereign executive, legislative and judicial powers of the Republic are the powers of the people as enjoined by Article 7 of the Constitution. As unelected people, Judges are exercising the people's sovereign judicial power under the authority of the Constitution perfectly in keeping with the provisions of Article 7 of the Constitution. Anyway, Article 55(3) provides that the Cabinet shall be collectively responsible to the Parliament. To put it differently, the accountability of the Executive has been vested in the House of the Nation because the Members of the House of the Nation are the elected representatives of the people. What I am trying to stress is this: the Executive is accountable to the Legislature for the sake of transparency of their actions and deeds. But it is worthy of notice that nowhere it has been

provided in the Constitution that the Judiciary shall be responsible or accountable to the Parliament. But through the Sixteenth Amendment, the Supreme Court has become accountable or responsible to the Parliament for all practical purposes by way of disciplining its Judges by the Parliament. To my mind, the Apex Court has become suspect in public perception on the question of its undiluted independence because of the Sixteenth Amendment.

As per Article 65(1) of the Constitution, there shall be a Parliament for Bangladesh (to be known as the House of the Nation) in which, subject to the provisions of this Constitution, shall be vested the legislative power of the Republic. So it is seen that although the legislative power of the Republic is vested in the Parliament, yet it is not unlimited; rather the lawmaking power of the Parliament has been circumscribed by the provisions of the Constitution. In other words, our Parliament is not like the British Parliament which is supreme. In our jurisdiction, the Constitution is supreme and all the 3(three) organs of the State owe their existence to the Constitution. As the lawmaking power of the Parliament is not absolute, it can not make any law in derogation of the provisions and the basic features of the Constitution.

The Preamble of the Constitution of Bangladesh states ‘rule of law’ as one of the objectives to be attained. The expression ‘rule of law’ has various shades of meaning and of all constitutional concepts, ‘rule of law’ is the most subjective and value-laden. A.V. Dicey’s concept of rule of law includes three dimensions -(i) the supremacy of regular laws as opposed to

the influence of arbitrary power and the persons in authority do not enjoy wide, arbitrary or discretionary powers, (ii) equality before law, that is, every man, whatever his rank or position, is subject to ordinary laws and the jurisdiction of ordinary courts, and (iii) individual liberties legally protected not through any bill of rights, but through the development of common law. His thesis has been criticised from many angles, but his emphasis on the subjection of every person to the ordinary laws of the land, the absence of arbitrary power and legal protection for certain basic human rights remains the undisputed theme of the doctrine of rule of law.

The rule of law is a basic feature of the Constitution of Bangladesh. 'Law' does not mean anything that Parliament may pass. Articles 27, 31 and 32 have taken care of the qualitative aspects of law. Article 27 forbids discrimination in law or in State actions, while Articles 31 and 32 import the concept of due process, both substantive and procedural, and thus prohibit arbitrary or unreasonable law or State actions. The Constitution further guarantees in Part III certain rights including freedom of thought, speech and expression to ensure respect for the supreme value of human dignity.

An independent and impartial Judiciary is a precondition of rule of law. Constitutional provisions will be mere moral precepts yielding no result unless there is a machinery for enforcement of those provisions and faithful enforcement of those provisions is impossible in the absence of an independent and impartial Judiciary. In Masdar Hossain's Case, the Appellate Division has referred to the three essential conditions of independence of the Judiciary listed by the Canadian Supreme Court in *Walter Valente...Vs... Her Majesty The Queen and another, ([1985] 2 R. C.*

S. 673) which are security of tenure, security of salary and other remunerations and institutional independence to decide on its own matters of administration bearing directly on the exercise of its judicial functions.

In a subsequent decision (*British Columbia...Vs...Imperial Tobacco Canada Ltd, [2005]2 S.C.R 473*), the Canadian Supreme Court expressed itself in the following manner:

> "Judicial independence is a 'foundational principle' of the Constitution reflected in s.11(d) of the Canadian Charter of Rights and Freedoms, and in both ss.96-100 and the Preamble to the Constitutional Act, 1867... It serves to safeguard our constitutional order and to maintain public confidence in the administration of justice.
>
> Judicial independence consists essentially in the freedom 'to render decisions based solely on the requirements of the laws and justice'... It requires that the Judiciary be left free to act without improper 'interference from any other entity'... i.e. that the Executive and Legislative branches of the Government not to 'impinge on the essential authority and function... of the court'... Security of tenure, financial security and administrative independence are the three

> 'core characteristics' or 'essential conditions' of judicial independence... It is a precondition to judicial independence that they be maintained, and be seen by 'a reasonable person who is fully informed of all the circumstances' to be maintained... However, even where the essential conditions of judicial independence exist, and are reasonably seen to exist, judicial independence itself is not necessarily ensured. The critical question is whether the Court is free, and reasonably seen to be free, to perform its adjudicative role without interference, including interference from the Executive and Legislative branches of the Government..."
>
> (Underlinings are mine)

Independence of the Judges does not merely mean security of their tenure or decent wages to keep themselves off from any worry for their daily bread, but a condition under which Judges may keep their oath to uphold the Constitution and the laws without fear or favour. Independence and impartiality are, in fact, intertwined and it is futile to expect an impartial judgment from a Judge who is not immune from extraneous influences of any kind whatever. 'Impartiality', as one of America's best Judges once

observed, ‘is not a technical conception. It is a state of mind’ [Durga Das Basu’s Limited Government and Judicial Review, 1972, page 27].

Supremacy of the Constitution means that its mandates shall prevail under all circumstances. As it is the source of legitimacy of all actions, legislative, executive or judicial, no action shall be valid unless it is in conformity with the Constitution both in letter and spirit. If any action is actually inconsistent with the provisions of the Constitution, such action shall be void and can not, under any circumstances, be ratified by passing a declaratory law in Parliament. If a law is unconstitutional, it may be re-enacted removing the inconsistency with the Constitution or re-enacted after amendment of the Constitution. However, supremacy of the Constitution is a basic feature of the Constitution and as such even by an amendment of the Constitution, an action in derogation of the supremacy of the Constitution can not be declared to have been validly taken. Such an amendment is beyond the constituent power of Parliament and must be discarded as a fraud on the Constitution [*Khondker Delwar Hossain Secretary, BNP and another…Vs…Bangladesh Italian Marble Works and others, 62 DLR (AD) 298*].

Where the power of the Legislature is limited by the Constitution or the Legislature is prohibited from passing certain laws, the Legislature sometimes makes a law which in form appears to be within the limits prescribed by the Constitution; but which, in substance, transgresses the constitutional limitation and achieves an object which is prohibited by the Constitution. It is then called a colourable legislation and is void on the principle that what can not be done directly can not also be done indirectly.

The underlying idea is that although a Legislature in making a law purports to act within the limit of its powers, the law is void if, in substance, it has transgressed the limit resorting to pretence and disguise. The essence of the matter is that a Legislature can not overstep the field of its competence by adopting an indirect means. Adoption of such an indirect means to overcome the constitutional limitation is often characterised as a fraud on the Constitution.

The doctrine of colourable legislation does not, however, involve any question of bona fides or mala fides on the part of the Legislature. It is not permissible for a Court to impute malice to the Legislature in making laws which is its plenary power (*Shariar Rashid Khan...Vs...Bangladesh, 1998 BLD (AD) 155, paragraph 37*). The entire question is one of competence of the Legislature to enact a law. A law will be colourable if it is one which, in substance, is beyond the competence of the Legislature. If a Legislature is competent to do a thing directly, then the mere fact that it attempted to do it in an indirect manner will not render the law invalid (*Gajapati Narayan Deo...Vs...Orissa, AIR 1953 SC 375*).

We should not be mindless of the fact that independence of the Judiciary is a sine qua non of modern democracy and so long as the Judiciary remains truly separate and distinct from the Legislature and the Executive, the people's power will never be endangered as found by the High Court Division in the case of *The State...Vs...Chief Editor, Manabjamin, (2005) 57 DLR 359*.

Article 121 of the Indian Constitution provides that no discussion shall take place in Parliament with respect to the conduct of any Judge of the

Supreme Court or any High Court in the discharge of his duties except in a proceeding of his impeachment in Parliament. In this connection, the Indian Supreme Court observed, "The Constitution-makers attached so much importance to the independence of the Judicature in this country that they thought it necessary to place them beyond any controversy, except in the manner provided in Article 121" (*In Re Under Article 143, AIR 1965 SC 745, paragraph 63*).

In Bangladesh jurisdiction, in order to maintain independence of the Judges of the Supreme Court, the framers of the Constitution not only provided under Article 147 that the remuneration, privileges and other terms and conditions of their service shall not be varied to their disadvantage during their term of office, but also expressly declared in Article 94(4) that the Chief Justice and the other Judges of the Supreme Court shall be independent in the exercise of their judicial functions. It, therefore, naturally follows that the conduct of the Judges of the Supreme Court can not be discussed by the Executive Government or by the Members of Parliament. The Rules of Procedure of Parliament provide that no question, motion or resolution which contain any reflection on the conduct of any Judge of the Supreme Court shall be admissible. The immunity of the Members of Parliament under Article 78 in respect of what they say in Parliament can not be construed as allowing them to make any statement or comment which may directly or indirectly undermine the independence of the Judges of the Supreme Court. But none the less, it is our painful experience that whenever a judgment passed by the Supreme Court is not liked by the Parliament, most of the parliamentarians, irrespective of the political parties to which

they belong, decry that judgment and the concerned Judge(s) in an obnoxious, indecent and unseemly manner. This kind of conduct can not be countenanced at all and as such it is deprecated. Article 94(4) is an implied limitation on the freedom of speech of the Members of Parliament. But enforcement of this limitation is in the hands of the Speaker which is unfortunately seldom exercised by him.

In this sub-continent, the idea that a Constitution can contain some basic features which can not be deviated from was first reflected in the case of *Muhammad Abdul Haque...Vs...Fazlul Quader Chowdhury, PLD 1963 Dacca 669*. In that case, the petitioner being a Member of the National Assembly of Pakistan challenged the legality of the warrant and title of the respondents to the membership of the said Legislature. The Dacca High Court was asked to examine the legality of the authority of the respondents by which they claimed to be the Members of the National Assembly in spite of the fact that shortly after election to the National Assembly, Fazlul Quader Chowdhury and others were appointed to the President's Council of Ministers. The Dacca High Court was required to examine the vires of an order made under Article 224 of the Constitution of Pakistan, 1962. Mentioning the observation of Muhammad Munir C. J, it was stated by Syed Mahbub Murshed J:

> "The aforesaid dictum of the Supreme Court of Pakistan is a pointer that in the case before us, the power of adaptation does not extend to the wiping out of the vital provisions of the Constitution to implement a decision of the Members of the Assembly who were invited to be Ministers."

The said judgment of Dacca High Court was affirmed by the Supreme Court of Pakistan in *Mr. Fazlul Quader Cyowdhury and others...Vs...Mr. Muhammad Abdul Haque, PLD 1963 SC 486*. A. R Cornelius C. J, in the judgment observed:

> "Forms of Government are fundamental features of a Constitution, and to alter them in limine in order to placate or secure the support of a few persons, would appear to be equivalent not to bringing the given Constitution into force, but to bringing into effect an altered or different Constitution" (Page 512).

In the same appeal, it was also observed by Cornelius C. J:

> "In that passage, there clearly appears a determination on the part of the Court to resist any attempt to manipulate the Constitution in order to suit a particular person, and at the same time to insist that nothing should be permitted which derogates from the "very basis" of the Constitution or is in direct violation of the Constitution" (Page 512).

Fazle-Akbar J., agreeing with the observation of the learned Chief Justice Cornelius, observed:

> "However wholesome the intention and however noble the motive may be, the extra-constitutional action could not be supported because the President was not entitled to go beyond the Constitution and touch any of the fundamentals of the Constitution" (Page 524).

Hamoodur Rahman J. in this context observed as follows:

> "The fundamental principle underlying a written Constitution is that it not only specifies the persons or authorities in whom the sovereign powers of the State are to be vested but also lays down fundamental rules for the selection or appointment of such persons or authorities and above all fixes the limits of the exercise of those powers. Thus the written Constitution is the source from which all governmental power emanates and it defines its scope and ambit so that each functionary should act within his respective sphere. No power can, therefore, be claimed by any functionary which is not to be found within the four corners of the Constitution nor can anyone transgress the limits therein specified" (Page 535).

He further observed:

> "An alteration of this 'main fabric', therefore, so as to destroy it altogether can not, in my view, be called an adaptation of the Constitution for the purpose of implementing it" (Page 538).

Thus it is evident that a Constitution can contain within itself some basic features which were first identified by Dacca High Court and then developed by the Supreme Court of Pakistan. The source of this antiquated principle, no doubt, originated in the U.S Supreme Court in *Marbury..Vs...Madison (1803) 1 Cranch, 137*. But Abdul Huq's Case helped develop the concept as an original and independent view of Dhaka High Court which was affirmed by the Supreme Court of Pakistan and later developed in India.

In India whether by an amendment of the Constitution, the basic features can be changed was first questioned in the case of *Sajjan Singh...Vs...State of Rajasthan, AIR 1965 SC 845*. The Indian Supreme Court in its judgment referred to Abdul Huq's Case as a point of reference and relied upon it as a precedent.

The case of *L. C. Golak Nath...Vs....State of Punjab, AIR 1967 SC 1643* was heard by a Full Bench comprising 11(eleven) Judges. Before Golak Nath's Case, the Indian Supreme Court was of the view that subject to the condition provided in Article 368, Parliament has the power to amend any Article of the Constitution. This stand was changed in Golak Nath's Case. It was held that the fundamental rights contained in part III of the

Constitution of India are not amendable under Article 368. The same can only be done after constituting a Constituent Assembly. The Judgment delivered in Golak Nath's Case was superseded by the Constitution (24th Amendment) Act, 1971 by inserting clause (4) in Article 13 and clause (1) in Article 34.

In the case of *His Holiness Kesavananda Bharati Sripadagalvaru and others...Vs...State of Kerala and another (AIR 1973 SC 1461),* the Supreme Court of India declared the Constitution's 25th Amendment Act, 1971 illegal and void on the ground that the said Amendment took away the Supreme Court's power of judicial review which is a basic structure of the Constitution. Regarding the theory of basic structure of the Constitution in the said case, Sikri C. J. observed:

> "The learned Attorney General said that every provision of the Constitution is essential; otherwise it would not have been put in the Constitution. This is true. But this does not place every provision of the Constitution in the same position. The true position is that every provision of the Constitution can be amended provided the basic foundation and structure of the Constitution remain the same."

In the Eighth Amendment Case [41 DLR (AD) 165], the vires of Article 100 of the Constitution (Eighth Amendment) Act, 1988 was

challenged. Describing the basic structures of the Constitution, Justice Shahabuddin Ahmed observed in paragraph 416:

> "416. Main objection to the doctrine of basic structure is that it is uncertain in nature and is based on unfounded fear. But in reality basic structures of a Constitution are clearly identifiable. Sovereignty belongs to the people and it is a basic structure of the Constitution. There is no dispute about it, as there is no dispute that this basic structure can not be wiped out by amendatory process. However, in reality people's sovereignty is assailed or even denied under many devices and cover-ups by holders of power, such as, by introducing controlled democracy, basic democracy or by super-imposing thereupon some extraneous agency, such as a council of elders or of wisemen. If by exercising the amending power, people's sovereignty is sought to be curtailed, it is the constitutional duty of the Court to restrain it and in that case, it will be improper to accuse the Court of acting as "super-legislators". Supremacy of the Constitution as the solemn expression of the

will of the people, Democracy, Republican Government, Unitary State, Separation of Powers, Independence of the Judiciary, Fundamental Rights are basic structures of the Constitution. There is no dispute about their identity. By amending the Constitution, the Republic can not be replaced by Monarchy, Democracy by Oligarchy or the Judiciary can not be abolished, although there is no express bar to the amending power given in the Constitution. Principle of separation of powers means that the sovereign authority is equally distributed among the three organs and as such one organ can not destroy the other. These are structural pillars of the Constitution and they stand beyond any change by amendatory process. Sometimes it is argued that this doctrine of bar to change of basic structures is based on the fear that unlimited power of amendment may be used in a tyrannical manner so as to damage the basic structures in view of the fact that power corrupts and absolute power corrupts absolutely. I think, the doctrine of bar to change of basic

> structure is an effective guarantee against frequent amendments of the Constitution in sectarian or party interest in countries where democracy is not given any chance to develop."

There is no dispute that the Constitution stands on certain fundamental principles which are its structural pillars and if these pillars are pulled down or damaged, the whole constitutional edifice will fall down. It is by construing the constitutional provisions that these pillars are to be identified.

In the Eighth Amendment Case, paragraphs 272, 273, 380, 404, 433, 437, 475 and 478 are in the following terms:

> "272. This point may now be considered. Independence of Judiciary is not an abstract conception. Bhagwati, J: said 'if there is one principle which runs through the entire fabric of the Constitution, it is the principle of the rule of law and under the Constitution, it is the Judiciary which is entrusted with the task of keeping every organ of the State within the limits of the law and thereby making the rule of law meaningful and effective'. He said that the Judges must uphold the core principle of the rule of law which says— 'Be you ever so high, the law is above you.' This is the

principle of Independence of the Judiciary which is vital for the establishment of real participatory democracy, maintenance of the rule of law as a dynamic concept and delivery of social justice to the vulnerable sections of the community. It is this principle of Independence of the Judiciary which must be kept in mind while interpreting the relevant provisions of the Constitution (*S. P. Gupta and others…Vs…President of India and others, AIR 1982 SC at page 152*)."

"273. He further says─ 'What is necessary is to have Judges who are prepared to fashion new tools, forge new methods, innovate new strategies and evolve a new jurisprudence who are judicial statesmen with a social vision and a creative faculty and who have, above all, a deep sense of commitment to the Constitution with an activist approach and obligation for accountability, not to any party-in-power nor to the opposition … We need Judges who are alive to the socio-economic realities of Indian life, who are anxious to wipe every tear from every eye,

who have faith in the constitutional values and who are ready to use law as an instrument for achieving the constitutional objectives. (At page 179). He quoted the eloquent words of Justice Krishna Iyer:

"Independence of the Judiciary is not genuflection; nor is it opposition to every proposition of Government. It is neither judiciary made to opposition measure nor Government's pleasure."

"380. There is, however, a substantial difference between Constitution and its amendment. Before the amendment becomes a part of the constitution, it shall have to pass through some test, because it is not enacted by the people through a Constituent Assembly. Test is that the amendment has been made after strictly complying with the mandatory procedural requirements, that it has not been brought about by practising any deception or fraud upon statutes and that it is not so repugnant to the existing provision of the Constitution that its co-existence therewith will render the Constitution unworkable, and that, if the

doctrine of bar to change of basic structure is accepted, the amendment has not destroyed any basic structure of the Constitution."

"404. Independence of the Judiciary, a basic structure of the Constitution, is also likely to be jeopardized or affected by some of the other provisions in the Constitution. Mode of their appointment and removal, security of tenure, particularly fixed age for retirement and prohibition against employment in the service of the Republic after retirement or removal are matters of great importance in connection with the independence of Judges. Selection of a person for appointment as a Judge in disregard to the question of his competence and his earlier performance as an Advocate or a Judicial Officer may bring in a 'Spineless Judge' in the words of President Roosevelt; such a person can hardly be an independent Judge…"

"433. Alexander Hamilton, one of the founding fathers of the U.S. Constitution, in his 'Federalist Paper No. 78' described the

Supreme Court as the least dangerous branch. He said: “The Executive not only dispenses the honours but holds the sword of the community. The Legislature not only commands the purse, but also prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society, and can take no active resolution whatsoever.”

“437… It is often forgotten why a Court is important and why a Court must be independent. The reason is that all rights are rights against the State. A Court must be able to overturn unconstitutional law passed by the Parliament, it must overrule the police, the bureaucrats, and the army, the President or the Prime Minister. Only when the Court has this power, it can protect the citizenry from the State…”

“475. The doctrine of basic structure is one growing point in the constitutional jurisprudence. It has developed in a climate where the Executive, commanding an

overwhelming majority in the Legislature, gets snap amendments of the Constitution passed without a Green Paper or White Paper, without eliciting any public opinion, without sending the Bill to any select committee and without giving sufficient time to the Members of the Parliament for deliberation on the Bill for amendment. Examples may be found both at home and abroad…"

"478. The doctrine of basic structure is a new one and appears to be an extension of the principle of judicial review. Although the U. S. Constitution did not expressly confer any judicial review, Marshall CJ held in *Marbury…Vs…Madison (1803) 1 Cranch 137* that the Court, in the exercise of its judicial functions, had the power to say what the law was, and if it was found an Act of Congress conflicted with the Constitution, it had the duty to say that the Act was not law. Though the decision of Marshall, C.J is still being debated, the principle of judicial review has got a wide acceptance not only in the countries that are under the influence of

> common law but in civil law countries as well."

In the Eighth Amendment Case, it was decided by the majority of the Judges that the Constitution stands on certain fundamental principles which are its structural pillars. Parliament can not amend those being fundamental in character, by its amending power, for, if these pillars are demolished or damaged, then the whole constitutional edifice will fall apart. Though all the Judges put forward different features as basic structures, but some of these are common, and these are: (i) Sovereignty, (ii) Supremacy of the Constitution, (iii) Separation of Power, (iv) Democracy, (v) Republican Government, (vi) Independence of the Judiciary, (vii) Unitary State and (viii) Fundamental Rights.

As to implied limitation on the amending power of the Parliament, it is inherent in the word "amendment" in Article 142 and is also deducible from the entire scheme of the Constitution. Amendment of the Constitution means a change or alteration for improvement or to make it effective and meaningful. Amendment is subject to the retention of the basic structures of the Constitution. The Court, therefore, has power to undo any amendment if it transgresses its limit and alters any basic structure of the Constitution.

In Secretary, Ministry of Finance…Vs…Md. Masdar Hossain and others reported in 52 DLR (AD) 82, it was held by the Appellate Division in paragraph 57:

> "57. The Independence of the Judiciary, as affirmed and declared by Articles 94(4) and 116A, is one of the basic pillars of the Constitution and

> can not be demolished, whittled down, curtailed or diminished in any manner whatsoever, except under the existing provisions of the Constitution. It is true that this independence, as emphasized by the learned Attorney-General, is subject to the provisions of the Constitution, but we find no provision in the Constitution which curtails, diminishes or otherwise abridges this independence...”

The written Constitution of Bangladesh has placed the Supreme Court in the position of the guardian of the Constitution itself. So the Supreme Court will not countenance any inroad upon the Constitution. A reference to Articles 94(4) and 147(2) of the Constitution clearly reveals the independent character of the Supreme Court. Therefore it can not be questioned that the Supreme Court has not been envisaged in the Constitution as an independent institution.

Independence of the Judiciary is an essential attribute of the rule of law. The notion of independence of the Judiciary is not limited to the independence from the executive pressure or influence-it is a wider concept which takes within its sweep independence from any other pressure or prejudice. If the Judiciary manned by the Judges are not independent, how can the independence of the Judiciary be secured? It was observed in *C. Ravichandran Iyer…Vs…Justice A. M. Bhattacharjee, (1995) 5 SCC 457* as under:

> "Independent Judiciary is, therefore, most essential when liberty of citizen is in danger. It then becomes the duty of the Judiciary to poise the scales of justice unmoved by the powers (actual or perceived) and undisturbed by the clamour of the multitude. The heart of judicial independence is judicial individualism. The Judiciary is not a disembodied abstraction. It is composed of individual men and women who work primarily on their own. Judicial individualism, in the language of Justice Powell of the Supreme Court of the United States in his address to the American Bar Association, Labour Law Section on 11.08.1976, is 'perhaps one of the last citadels of jealously preserved individualism…"

Douglas, J. in his dissenting opinion in *Stephen S. Chandler…Vs…Judicial Council of the Tenth Circuit of the United States, 398 US 74; 26 LED 2d 100*, observed:

> "No matter how strong an individual Judge's spine, the threat of punishment-the greatest peril to judicial independence- would project as dark a shadow whether cast by political

> strangers or by judicial colleagues. A Federal Judge must be independent of every other Judge… Neither one alone nor any member banded together can act as censor and place sanctions on him. It is vital to preserve the opportunities for judicial individualism."

In "Understanding the Law" by Geoffrey Rivlin, Sixth Edition, at page 84, it has been stated:

> "The responsibility of a Judge to be independent of outside pressures was given eloquent modern expression in March, 1998 by the American Judge, Hiller B. Zobel, who presided over the trial of the English nanny Louise Woodward, for murder: 'Elected officials may consider popular urging and sway to public opinion polls. Judges must follow their duty, heedless of editorials, letters, telegrams, picketers, threats, petitions, panellists and talk shows. In this country, we do not administer justice by plebiscite [popular vote]."

In the self-same book, at page 88, the value and importance of an independent Judiciary has been emphasized as follows:

“The value and importance of an independent Judiciary, and the reasons for our high-minded expectations of Judges, were spelled out in a speech by Lord Justice Igor Judge, now Lord Judge of Draycote, Lord Chief Justice of England and Wales.

> The principle of judicial independence benefits the Judge sitting in judgment. The Judge does what he or she believes to be right, according to law, undistracted and uninhibited. But the overwhelming beneficiary of the principle is the community. If the Judge is subjected to any pressure, his judgment is flawed, and justice is tarnished. When Judges speak out in defence of the principle, they are not seeking to uphold some minor piece of flummery or privilege, which goes with their office. They are speaking out in defence of our community’s entitlement to have its disputes, particularly those with the Government of the day, and the institutions of the community, heard and decided by a Judge who is independent of them all... Among our tasks we have to ensure that the rule of law applies to everyone equally, not

> only when the consequences of the decision will be greeted with acclaim, but also, and not one jot less so, indeed, even more so, when the decision will be greeted with intense public hostility."

A write-up captioned "Crisis in Pakistan" by Justice Robert J. Sharpe and Michelle Bradfield has found place in "Judicial Independence in Context" edited by Adam Dodek and Lorne Sossin. In that write-up, it has been stated:

> "Chief Justice Chaudhury's strong assertion of judicial independence indicated that he was breaking with the Pakistani judiciary's traditional pattern of docility vis-à-vis military rule, which included the judgment he signed in 1999 validating Musharraf's coup under the doctrine of "state necessity". Every time Chaudhury C. J. asserted his apparently newfound judicial independence, it became more evident that he was no longer prepared to toe the line that Pakistan's rulers had laid down for its judges. The constitutionality of Musharraf's right to hold the office of the President was very much in doubt and an independent-minded Chief Justice determined to uphold

> the rule of law posed a serious threat to Musharraf's continued retention of power."

It has been further stated in the above-mentioned write-up:

> "After a protracted hearing on 20 July, 2007 the Supreme Court set aside the reference to the SJC, declared Chaudhury C.J's suspension from office illegal, and ordered his reinstatement. The President's order of 9 March suspending the Chief Justice and the order of the SJC restraining the Chief Justice were declared to have been made without lawful authority, as was the appointment of the acting Chief Justice. The Court pronounced the 15 March order placing Chaudhury C. J. on "compulsory leave" invalid and the 1970 emergency order upon which it was based to be ultra vires the Constitution. As a consequence of these orders, the Court ruled that the Chief Justice "shall be deemed to be holding the said office and shall always be deemed to have been so holding the same."

The capacity or inclination of Judges to exercise independent thought and judgment can certainly be referred to as judicial independence. The purpose or rationale of affording Judges a large measure of autonomy is to

establish conditions that will ensure them to make decisions free from control by others. This goes to the very core of the judicial function as a third party method of settling disputes about legal rights and duties. If a Judge is controlled by or unduly influenced by one of the parties to a dispute, he can not act as a third party. Even the appearance of being partial to one of the parties will undermine his legitimacy as a third party adjudicator. A Judiciary free in reality and in appearance from control by the other branches of the Government is an essential condition of a liberal democracy in which the citizenry can assert their legal rights against the Government─ even against a very popular Government.

It is now a well-established principle that the judicial power should be regarded in its nature, and even more in the persons who administer it, as separate from other instruments of political authority. An independent and impartial Judiciary is universally recognized as a basic requirement for the establishment of the rule of law; an inevitable and inseparable ingredient of a democratic and civilized way of life. It is only thus that a citizen can be assured of a just and fair determination of his disputes with other citizens, and with the State.

The role of Judges in the establishment of the rule of law was defined by the International Commission of Jurists in Athens in June, 1955 in the following terms:

> "Judges should be guided by the rule of law, protect and enforce it, without fear or favour, and resist any encroachments by

> Governments or political parties on their independence as Judges."

The International Commission of Jurists reiterated this principle in its New Delhi Declaration in January, 1959 by stating:

> "(a) An independent judiciary even though appointed by the Head of the State is an indispensable requisite of a free society under the rule of law. Such independence implies freedom from interference by the Executive or the Legislature with the exercise of the judicial function, but that does not mean that the Judge is entitled to act in an arbitrary manner; and
>
> (b) The principle of irremovability of the Judiciary and their security of tenure until death or until a retiring age fixed by statue is reached, is an important safeguard of the rule of law."

Whenever a Constitution is justiciable, i.e., enforceable in a Court of law, the Judiciary becomes the guardian of the Constitution. According to A.V. Dicey:

> "This system (referring to the American), which makes the Judges the guardians of the Constitution provides the only adequate

> safeguard which has hitherto been invented against unconstitutional legislation."
>
> (The Law of Constitution, 10th Ed. P-137)

In the case of *Idrisur Rahman (Md) and others…Vs…Secretary, Ministry of Law, Justice and Parliamentary Affairs, Government of the People's Republic of Bangladesh reported in 61 DLR (HCD) 523,* it was held in paragraph 209:

> "209. Independence of Judiciary is an indispensable condition for democracy— if the Judiciary fails, the Constitution fails and the people might opt for some other alternative."

Montesquieu in his book "Spirit of Laws", Vol.-1, Page 181 observed:

> "There is no liberty if the power of judging be not separated from the Legislative and the Executive powers."

Our Constitution has not only taken care to empower the Supreme Court of Bangladesh to limit the power of the Legislature in lawmaking but has also authorized the Supreme Court to function as the bulwark of the Constitution against Executive encroachments on the lives and properties of the citizenry and against any breach of their fundamental rights.

Since ours is a limited Government, the limitations imposed by the Constitution can only be preserved in practice, in the words of Hamilton, in "no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution

void. Without this, all the reservations of particular rights or privileges would amount to nothing" [Federalist Paper No. 78 by Alexander Hamilton].

In this connection, it is pertinent to refer to the eloquent statement of Chief Justice John Marshall who said, "The judicial department comes home in its effects to every man's fireside. It passes on his property, his reputation, his life, his all. Is it not, to the last degree important, that the Judge should be rendered perfectly and completely independent, with nothing to influence or control him but God and his conscience?" [Proceedings and Debates of the Virginia State Convention of 1829-30(1830), page-616].

It is, therefore, evident that the Supreme Court occupies a unique position of the "balance wheel" and its independence is the cornerstone of our constitutional-democratic state under the rule of law.

The Supreme Court of India through its comprehensive judgment in the leading case of *Minerva Mills Ltd....Vs...Union of India (AIR 1980 SC 1789)*, literally left no query unanswered on Parliamentary limitation in making law and in amending the Constitution, as well as the superior Court's power, including the source of their power, to judicially review Acts of Parliament. Their Lordships of the Indian Supreme Court observed in that case as under:

> "Parliament too, is a creature of the Constitution and it can only have such powers as are given to it under the Constitution. It has no inherent power of amendment of the Constitution and being an authority created by the Constitution, it can

not have such inherent power, but the power of amendment is conferred upon it by the Constitution and it is a limited power which is so conferred. Parliament can not in exercise of this power so amend the Constitution as to alter its basic structure or to change its identity. Now, if by constitutional amendment, Parliament is granted unlimited power of amendment, it would cease to be an authority under the Constitution, but would become supreme over it, because it would have power to alter the entire Constitution including its basic structure and even to put an end to it by totally changing its identity. It will, therefore, be seen that the limited amending power of Parliament is itself an essential feature of the Constitution, a part of its basic structure, for if the limited power of amendment is enlarged into an unlimited power, the entire character of the Constitution would be changed. It must follow as a necessary corollary that any amendment of the Constitution which seeks, directly or indirectly, to enlarge the

amending power of Parliament by freeing it from the limitation of unamendability of the basic structure, would be violative of the basic structure and hence outside the amendatory power of Parliament.

It is a fundament principle of our constitutional scheme, and I have pointed this out in the preceding paragraph, that every organ of the State, every authority under the Constitution, derives its power from the Constitution and has to act within the limits of such power. But then the question arises as to which authority must decide what are the limits on the power conferred upon each organ or instrumentality of the State and whether such limits are transgressed or exceeded. Now there are three main departments of the State amongst which the powers of the Government are divided; the Executive, the Legislative and the Judiciary. Under our Constitution, we have no rigid separation of powers as in the United States of America, but there is a broad demarcation, though having regard to the complex nature of

governmental functions, certain degree of overlapping is inevitable. The reason for this broad separation of powers is that the 'concentration of powers in any one organ may', to quote the words of Chandrachud, J. (as he then was) in Smt. Indira Gandhi's case (AIR 1975 SC 2299) 'by upsetting that fine balance between the three organs, destroy the fundamental premises of a democratic Government to which they were pledged'. Take, for example, a case where the executive which is in charge of administration, acts to the prejudice of a citizen and a question arises as to what are the powers of the executive and whether the executive has acted within the scope of its powers. Such a question obviously can not be left to the executive to decide for two very good reasons. First, the decision of the question would depend upon the interpretation of the Constitution and the laws and this would pre-eminently be a matter fit to be decided by the judiciary, because it is the judiciary which alone would be possessed of expertise in this field

> and secondly, the constitutional and legal protection afforded to the citizen would become illusory, if it were left to the executive to determine the legality of its own action. So also if the Legislature makes a law and a dispute arises whether in making the law, the Legislature has acted outside the area of its legislative competence or the law is violative of the fundamental rights or of any other provisions of the Constitution, its resolution can not, for the same reasons, be left to the determination of the Legislature."

Their Lordships continued to observe:

> "It is for the judiciary to uphold the constitutional values and to enforce the constitutional limitations. That is the essence of the rule of law which, inter alia, requires that 'the exercise of powers by the Government whether it be the legislature or the executive or any other authority, be conditioned by the Constitution and the law.
>
> The power of judicial review is an integral part of our constitutional system and without it, there will be no Government of laws and the rule of law would become a

> teasing illusion and a promise of unreality. I am of the view that if there is one feature of our Constitution which, more than any other, is basic and fundamental to the maintenance of democracy and the rule of law, it is the power of judicial review and it is unquestionably, to any mind, part of the basic structure of the Constitution."

Coming back to the case before us, I think, the constitutional provisions which are germane to proper adjudication of the Rule are the relevant paragraphs of the Preamble, Articles 7B, 22, 70, 88(b), 89(1), 94(4) and 96 (both before and after the Sixteenth Amendment) and Article 147(2)(4) which are reproduced below:

Preamble:

> "Further pledging that it shall be a fundamental aim of the State to realize through the democratic process a socialist society, free from exploitation- a society in which the rule of law, fundamental human rights and freedom, equality and justice, political, economic and social, will be secured for all citizens; (Paragraph 3)
>
> Affirming that it is our sacred duty to safeguard, protect and defend this Constitution and to maintain its supremacy as the embodiment of the will of the people of Bangladesh so that we may

prosper in freedom and may make our full contribution towards international peace and co-operation in keeping with the progressive aspirations of mankind; (Paragraph 4)"

Article 7B:

"Notwithstanding anything contained in Article 142 of the Constitution, the preamble, all Articles of Part I, all Articles of Part II, subject to the provisions of Part IXA, all Articles of Part III, and the provisions of Articles relating to the basic structures of the Constitution including Article 150 of Part XI shall not be amendable by way of insertion, modification, substitution, repeal or by any other means."

Article 22:

"The State shall ensure the separation of the judiciary from the executive organ of the State."

Article 70:

After the Constitution (15th Amendment) Act, 2011—

"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—

(a) resigns from that party; or

(b) votes in Parliament against that party;

but shall not thereby be disqualified for subsequent election as a Member of Parliament."

Article 88(b):

"The following expenditure shall be charged upon the Consolidated Fund—

(b) The remuneration payable to—

(i) the Speaker and Deputy Speaker;

(ii) the Judges of the Supreme Court;

(iii) the Comptroller and Auditor-General;

(iv) the Election Commissioners;

(v) the Members of the Public Service Commissions;"

Article 89(1):

"So much of the annual financial statement as relates to expenditure charged upon the Consolidated Fund may be discussed in, but shall not be submitted to the vote of, Parliament."

Article 94(4):

"Subject to the provisions of this Constitution, the Chief Justice and the other Judges shall be independent in the exercise of their judicial functions."

Article 96:

Before the Constitution (Sixteenth	After the Constitution (Sixteenth

Amendment) Act, 2014	Amendment) Act, 2014
"96. (1) Subject to the other provisions of this article, a Judge shall hold office until he attains the age of sixty-seven years. (2) A Judge shall not be removed from his office except in accordance with the following provisions of this Article. (3) There shall be a Supreme Judicial Council, in this Article referred to as the Council, which shall consist of the Chief Justice of Bangladesh, and the two next senior Judges: Provided that if, at any time, the Council is inquiring into the capacity or conduct of a Judge who is a member of the Council, or a member of the Council is absent or is unable to act due to illness or other cause, the Judge who is next in seniority to those who are members of the Council shall act as such member. (4) The function of the Council shall be-	"96. (1) Subject to the other provisions of this Article, a Judge shall hold office until he attains the age of sixty-seven years. (2) 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. (3) 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. (4) A Judge may resign his office by writing under his hand addressed to the President."

(a) to prescribe a Code of Conduct to be observed by the Judges; and (b) to inquire into the capacity or conduct of a Judge or of any other functionary who is not removable from office except in like manner as a Judge. (5) Where, upon any information received from the Council or from any other source, the President has reason to apprehend that a Judge— **(a)** may have ceased to be capable of properly performing the functions of his office by reason of physical or mental incapacity, or **(b)** may have been guilty of gross misconduct, the President may direct the Council to inquire into the matter and report its finding. (6) If, after making the inquiry, the Council reports to the President that in its opinion the Judge has ceased to be capable of properly performing the functions of his office or has	

been guilty of gross misconduct, the President shall, by order, remove the Judge from office. (7) For the purpose of an inquiry under this Article, the Council shall regulate its procedure and shall have, in respect of issue and execution of processes, the same power as the Supreme Court. (8) A Judge may resign his office by writing under his hand addressed to the President."	

Article 147 (2) (4):

"(2) The remuneration, privileges and other terms and conditions of service of a person holding or acting in any office to which this Article applies shall not be varied to the disadvantage of any such person during his term of office.

(4) This Article applies to the offices of—

(a) President;

(b) Prime Minster;

(c) Speaker or Deputy Speaker;

(d) Minister, Minister of State or Deputy Minister;

(e) Judge of the Supreme Court;

(f) Comptroller and Auditor-General;

(g) Election Commissioner;

(h) Member of Public Service Commission."

From the third paragraph of the Preamble, it is abundantly clear that it shall be a fundamental aim of the State to realize through the democratic process a society in which the rule of law, amongst others, will be secured for all citizens. It is in the fourth paragraph of the Preamble that it is our sacred duty to safeguard, protect and defend the Constitution and to maintain its supremacy as the embodiment of the will of the people of Bangladesh. It is explicit that the third and fourth paragraphs of the Preamble of the Constitution have enjoined a duty upon the State for establishment of the rule of law and a duty upon the people to safeguard, protect and defend the Constitution and to maintain its supremacy. On the other hand, the Judges of the Supreme Court are oath-bound to preserve, protect and defend the Constitution and the laws of Bangladesh as per Article 148 read with third schedule of the Constitution. So it is seen that the act of safeguarding, protecting and defending the Constitution is upon the people whereas apart from protecting and defending the Constitution, the Judges of the Supreme Court must preserve the Constitution, come what may. The preservation of the Constitution is very significant. The Constitution must be preserved, protected and defended in case of any assault on it either by the Executive or by the Legislature. As independence of the Judiciary is one of the basic

structures of the Constitution, it must be preserved, protected and defended by the Judges of the Supreme Court at all costs.

Dr. Kamal Hossain has rightly contended that in an effort to ensure the independence of the Judiciary by securing the remuneration of the Judges of the Supreme Court, the Constitution has provided in Articles 88(b) and 89(1) that the remuneration of the Judges of the Supreme Court is payable from the Consolidated Fund and the expenditure charged upon the Consolidated Fund can only be discussed in Parliament; but it can not be voted on. So it is evident that the Constitution upholds the independence of the Judicature in a way that even Parliament can not vote on their remuneration. Viewed from this angle, I am at one with Dr. Kamal Hossain that Articles 88(b) and 89(1) conjointly form an integral part of the independence of the Judiciary, one of the basic structures of the Constitution. To be more precise, the independence of the Judiciary is also protected by those two Articles, namely, Articles 88(b) and 89(1) of the Constitution. In the result, the Sixteenth Amendment, considered from the standpoint as above, should not be allowed to exist as a valid piece of legislation.

Article 147(2) of the Constitution provides in clear, unambiguous and categorical terms that the remuneration, privileges and other terms and conditions of service of a person holding or acting in any office to which this Article applies shall not be varied to the disadvantage of any such person during his term of office. As per Article 147(4), this Article applies, amongst others, to the office of a Judge of the Supreme Court. Prior to the Sixteenth Amendment, the gross misconduct or incapacity of any Supreme Court

Judge was required to be inquired into by the Supreme Judicial Council consisting of the Chief Justice and the next 2(two) senior most Judges of the Appellate Division as introduced by the Second Proclamation (Tenth Amendment) Order, 1977 (Second Proclamation Order No. 1 of 1977). The Supreme Judicial Council mechanism was justifiably endorsed by the Parliament and incorporated in Article 96 of the Constitution by the Fifteenth Amendment of the Constitution. But the Parliamentary mechanism of removal as introduced by the Sixteenth Amendment has varied the terms and conditions of service of the Judges of the Supreme Court to their disadvantage during their incumbency as Judges as guaranteed by the Fifteenth Amendment. In such view of the matter, it is palpably clear that the Sixteenth Amendment is violative of Article 147(2) of the Constitution.

Dr. Kamal Hossain has rightly adverted to Article 23 of the Beijing Statement of Principles of the Independence of the Judiciary which provides that by reason of difference in history and culture, the procedure adopted for the removal of Judges may differ in different societies. Although the Parliamentary removal procedure has traditionally been adopted in some societies; yet in other societies, that procedure is unsuitable and its use other than for the most serious of reasons is apt to lead to misuse. So the probable misuse of the Parliamentary procedure of removal of Judges has been internationally recognized.

Dr. Kamal Hossain has also rightly pointed out that the Sixteenth Amendment has undermined the independence of the Judiciary by making the Judiciary vulnerable to a process of removal of the Judges of the Supreme Court by the Parliament which is likely to be influenced by

political clout and pressure. The risk of political clout upon the independence of the Judiciary has been noted in the following statement by H. M. Seervai in his book- "The Position of the Judiciary under the Constitution of India", published by Bombay University Press, at page 109:

> "… the American experience in impeaching a judge has been unsatisfactory. The Senate, which is a Legislative body, has little time for a detailed investigation into the conduct of a judge; and where such investigation has been made, political and party considerations have come into play."

So we find that the American experience about the impeachment of Judges by the Legislature is not happy.

Speaking about Article 70 of the Constitution of Bangladesh, I must say that this Article has fettered the Members of Parliament unreasonably and shockingly. It has imposed a tight rein on them. Members of Parliament can not go against their partyline or position on any issue in the Parliament. They have no freedom to question their party's stance in the Parliament, even if it is incorrect and flawed. They can not vote against their party's decision. They are, indeed, hostages in the hands of their party high command.

Because of Article 70 of the Constitution, a Member of Parliament effectively loses his character as an agent of the people and becomes the nominee of his party. What is dictated by the cabinet of the ruling party or the shadow cabinet of the opposition, Members of Parliament must follow

them meekly ignoring the will and desire of the electorate of their constituencies. There starts a process of distance and apathy between the Members of Parliament and their electors. Such Members are dummies in Parliament. Having a solid grip over the majority of the Members of Parliament, the party-in-power moves to influence the executive, judiciary and other instrumentalities. It eventually results in what we say, 'daleo-karan'- the political terminology to indicate a 'group oriented society'.

In defence of empowering the Parliament with regard to removal of the Judges of the Supreme Court, both Mr. Mahbubey Alam and Mr. Murad Reza have emphatically cited the practices in the UK, USA, India, Canada, Australia and a few other countries; but there is a fundamental difference between the lawmakers in those countries and those in our country. In the USA, UK, Canada and Australia, the lawmakers are free to perform their functions in the Parliament. No restriction like the one imposed by Article 70 of our Constitution exists in those countries. However, in India there is some restriction on the lawmakers; yet they do not blindly obey the party's decisions because of prevalence of democratic practice in the parties. In view of Article 70 of the Constitution of Bangladesh as it stands now, the Members of Parliament must toe the partyline in case of removal of any Judge of the Supreme Court. Consequently, the Judge will be left at the mercy of the party high command.

The other significant aspect in all those countries is their focus on the appointment process of Judges, not their removal. But in our country, the Executive never speaks about the mechanism for appointment of Judges of the higher Judiciary in those countries. Due to the effective mechanism for

judicial appointments in the higher Judiciary, Parliaments in those countries do not need to exercise their authority to remove Judges. Both Dr. Kamal Hossain and Mr. M. Amir-ul Islam have lamented that all the successive Governments in Bangladesh have remained conspicuously callous and indifferent to the constitutional provision (Article 95 (2)(c)) to enact a law prescribing other qualifications for appointment of Judges of the Supreme Court ostensibly for political reasons. Resultantly Judges are being appointed to both the Divisions of the Supreme Court without any rigorous process of their selection by the President after consultation with the Chief Justice. The non-framing of any law pursuant to Article 95(2)(c) of the Constitution has virtually given an upper hand to the Executive in the matter of appointment of the Judges of the Supreme Court of Bangladesh.

At this juncture, I would like to mention that both Mr. Mahbubey Alam and Mr. Murad Reza have submitted that by the Sixteenth Amendment, Parliament has restored the original Article 96 of the Constitution. According to them, this restoration of the original Article 96 of the Constitution by way of amendment has restored the people's sovereignty; but they have conveniently forgotten that the Legislature has failed to restore the original Articles 115 and 116 of the Constitution, though the Appellate Division has made a pious wish to that effect in the Fifth Amendment Case. It seems that the Parliament has given a damn to the pious wish of the Appellate Division in that regard. Anyway, it is my considered view that unless and until Articles 115 and 116 are restored to their original position of the 1972 Constitution, the lower Judiciary will continue to remain under the sway and influence of the Executive impinging

upon its independence. But regrettably, the political Executives do not appear to be at all mindful of the complete independence of the lower Judiciary from the Executive organ of the State.

In examining the constitutionality of the Sixteenth Amendment, I can not shut my eyes to the peculiar political culture prevalent in this country. It is common knowledge that there is no consensus about pressing national issues between the major political parties of the country. As a matter of fact, the major political parties are poles apart in this respect. Secondly, our society is sharply polarized. Thirdly, there may not be always two-thirds majority of the party-in-power in Parliament. Taking all these factors into consideration, I am of the opinion that the Parliamentary removal mechanism may fizzle out in many instances. In consequence, the allegedly corrupt or incapacitated Judges of the Supreme Court will continue to be in office to the great detriment of public interest. On this point, the case of *Mrs. Sarojini Ramaswami…Vs…Union of India and others, AIR 1992 SC 2219* referred to by Mr. Manzill Murshid can not be disregarded at all.

Ours is a unitary State. Our Legislature is unicameral. But in the UK, USA, Canada, Australia and India, the Legislatures are bicameral. The power of impeachment of the Judges of the higher Judiciary in those countries having two chambers (upper house and lower house) may be highlighted incidentally. In those countries, the two chambers maintain the balance of power and nullify the practical apprehension of victimization, by parliamentary executives, owing to personal vengeance, if any, arising out of any judgment that might not be the way they have desired or expected. Without a judicial mind, free from apprehension and anxiety of being

ridiculed, harassed or victimized, it will be difficult for a Judge to discharge his judicial function according to his oath of office. In view of the peculiar socio-political scenario of Bangladesh and sharp polarization of the society, the Judges of the Apex Court of Bangladesh will not feel safe and secure in discharging their judicial functions by keeping the Sixteenth Amendment in place.

In an article titled "Impeachment of Judges: Tremors in Indian Judiciary" by T. N. Shalla; published in "Law, Judiciary and Justice in India", Deep and Deep Publications, 1993, he stated at page 92:

> "The existing law permits politicians and other vested interests to use the weapon of impeachment of Judges sometimes for extraneous considerations. Earlier abortive attempt to move a motion for impeachment of Justice J.C. Shah substantiates the point. As many as 198 signatures of MPs were procured on a scandalous petition to the Speaker of the Lok Sabha to impeach him, only because he had passed a wholly justified order against a corrupt Government servant. Fortunately, Mr. G. S. Dhillon, the then Speaker of the Lok Sabha, managed to convince the majority of the signatories of the irresponsibility of their action and the move for impeachment was dropped."

In Bangladesh jurisdiction too, the possibility of any such move by the Members of Parliament against any Judge of the Supreme Court for rendition of any justified judgment or order can not be thrown overboard at all.

Basically, the process of impeachment of a Judge is a political process. A learned author, namely, Wrisley Brown says in "The Impeachment of the Federal Judiciary", Harv LR (1912-1913) 684 at page 698:

> "Thus an impeachment in this country, though judicial in external form and ceremony, is political in spirit. It is directed against a political offence. It culminates in a political judgment. It imposes a political forfeiture. In every sense, save that of administration, it is a political remedy, for the suppression of a political evil, with wholly political consequences."

In paragraph 42 of *Sub-Committee on Judicial Accountability…Vs…Union of India and others, (1991) 4 SCC 699*, the above view of Wrisley Brown was referred to by the Indian Supreme Court.

In *Lily Thomas (Ms), Advocate...Vs...Speaker, Lok Sabha and others, (1993) 4 SCC 234*, it was mentioned in paragraph 2:

> "2. Article 124 (4) is extracted below:

‘124. (4) A Judge of the Supreme Court shall not be removed from his office except by an order of the President passed after an address by each House of Parliament supported by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting has been presented to the President in the same session for such removal on the ground of proved misbehaviour or incapacity.’

In *Sub-Committee on Judicial Accountability…Vs...Union of India and others ((1991) 4 SCC 699)* the Constitution Bench … held that the constitutional process up to the point of admission of Motion, constitution of Committee and recording of findings by the Committee were not proceedings in the Houses of Parliament. In our opinion, proceedings for impeachment partake of judicial character because it is removal after inquiry and investigation. The statutory process appears to start when the Speaker exercises duty under the Judges (Enquiry) Act and comes to an end once the

> Committee appointed by the Speaker submits the report. The debate on the Motion thereafter in the Parliament, the discussion and the voting appear more to be political in nature. Voting is formal expression of will or opinion by the person entitled to exercise the right on the subject or issue in question."

So we find that the political role of the Parliament in the matter of removal of any Judge of the higher Judiciary is inevitable. In my humble estimation, generally speaking, this political role of the Legislature on the question of removal of any Judge of the higher Judiciary will necessarily give rise to suspicions and misgivings in the minds of the people undermining their confidence in the judicial system of Bangladesh.

There is no earthly reason to disagree with the submission of Mr. Manzill Murshid that the power conferred upon the Parliament by the Sixteenth Amendment is beyond the scope and jurisdiction of the Parliament on the score that causing of any investigation of misbehaviour or incapacity of any Judge of the Supreme Court and recommending to the President for his removal from office are neither legislative functions nor those are acts of scrutiny of the Executive actions; rather those functions are judicial in nature and the Constitution does not allow or contemplate any judicial role by the Parliament and the role of each organ of the State is clearly defined and carefully kept separate under the Constitution to maintain its harmony and integrity and to maximize the effectiveness of the functionality of the

3(three) organs of the State, that is to say, the Executive, the Legislature and the Judiciary and the assumption of the judicial role by the Parliament in the matter of removal of the Judges of the Supreme Court derogates from the theory of separation of powers as enshrined in our Constitution.

According to the submission of Mr. Manzill Murshid, the Sixteenth Amendment blatantly and shockingly destroys the spirit and essence of the provisions of Article 22 of the Constitution and clearly establishes the dominance of the Executive over the Judiciary through the Parliament and thereby makes the Judiciary subservient to the Executive and a toothless and tearful silent spectator to the dismantling of the constitutional fabric. However, in the facts and circumstances of the case, I find it very difficult to discard this submission of Mr. Manzill Murshid.

Mr. Manzill Murshid has justifiably submitted that for impeachment and removal of the President of the People's Republic of Bangladesh, detailed provisions have been spelt out in Articles 52 and 53 of the Constitution; but for removal of the Judges of the Supreme Court under the amended Article 96(2), details have been left to the Parliament to be worked out in the form of a law pursuant to the amended Article 96(3) and that is incongruous and even if an ordinary law is passed pursuant thereto, it will be subject to frequent changes by simple majority of the Members of Parliament in the interest of the party-in-power jeopardizing the independence of the Judiciary.

The duty of the Members of Parliament is to frame laws; but in the present context of Bangladesh, they are also performing the functions of all development activities in their respective constituencies and the local

administration seems to be under their control. In this context, Mr. Manzill Murshid, I suppose, has rightly submitted that the Members of Parliament will not hesitate to act arbitrarily or illegally as a result of which the powerless people will be compelled to resort to the High Court Division and in most of the cases (Writ Petitions), the Government is the respondent and that being so, the Members of Parliament will be interested in those cases and by virtue of the Sixteenth Amendment, a Member of Parliament can bring a motion against any Judge in any case and discuss it therein necessitating his character-assassination and consequently the Judge may not be able to perform his duties independently to the great detriment of public interest.

The Sri Lankan experience about the removal of Dr. Shirani Bandaranayake, the then Chief Justice of Sri Lanka may be shared at this stage. Dr. Shirani Bandaranayake, 43rd Chief Justice of Sri Lanka, was impeached by Parliament and then removed from office by President Mahinda Rajapaksa in January, 2013. Sri Lankan Parliament ignored a Court order quashing a report against Chief Justice Shirani Bandaranayake, and began a two-day debate to impeach her. But the Legislature, backed by an all-powerful Executive, deliberated upon the report prepared by the Parliament Select Committee (PSC), which had held Ms. Bandaranayake guilty of some of the 14 charges levelled against her. Bandaranayake was accused of a number of charges including financial impropriety and interfering in Court cases, all of which she denied. The impeachment followed a series of rulings against the Government by the Supreme Court of Sri Lanka including one against a bill proposed by a Minister, namely, Basil

Rajapaksa, President Rajapaksa's brother. Bandaranayake was replaced as Chief Justice by former Attorney General Mohan Peiris. Bandaranayake refused to recognize the impeachment process and the lawyers refused to work with the new Chief Justice. Bandaranayake's controversial impeachment drew much criticism and concern from within and outside Sri Lanka. On 28th January, 2015, she was reinstated on the ground that her 2013 impeachment was unlawful and as such the appointment of Mohan Peiris, her successor-in-office, was void ab initio. On the following day (29th January, 2015), she retired from the office of the Chief Justice of Sri Lanka. [See the report of the International Bar Association's Human Rights Institute, namely, "A Crisis of Legitimacy: The Impeachment of Chief Justice Bandaranayake and the Erosion of the Rule of Law in Sri Lanka"] Needless to say, we may experience a similar situation in Bangladesh on account of enactment of the Sixteenth Amendment.

I have already adverted to the case of *Mrs. Sarojini Ramaswami…Vs…Union of India and others, AIR 1992 SC 2219* reminding us that in Indian jurisdiction, in spite of a finding of guilt by a Committee formed under the Judges (Inquiry) Act, 1968 against V. Ramaswami J, the then Chief Justice of Punjab and Haryana High Court, he could not be removed from office because of not having the required votes in Lok Sabha as the Members of Congress (a political party) were absent therein. This situation may also happen in Bangladesh jurisdiction and this has been emphatically asserted by Mr. Manzill Murshid.

The 1988 Malaysian constitutional crisis (also known as the 1988 judicial crisis) was a series of events that began with the United Malays

National Organization (UMNO) party elections in 1987 and ended with the suspension and eventual removal of the Lord President of the Supreme Court, Tun Mohamed Salleh Abas, from his seat. The Supreme Court in the years leading up to 1988 had been increasingly independent of the other branches of the Government. Matters thereafter came to a head when Mahathir Mohamed, who believed in the supremacy of the Executive and Legislative branches, became the Prime Minster of Malaysia. Many saw his eventual sacking of Salleh Abas and two other Supreme Court Judges as the ignominious obliteration of judicial independence in Malaysia, and Mahathir's action was condemned by all quarters. [See the report of a Mission on behalf of the International Bar Association, the ICJ Center for the Independence of Judges and Lawyers, the Commonwealth Lawyers' Association and the Union Internationale Des Avocats, namely, "Justice In Jeopardy: Malaysia 2000"] This type of situation can not be brushed aside in our jurisdiction keeping the Sixteenth Amendment in place.

Dr. Kamal Hossain, as stated earlier, was the Chairman of the Constitution Drafting Committee formed immediately after the liberation of Bangladesh. Mr. M. Amir-ul Islam was one of the eminent Members of that Committee. It is a great fortune for us that those two jurists are still alive and we have had the opportunity of having their able assistance as Amici Curiae in coming to the right decision in this case.

Both Dr. Kamal Hossain and Mr. M. Amir-ul Islam are of the opinion that in the post-liberation period of Bangladesh, the Members of the Constitution Drafting Committee were less experienced and with the passage of time, they have become more experienced in constitutional matters and in

the ways of the world. Now they realize that they should not have entrusted the task of removal of the Judges of the Supreme Court of Bangladesh to the Legislature, regard being had to the prevalent political culture and socio-political scenario of the country.

However, I find substance in the argument of Mr. M. Amir-ul Islam that the force of law is not logic; but experience and experience is the best teacher and guide of a person. Because of their maturity, experience and expertise in constitutional law, both Dr. Kamal Hossain and Mr. M. Amir-ul Islam now hold the view that the Parliamentary removal mechanism of Judges is unsuitable, outdated, obsolete and violative of the independence of the higher Judiciary in Bangladesh.

I am in complete agreement with the argument of Mr. M. Amir-ul Islam that the historical perspective together with our experience and judicial observations in various cases, namely, Masdar Hossain's Case, Fifth Amendment Case, Eighth Amendment Case etc. militate against the Sixteenth Amendment and by that reason, the homecoming of the original Article 96 of the Constitution, as Mr. M. Amir-ul Islam puts it, is not a plausible argument.

By the Sixteenth Amendment, in effect, the power of judging the Judges of the Supreme Court of Bangladesh has been given to the Parliament. The power of judging is, no doubt, a judicial power. This judicial power should not have been given to the Parliament, a separate organ of the State.

The stark reality of our country and the principle of independence of the Judiciary dictate that a Judge should be tried by his peers for his alleged

misbehaviour or incapacity. In this respect, I absolutely agree with Mr. Rokanuddin Mahmud that the Chief Justice-led Supreme Judicial Council is the best disciplinary body for the Judges of the Supreme Court of Bangladesh. As the Chief Justice-led Supreme Judicial Council is composed of Judges, the people will not nourish any suspicion about any proceedings taken against a delinquent Judge of the Supreme Court. What is of signal importance is that the removal mechanism of the Judges of the Supreme Court through the Chief Justice-led Supreme Judicial Council had been in place for about 37(thirty-seven) years in this country and the people accepted it by their acquiescence. Even the Parliament admittedly endorsed the Chief Justice-led Supreme Judicial Council and incorporated the provisions relating thereto in Article 96 of the Constitution through the Fifteenth Amendment of the Constitution, despite knocking down of the Fifth Amendment as void and ultra vires the Constitution finally by the Appellate Division. Assuming for the sake of argument that the Supreme Judicial Council system is not beyond reproach, in that event, the same may be reformed by upholding the principles of independence of the Judiciary and separation of powers.

Judicial independence has been called "the lifeblood of constitutionalism in democratic societies" (*Beauregard…Vs…Canada, [1986] 2 S.C. R. 56*) and has been said to exist "for the benefit of the judged, not the judges" (*Ell…Vs…Alberta, [2003] 1 S.C.R. 857*). We ought not to be oblivious of these dicta of the Canadian Supreme Court.

Undeniably, there are two dimensions of judicial independence, one individual and the other institutional. The individual dimension relates to the

independence of a particular Judge. The institutional dimension relates to the independence of the Court. Both the dimensions depend upon some objective standards that protect the Judiciary's role. The Judiciary must both be and be seen to be independent. Public confidence hinges upon both these requirements being met. Judicial independence serves not as an end in itself, but as a means to safeguard our constitutional order and to maintain public confidence in the administration of justice.

The three core characteristics of judicial independence are security of tenure, financial security and administrative independence which have emerged from the various decisions referred to above. However, the guarantee of security of tenure may have a collective or institutional dimension, such that only a body composed of Judges may recommend the removal of a Judge. The Sixteenth Amendment, to my mind, has affected the security of tenure of the Judges of the Supreme Court of Bangladesh, a core characteristic of judicial independence.

It transpires that Mr. Ajmalul Hossain has correctly submitted that the institutional independence of the Judiciary reflects a deeper commitment to the separation of powers among the Executive, Legislative and Judicial organs of the State and although judicial independence had historically developed as a bulwark against the abuse of executive power, it equally applies against other potential intrusions, including any from the Legislative branch as a result of legislation. In a nutshell, the Judiciary must guard against any abuse of executive power and any legislative intrusion upon itself as a result of legislation. In the light of the discussions made above and in the facts and circumstances of the case and having regard to the socio-

political conditions and political culture of Bangladesh, I feel constrained to hold that the Sixteenth Amendment is an intrusion upon the independence of the Judiciary from the Legislative organ of the State. So this intrusion can not be countenanced in the least.

Judicial independence flows as a consequence of separation of powers. This independence also operates to insulate the Courts from interference by the parties to litigations and the public generally. Our experience shows that a vast majority Members of Parliament have criminal records and are involved in civil litigations too. But by dint of the Sixteenth Amendment, they have become the virtual bosses of the Judges of the higher Judiciary posing a threat to their independence in the discharge of judicial functions. This situation also drives home the point that there may be a conflict of interest of those Members of Parliament by reason of the Sixteenth Amendment.

A very pertinent question has been raised by Mr. Ajmalul Hossain as to whether the Sixteenth Amendment has advanced public interest or defeated it. My answer to this question is that the Sixteenth Amendment has singularly defeated public interest in view of the observations made by the Canadian Supreme Court in paragraph 23 of the decision in the case of *Ell...Vs…Alberta, [2003] 1 S.C.R 857* which are as follows:

> "23. Accordingly, the judiciary's role as arbiter of disputes and guardian of the Constitution require that it be independent from all other bodies. A separate, but related, basis for independence is the need to

> uphold public confidence in the administration of justice. Confidence in our system of justice requires a healthy perception of judicial independence to be maintained amongst the citizenry. Without the perception of independence, the Judiciary is unable to "claim any legitimacy or command the respect and acceptance that are essential to it". See *Mackin…Vs…New Brunswick (Minister of Finance), [2002] 1 S. C. R. 405, 2002 SCC 13*, at paragraph 38, per Gonthier J. The principle requires the Judiciary to be independent both in fact and perception."

I see eye to eye with the above-mentioned observations of the Canadian Supreme Court.

Reverting to Bangladesh jurisdiction, a billion-dollar question has arisen: whether the Sixteenth Amendment has infringed upon the independence of the Judiciary in public perception? My answer is obviously in the affirmative. 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 can not be sustained at all. Sustenance of an independent Judiciary is a must for rule of law and nourishment of

democratic values in a democratic polity. The principle of independence of the Judiciary as held by the Canadian Supreme Court exists for the benefit of the judged and not the Judges and I also hold so. If the Judiciary fails because of adverse public perception about its independence, then the constitutional order will fall apart like a House of Cards.

As Professor Shetreet has written (in "Judicial Independence: New Conceptual Dimensions and Contemporary Challenges", in S. Shetreet and J. Deschenes, eds., Judicial Independence: The Contemporary Debate (1985), 590, at page 599):

> "Independence of the Judiciary implies not only that a Judge should be free from executive or legislative encroachment and from political pressures and entanglements, but also that he should be removed from financial or business entanglement likely to affect or rather to seem to affect him in the exercise of his judicial functions."

I find substance in the submission of Mr. Manzill Murshid that through the Sixteenth Amendment, the power of removal of the Judges of the Supreme Court has been shifted to the Legislature which is a separate independent organ of the State in the scheme of the Constitution and by this amendment, a sort of situation has been created to dominate the higher Judiciary in an indirect manner which will ultimately affect the justice-seekers and this indirect control of the higher Judiciary by the Legislature is contrary to the principles of independence of the Judiciary and rule of law.

I think, Mr. Manzill Murshid, on the basis of his practical wisdom, has rightly submitted that the primary objective of the Sixteenth Amendment is to destroy the principle of independence of the Judiciary and to make the Judiciary subservient to the Executive through the Legislature and that being so, the Sixteenth Amendment is a vicious blow to the independence of the Judiciary.

The Judiciary is an institution of the highest value in the society. The independence of the Judge is indispensable to impartial justice under the law. It is indivisible. All institutions and authorities, whether national or international, must respect, protect and defend that independence. The view of the Appellate Division about the independence of the Judiciary in the Fifth Amendment Case was couched in the following terms in paragraph 232:

> "232. It also appears that the provision of Article 96 as existed in the Constitution on August 15, 1975 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". However, clauses (2), (3), (4), (5), (6) and (7) of Article 96 were substituted by the Second Proclamation (Tenth Amendment) Order, 1977 providing the procedure for removal of a Judge of the Supreme Court of Bangladesh by the Supreme Judicial Council

> in the manner provided therein instead of earlier method of removal. The substituted provisions being more transparent procedure than that of the earlier ones and also safeguarding independence of judiciary, are to be condoned."

So it is obvious that according to the Appellate Division, the provisions relating to the Supreme Judicial Council are more transparent in safeguarding the independence of the Judiciary. By the way, it may be pointed out that in Civil Review Petition Nos. 17-18 of 2011, the Appellate Division did not change its stance vis-à-vis the Supreme Judicial Council as articulated in paragraph 232 of the decision in the Fifth Amendment Case, though it condoned the provisions pertaining thereto provisionally till 31st December, 2012. Furthermore, it is an indisputable fact that the Sixteenth Amendment was not enacted within the given time-frame of 31st December, 2012. Rather the House of the Nation, as discussed earlier, endorsed the provisions relating to the Supreme Judicial Council and incorporated the same in Article 96 through the Fifteenth Amendment of the Constitution in 2011. Thereafter all of a sudden, the Sixteenth Amendment was passed in 2014 to the astonishment of all concerned.

As per Article 112 of the Constitution, all authorities, whether executive and judicial, in the Republic shall act in aid of the Supreme Court. Accordingly the Supreme Judicial Council was maintained in Article 96 through the Fifteenth Amendment of the Constitution. But subsequently without any apparent cause, the political executives made a volte-face and

got the Sixteenth Amendment passed on the strength of their more than two-thirds majority in the Parliament without sufficiently reflecting upon the infringement of the independence of the Judiciary and its probable disastrous consequences undermining the confidence of the people in the administration of justice.

The respondent no. 1 has filed a Supplementary Affidavit-in-Opposition annexing a copy of the draft bill of a law purported to have been made pursuant to Article 96(3) of the Constitution as amended by the Sixteenth Amendment. Although this is a draft bill, yet I feel inclined to refer to it. By making a reference thereto, we may gauge the intention of the political executives behind making the draft bill. This draft bill has been approved by the Cabinet in principle very recently as reported in the press. It appears from the draft bill that on receipt of a complaint about the misbehaviour or incapacity of a Judge of the Supreme Court from any person, the Speaker shall form a Ten-Member Committee from amongst the Members of Parliament and that Ten-Member Committee will ascertain the prima facie truth or otherwise of the complaint. So it is seen that a Ten-Member Committee of the Members of Parliament will hold a preliminary enquiry into the complaint lodged against any Judge of the Supreme Court. Does this conform to the principle of the independence of the Judiciary? The answer is 100% in the negative. Furthermore, not a single sitting Judge of the Supreme Court has been made a Member of the Three-Member Investigation Committee. To me, this is very stunning, mind-boggling and astounding. Anyway, the impairment of the independence of the Judiciary by the Sixteenth Amendment stands corroborated by the draft bill.

The main submission of both Mr. Mahbubey Alam and Mr. Murad Reza is that by the Sixteenth Amendment, Article 96 of the original Constitution has been restored with a view to establishing the sovereignty of the people as per Article 7 of the Constitution. The powers of the people, according to them, have been reflected in Articles 52, 57, 74 and 96 of the original Constitution relating to impeachment of the President, resignation of the Prime Minister, removal of the Speaker and a Judge of the Supreme Court by resolutions of Parliament respectively. Both Mr. Mahbubey Alam and Mr. Murad Reza are of the view that although the provisions of Articles 52, 57 and 74 of the Constitution have remained unchanged, the military ruler General Ziaur Rahman introduced the procedure of removal of a Judge by the Supreme Judicial Council which is against the spirit of Article 7 of the Constitution.

It has already been stated earlier that nowhere in our Constitution there is a provision to the effect that the Judiciary shall be responsible or accountable to the Parliament. However, assuming for the sake of argument that the Judges are accountable to the people, that accountability may be rendered to their appointing authority, that is to say, the President of the Republic. The office of the President is an elective office and he is elected by the Members of Parliament according to law. In that sense, he represents the people. He is also the Head of the State. In my 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. It may be reiterated that independence of the Judiciary is an essential element

of the rule of law. 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.

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 this Article (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. So after passing of the Constitution (Fifteenth Amendment) Act, 2011 by the Legislature, the Chief Justice-led Supreme Judicial Council can not be stigmatized as a legacy of the Martial Law regime of General Ziaur Rahman.

Although in common parlance, it is said that the provisions of Article 96 as framed by the Constituent Assembly have been restored through the Sixteenth Amendment; but there is no such expression as 'any provision may be amended by way of restoration' in Article 142(a) of the Constitution.

Article 142(a) of the Constitution provides that notwithstanding anything contained in the Constitution, any provision thereof may be amended by way of addition, alteration, substitution or repeal by Act of Parliament. The petitioners have challenged the constitutionality of the substituted provisions of Article 96 brought about by the Sixteenth Amendment, no matter whether they were in the original Constitution of 1972 or not. That is immaterial. Over and above, the socio-political scenario of the country has changed tremendously since 1972. The Constitution is for the people. So it should meet the needs and expectations of the people and the requirements of the society. As the Sixteenth Amendment has facilitated the political executives to control the Judiciary through the Legislature, it has, of necessity, affected two basic structures of the Constitution, namely, separation of powers and independence of the Judiciary. This being the panorama, the Sixteenth Amendment is subject to judicial review. So the contention of both Mr. Mahbubey Alam and Mr. Murad Reza that the Sixteenth Amendment is not judicially reviewable stands jettisoned.

It has been reported by the press that about 70% of the Members of Parliament in Bangladesh are businessmen. Both Mr. Mahbubey Alam and Mr. Murad Reza do not dispute this figure. That being so, our experience shows that they are less interested in Parliamentary debates in the matter of lawmaking. Consequently now-a-days most of the laws passed by the Parliament are found to be flawed, defective and of low standard. Instead of seriously performing their job of lawmaking, the Members of Parliament have become interested in getting themselves involved with the process of removal of the Judges of the Supreme Court on the strength of the Sixteenth

Amendment. It is not the job of the lawmakers to judge the Judges of the Supreme Court of Bangladesh for their misbehaviour or incapacity. In this respect, the Sixteenth Amendment has vested the judicial power in the Parliament as argued by Mr. M. Amir-ul Islam and I also think so.

In the case of *Belgaum Gardeners Cooperative Production Supply and Sale Society Ltd…Vs...State of Karnataka, 1993 Supp (1) SCC 96*, it was observed in paragraph 76:

> "76. The principle which emerges from these authorities is that the Legislature can change the basis on which a decision is given by the Court and thus change the law in general, which will affect a class of persons and events at large. It can not, however, set aside an individual decision inter parties and affect their rights and liabilities alone. Such an act on the part of the Legislature amounts to exercising the judicial power of the State and to functioning as an appellate court or tribunal."

In the case of *People's Union For Civil Liberties (PUCL) and another...Vs...Union of India and another, (2003) 4 SCC 399*, it was held in paragraph 37:

> "37. For the purpose of deciding these petitions, the principles emerging from various decisions

rendered by this Court from time to time can, inter alia, be summarized thus:

> ―the Legislature can change the basis on which a decision is rendered by this Court and change the law in general. However, this power can be exercised subject to constitutional provision, particularly, legislative competence and if it is violative of fundamental rights enshrined in Part III of the Constitution, such law would be void as provided under Article 13 of the Constitution. The Legislature also can not declare any decision of a court of law to be void or of no effect."

From the above decisions of the Indian Supreme Court, I am led to hold that the Legislature can not expressly or impliedly declare the judgment passed by the Appellate Division in the Fifth Amendment Case to be void or of no effect pertaining to the condonation of the provisions about the Chief Justice-led Supreme Judicial Council through the Sixteenth Amendment. What is of paramount importance is that the judgment of the Appellate Division in the Fifth Amendment Case, so far as it relates to the Supreme Judicial Council, was implemented through the Fifteenth Amendment of the Constitution.

To all its intents and purposes, the Sixteenth Amendment has made the Members of Parliament the Judges of the Judges of the Supreme Court of Bangladesh. The usurpation of this judicial power by the Legislature has contravened the theory of separation of powers among the three organs of the State.

It is undisputed that the original Article 96 of the Constitution was supplanted by the Parliament by virtue of its amendatory power under Article 142 of the Constitution by the Fifteenth Amendment. With coming into force of the Fifteenth Amendment in 2011, the basic structure with regard to the independence of the Judiciary got a new dimension and added significance and stood fortified.

Federalist Paper No. 78 is an essay by Alexander Hamilton. This is regarded as a foundation text of constitutional interpretation. Of all the essays, Federalist Paper No. 78 is the most cited by the Judges of the United States Supreme Court.

Federalist Paper No. 78 describes the process of judicial review, in which the Federal Courts review statutes to determine whether they are consistent with the Constitution and its statutes. It also indicates that under the Constitution, the Legislature is not the judge of the constitutionality of its own actions. Rather, it is the responsibility of the Federal Courts to protect the people by restraining the Legislature from acting inconsistently with the Constitution:

> "If it be said that the legislative bodies are themselves the constitutional judges of their own powers, and that the construction they

> put upon them is conclusive upon the other departments, it may be answered, that this can not be the natural presumption, where it is not to be collected from any particular provisions in the Constitution. It is not otherwise to be supposed, that the Constitution could intend to enable the representatives of the people to substitute their will to that of their constituents. It is far more rational to suppose, that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority."

In "Modern Political Constitutions: An Introduction to the Comparative Study of their History and Existing Form" by C. F. Strong, it has been mentioned at page 236:

> "But it is not this distinction that the theory of the separation of powers points. The application of the theory means not only that the executive shall not be the same body as the legislature but that these two bodies shall be isolated from each other, so that the one shall not control the other. Any state which has adopted and maintained this doctrine in

> practice in its full force has an executive beyond the control of the legislature. Such an executive we call non-parliamentary or fixed. This type of executive still exists in the United States, whose Constitution has not been altered in this particular since its inception. But France, which, as we have said, applied the doctrine in its first Constitutions born of the Revolution, later adopted the British executive system, and this feature appeared in the Constitutions of the Third and Fourth Republics, and again, though greatly modified, in that of the Fifth Republic. The system is one in which a cabinet of ministers is dependent for its existence on the legislature of which it is a part, the members of the executive being also members of the legislature."

But in our constitutional scheme, the Prime Minister is the Leader of the House and the political executives are also Members of Parliament. So in Bangladesh perspective, the Legislature always tends to be under the thumb of the Executive.

The Supreme Court of India is widely known for its active and pragmatic role in maintaining smooth functioning of the constitutional journey of India against the Executive and/or Legislative transgression.

Since its inception in 1950, the Supreme Court through its various orders, judgments and advisory opinions, has been vigilant in keeping the constitutional journey of India on the right track. The judgment in the case of *the Supreme Court Advocates-on-Record-Association and another...Vs...Union of India* [Ninety-Ninth Amendment Case] is a glaring example in this respect.

The Parliament of India passed the Ninety-Ninth Amendment Act, 2014 which came into force on 13th April, 2015. The Ninety-Ninth Amendment Act, 2014 empowers the Parliament to make laws for the regulation of the selection and appointment procedure of Judges in the Supreme Court and High Courts. In exercising this power, the Parliament passed the National Judicial Appointments Commission Act, 2014 (NJAC Act, 2014) which also came into effect on 13th April, 2015. The Ninety-Ninth Amendment Act, 2014 and the NJAC Act, 2014 form the subject matter of challenge in the case of *the Supreme Court Advocates-on-Record-Association and another...Vs...Union of India (2015)*.

The Supreme Court opines that in its attempt to replace the collegium system, the Parliament first makes some textual changes in Article 124 of the Constitution by replacing the consultation clause with the Chief Justice of India by the impugned NJAC. The textual changes may be noticed as under:

Pre-amendment	**Post-amendment**
124. Establishment and Constitution of Supreme Court. ―(1) There shall	124. Establishment and Constitution of Supreme Court. –(1) There shall

be a Supreme Court of India consisting of a Chief Justice of India and, until Parliament by law prescribes a larger number, of not more than seven other Judges.	be a Supreme Court of India consisting of a Chief Justice of India and, until Parliament by law prescribes a larger number, of not more than seven other Judges.
2) Every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal after consultation with such of the Judges of the Supreme Court and of the High Courts in the States as the President may deem necessary for the purpose and shall hold office until he attains the age of sixty-five years:	(2) Every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal on the recommendation of the National Judicial Appointments Commission referred to in Article 124A and shall hold office until he attains the age of sixty-five years:
Provided that in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of India shall always be consulted:	Omitted
Provided further that- (a) a Judge may, by writing under his hand addressed to the President, resign his office; (b) a Judge may be removed from	Provided that- (a) a Judge may, by writing under his hand addressed to the President, resign his office; (b) a Judge may be removed from his office in the manner provided in

his office in the manner provided in clause (4).	clause (4).

Thus it is apparent from the above Table that the Ninety-Ninth Amendment introduces the NJAC under Article 124A replacing the collegium system. The Supreme Court of India takes into account the provisions of newly-inserted Article 124A which deals with the composition of the NJAC. After examining the provisions in this regard, the Supreme Court finds that in the six members of the NJAC, the Judiciary has got only three members. The Supreme Court observes that the NJAC does not make a proper and adequate representation from the Judiciary to ensure primacy in the process of appointment and transfer of Judges in the higher Judiciary. Thereby it makes a striking blow at the basic structure of the independence of the judiciary. Then the Supreme Court looks into the inclusion of the Union Minister for Law and Justice in the structure of the NJAC. Referring to many scholarly presentations from different corners of the world on the issue of reciprocity, the Supreme Court reveals that the inclusion of the Union Minister for Law and Justice in the NJAC is nothing but a direct involvement of the executive branch of the Government of India. In the findings of the Supreme Court, the Government of India frequently becomes a party to cases before the higher judiciary and the Union Minister being a representative of the Government of India, appears as party to the cases pending before the Supreme Court or High Court(s). So a Judge, whose name will be recommended by the NJAC at the instance of the Union Minister for Law and Justice, will naturally be lenient to the Government on

the ground that the Judge being the recipient of benefit by the said Minister is likely to continue to feel obliged to the Government. Consequently, this Judge will not be in a position to discharge his official duties and responsibilities properly for being loyal to the Union Minister for Law and Justice. In another sense, with his inclusion in the structure of the NJAC, participation of the executive in the selection and appointment process will increase alarmingly in India, though efforts are being made to lower down executive participation to zero level across the globe.

Then the Supreme Court advances to check the constitutionality of the provisions regarding the inclusion of two eminent members in the structure of the NJAC and unearths the fact that the NJAC Act, 2014 does not make clear the eligibility criteria for their inclusion. More pathetically, the opinion of the Attorney General for India differs with that of the counsel representing the State of Maharashtra as the former asserts that they will be persons having no background in law while the latter argues they will be persons having background in law. In case, they are chosen from non-law background segment, how it will be possible for them to insulate inputs in the Judiciary is not clear to the Supreme Court. More importantly, the NJAC Act, 2014 virtually equips the two eminent members of the NJAC as this Act provides that a recommendation fails if any two members of the NJAC do not agree with the name proposed to be recommended. This veto power in any two members of the NJAC will adversely impact upon the primacy ingrained in the Judiciary in the matter of selection and appointment of Judges in the higher Judiciary and their transfer from one High Court to another. Hence, according to the Supreme Court, it violates the

independence of the Judiciary amounting to a breach of the basic structure of the Constitution and therefore the Supreme Court declares it ultra vires the Constitution.

Under the NJAC Act, 2014, the Secretary to the Government of India is made the convener of the NJAC and the Supreme Court declares his inclusion as the convener of the meetings of the NJAC ultra vires and on the same ground, the Supreme Court also declares the inclusion of the Union Minister for Law and Justice ultra vires. The Supreme Court avoids examining every single provision of the NJAC Act, 2014 from legal perspective on the ground that since the impugned Ninety-Ninth Amendment of the Constitution becomes unsustainable in law, the NJAC Act, 2014 which is enacted under the authority of it, is also liable to be declared a nullity and void. Consequently, the Supreme Court strikes down the Ninety-Ninth Amendment of the Constitution and the NJAC Act, 2014 on the ground that the impugned Amendment and the Act are violative of and contradictory to the concept of independence of the Judiciary. Then the Supreme Court issues its ruling on the effect of striking down the impugned Ninety-Ninth Amendment and the NJAC Act, 2014. The Supreme Court holds that the legal position postulated in the *Koteswar Vittal Kamath...Vs...K. Rangappa Baliga ((1969) 1 SCC 255)* is applicable only when a new system substitutes the old one. In the present case, the Ninety-Ninth Amendment introduces completely a new system replacing the collegium system in the process of selection and appointment of Judges in the Supreme Court and High Courts and transfer of a Judge from one High

Court to another. As a consequence, the original provisions of the Constitution will stand automatically revived.

Independence of the Judiciary is an inseparable component of the concept of separation of powers which is one of the most vital components of a democratic society. However, independence of the Judiciary is a concept that has no in-built mechanism to remain operative in a country uninterruptedly; rather is has to face numerous challenges on its way. It is the Judiciary upon which the duty of upholding its independence rests through ages. In this respect, selection and appointment of Judges in the higher Judiciary are a significant factor. It is the fundamental element of the independence of the Judiciary that its members must be free from fear or pressure from any quarters in their efforts to discharge their responsibilities as such. In this context, efforts have been ventured to make the Judiciary free of executive influence, particularly in the matter of selection and appointments. In different countries, mechanisms are being adopted to lower down executive participation the process of selection and appointment of Judges to zero level, though their Constitutions do not specifically provide for strict separation of the Judiciary from the Executive. In the context of India, though Article 50 of the Constitution provides for the separation of the Judiciary from the Executive, the impugned Ninety-Ninth Amendment Act and the NJAC Act, 2014 through introducing the NJAC replacing the collegium system of appointment of Judges in the higher Judiciary of India, have widened the door of executive participation in the matter of selection and appointment of Judges. This goes against the concept of independence of the Judiciary. The Supreme Court of India endorses the power of Indian

Parliament to bring any amendment to the Constitution of India, but that must be 'by maintaining the attributes of basic structure or separation of power or independence of judiciary test'.

It will be profitable for me if I quote some of the paragraphs of the decision dated 16th October, 2015 rendered by the Indian Supreme Court in the case of *the Supreme Court Advocates-on-Record-Association and another...Vs...Union of India in Writ Petition (Civil) No. 13 of 2015 along with other Writ Petitions* which was downloaded from the Internet. In that case, it was spelt out, inter alia, in paragraph 146:

> "146. The scope of judicial review with reference to a constitutional amendment and/or an ordinary legislation, whether enacted by the Parliament or a State Legislature, can not vary, so as to adopt different standards, by taking into consideration the strength of the Members of the concerned legislature, which had approved and passed the concerned Bill. If a constitutional amendment breaches the "core" of the Constitution or destroys its "basic or essential features" in a manner which was patently unconstitutional, it would have crossed over forbidden territory. This aspect would undoubtedly fall within the realm of judicial review. In the above

> view of the matter, it is imperative to hold that the impugned constitutional amendment, as also, the NJAC Act, would be subject to judicial review on the touchstone of the "basic structure" of the Constitution, and the parameters laid down by this Court in that behalf, even though the impugned constitutional amendment may have been approved and passed unanimously or by an overwhelming majority, and notwithstanding the ratification thereof by as many as twenty-eight State Assemblies."

It was further spelt out in that case in paragraph 168:

> "168. We are of the view that consequent upon the participation of the Union Minster in charge of Law and Justice, a Judge approved for appointment with the Minster's support, may not be able to resist or repulse a plea of conflict of interest, raised by a litigant, in a matter when the executive has an adversarial role. In the NJAC, the Union Minster in charge of Law and Justice would be a party to all final selections and appointments of Judges to the higher

> judiciary. It may be difficult for Judges approved by the NJAC, to resist a plea of conflict of interest (if such a plea was to be raised, and pressed), where the political-executive is a party to the lis. The above would have the inevitable effect of undermining the "independence of the judiciary", even where such a plea is repulsed. Therefore, the role assigned to the political-executive, can at best be limited to a collaborative participation, excluding any role in the final determination. Therefore, merely the participation of the Union Minster in charge of Law and Justice in the final process of selection, as an ex-officio Member of the NJAC would render the amended provision of Article 124A(1)(c) as ultra vires the Constitution, as it impinges on the principles of "independence of judiciary" and "separation of powers".

It was also observed in that case in paragraph 243:

> "243. It was additionally submitted that it was imperative to exclude all executive participation in the proceedings of the NJAC for two reasons. Firstly, the executive was

> the largest individual litigant, in matters pending before the higher judiciary, and therefore, can not have any discretionary role in the process of selection and appointment of Judges to the higher judiciary (in the manner expressed in the preceding paragraph). And secondly, the same would undermine the concepts of "separation of powers" and "independence of the judiciary", whereunder the judiciary has to be shielded from any possible interference, either from the executive or from the legislature."

After making in-depth discussions of the various provisions of the Indian Constitution, the Indian Supreme Court struck down the Constitution (Ninety-Ninth Amendment) Act, 2014 and the National Judicial Appointments Commission Act, 2014 as being unconstitutional on the ground of violation of the principles of separation of powers and independence of the Judiciary, two basic structures of the Constitution and revived the collegium system of appointment of Judges to the higher Judiciary of India.

In our jurisdiction, the involvement of the Members of Parliament including political executives in the removal process of the Judges of the Supreme Court of Bangladesh on the basis of the Sixteenth Amendment, to be sure, goes against the concepts of independence of the Judiciary and

separation of powers, though this system is in place in some jurisdictions of the world.

The submission of Mr. Manzill Murshid that the Sixteenth Amendment will have far-reaching demoralizing effects on the discharge of the functions of the Chairman and Members of the Public Service Commission, Comptroller and Auditor-General, Election Commissioners as well as the Commissioners of the Anti-Corruption Commission in that by virtue of this amendment, they will be removed in like manner as a Judge of the Supreme Court as per Articles 139(2), 129(2), 118(5) of the Constitution and Section 10(3) of the Anti-Corruption Commission Act, 2004 respectively and the Commissioners of the Anti-Corruption Commission may not be able to act independently against the allegedly corrupt Members of Parliament which may eventually frustrate the purpose of the Anti-Corruption Commission Act and the Comptroller and Auditor-General may also be self-restrained from acting independently while auditing the accounts of the Parliament Secretariat can not be brushed aside at all in view of the prevalent socio-political spectra of the country.

I am not impressed by the submission of Mr. Manzill Murshid that the Sixteenth Amendment was enacted mala fide because of declaring the Contempt of Courts Act, 2013 and an amended provision of the Anti-Corruption Commission Act, 2004 (purporting to afford protection to the Government officers) illegal and void and directing the concerned authority to arrest the accused officers of law-enforcing agencies in a seven-murder case in Narayanganj by the High Court Division. It is a settled proposition of law that the wisdom of the Legislature in making laws can not be questioned

by any Court. So in that view of the matter, even if there was some factual background leading to the passing of the Sixteenth Amendment by the Legislature, no ill motive or mala fide intention can be imputed thereto. In the case of *His Holiness Kesavananda Bharati Sripadagalvaru and others…Vs…State of Kerala and another, AIR (1973) SC 1461*, the Indian Supreme Court held in paragraph 298:

> "298. It is, of course, for Parliament to decide whether an amendment is necessary. The Courts will not be concerned with the wisdom of the amendment."

This being the position, the High Court Division can not hold that the Sixteenth Amendment was passed by the Parliament with mala fide intention.

I have already discussed that independence of the Judiciary is one of the basic structures of the Constitution and security of tenure of Judges is one of the 'core' characteristics of that independence. It can, therefore, be held that Article 96 containing provisions for removal of the Judges of the Supreme Court of Bangladesh being an integral part of the independence of the Judiciary as incorporated in the Constitution by the Fifteenth Amendment is not amendable under Article 7B. To put it differently, the Sixteenth Amendment is hit by Article 7B of the Constitution as it has affected the independence of the Judiciary.

The independence of the Judges of the Supreme Court of Bangladesh has been guaranteed by Article 94(4) of the Constitution. My discussions about the impairment of the independence of the Judiciary by the Sixteenth

Amendment lead me to hold that the Sixteenth Amendment is violative of that Article [Article 94(4)].

It is admitted on all hands that the Judiciary thrives upon the confidence of the people. As the confidence of the people in the Judiciary has been shaken because of impairment of its independence by the Sixteenth Amendment, the public interest will take a backseat and the people will suffer. If the Judiciary fails in this regard, the constitutional order may crumble to pieces. The Commonwealth Latimer House Principles, 2003 about the removal mechanism of Judges, to my way of thinking, are best exemplified by the Chief Justice-led Supreme Judicial Council as incorporated in Article 96 by the Fifteenth Amendment of the Constitution.

It is a correct submission on the part of Mr. Mahbubey Alam and Mr. Murad Reza that there is a presumption of constitutionality in favour of the Sixteenth Amendment. But that presumption of constitutionality, in my opinion, has been rebutted to the satisfaction of this Court as is apparent from the foregoing discussions.

From the discussions made above and in the facts and circumstances of the case, I have no hesitation in holding that the Sixteenth Amendment is a colourable legislation and is violative of separation of powers among the 3(three) organs of the State, namely, the Executive, the Legislature and the Judiciary and independence of the Judiciary as guaranteed by Articles 94(4) and 147(2), two basic structures of the Constitution and the same are also hit by Article 7B of the Constitution. So I find merit in the Rule. The Rule, therefore, succeeds.

Accordingly, the Rule is made absolute without any order as to costs. It is hereby declared that the Constitution (Sixteenth Amendment) Act, 2014 (Act No. 13 of 2014) (Annexure-'A' to the Writ Petition) is colourable, void and ultra vires the Constitution of the People's Republic of Bangladesh.

However, as per Article 103(2)(a) of the Constitution, we certify that the case involves a substantial question of law as to the interpretation of the Constitution.

QUAZI REZA-UL HOQUE, J:

I agree.

MD. ASHRAFUL KAMAL, J: