

THE JUDICIARY IN BANGLADESH: EVALUATING ITS ROLE WITHIN THE CONSTITUTIONAL FRAMEWORK

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The quest for socio-economic fairness within a society is an ongoing endeavor. The Preamble of Bangladesh's Constitution guarantees a society that is inclusive, equitable and free from prejudices. This ideal in Bangladeshi society is expected to be achieved through the rule of law. The Constitution of Bangladesh prioritizes the essential ideals of rights, freedom, justice, and equality. The judiciary in Bangladesh is organized hierarchically, with the Supreme Court at the apex and lower courts operating under its oversight. In addition to its appellate role, the Supreme Court serves as a constitutional guardian by maintaining constitutional supremacy, safeguarding fundamental rights, and curbing executive and legislative overreach. Nonetheless, the Court's efficacy is contentious owing to threats to judicial autonomy, political meddling, and institutional frailties. This paper rigorously analyzes the Supreme Court's authority and operational efficacy as the protector of the Constitution. It assesses its role in the advancement of constitutionalism and democratic government in Bangladesh. It also examines the constitutional revisions and legal framework that define the organization, powers, and operations of the Bangladeshi judiciary, emphasizing the conflicts between constitutional principles and political realities.

Keywords: *Bangladesh, Judiciary, Constitutional Amendments, Legal.*

1. INTRODUCTION

The level of civilization achieved by a nation is frequently evaluated based on the efficacy and integrity of its justice delivery system, especially in safeguarding the fundamental rights and freedoms of its citizens. In a constitutional democracy, the judiciary serves as the essential protector of the Constitution, the advocate for human rights, and the steward of the rule of law. It has a constitutional duty to uphold democratic governance by guaranteeing accountability, equity, and equality under the law. The continuity and progress of democracy primarily rely on the effective administration of justice, attainable solely through an independent, impartial, and efficient judiciary. Enhancing the institutional capacity, professional expertise, ethical standards, and legal acumen of judges, attorneys, and other judicial participants is very much crucial for maintaining judicial integrity, public trust, and the effective administration of justice. (Islam, 2016).

Bangladesh is a liberal secular-democratic country. Although Bangladesh is in a relatively balanced and secure period with respect to security & politics and the Government of Bangladesh has set up a spirited social and economic reform, based on strong regional and international cooperation, but the country continues to confront substantial challenges within its judicial system, particularly in ensuring judicial independence, accountability, and the effective implementation of the rule of law. This is partly due to the confrontational politics practiced by the two main political parties over decades, reflecting longstanding personal enmity between the leaders of Awami League and Bangladesh Nationalist Party (Talukder 1994: 125). This could have significance for countries in Asia, the Middle East and North Africa since Bangladesh have strengthened its stand as a successful secular, democratic and inclusive country with a predominantly Muslim population (Ministry of Foreign Affairs of Denmark n.d.).

A Judiciary free from the executive control is regarded as the *sin qua non* of any form of democratic Constitution. One of the cardinal objectives of a Constitutional state is to preserve and foster the fundamental rights of its citizens. The Bangladesh's constitution stands as "the most powerful evidence to state, Bangladesh as a unitary, independent and republic, founded on a struggle for national liberation. It lays a strong foundation of nationalism, secularism, democracy, and socialism as the ethical that stands for the Republic and declares the quest of a society that gives its citizens- the rule of law, fundamental civil rights and independence as well as fairness" (Akkas 2004).

The Constitution is the supreme law of the state, governing all legislative, executive, and judicial functions. In a constitutional democracy, the protection of constitutionalism depends not only on courts and legal experts but also on active public awareness and civic vigilance. Without citizens' engagement in defending constitutional rights and values, constitutional breaches become easier to normalize and institutionalize. As per Article 21 of the Bangladesh Constitution, "it is the duty of every citizen to observe the constitution and the laws, to maintain discipline, to perform public duties and to protect public property" (The Constitution of Bangladesh, 2016).

The Judiciary is bestowed with a cardinal position, and it has enhanced its legitimacy through the process of judicial activism. The Courts in Bangladesh can review the existing judicial rules and orders those are already delivered. Judicial activism in a way is emblematic of the fact that the Judiciary tries to apply societal goals on its own considering the prevailing socio-economic conditions. This aspect of the judiciary is quite important for a poor country like Bangladesh where socio-economic conditions provide ample scope for human rights abuses wherein courts come to play a magnified role as a saviour of the common people.

A judiciary of unquestionable integrity constitutes one of the fundamental pillars of democracy and the rule of law. As an independent constitutional institution, it serves as the ultimate safeguard for the protection of rights, liberties, and justice, particularly when other institutional mechanisms fail to provide adequate protection. The judiciary plays a critical role in preventing arbitrary exercise of power and ensuring that all actions of the state remain subject to constitutional and legal accountability. Consequently, safeguarding judicial independence, impartiality, and institutional integrity is an essential requirement for democratic government and the efficient administration of justice. Achieving these objectives requires continuous commitment, institutional reform, professional competence, and the devoted application of legal expertise, experience, and ethical standards (Rahman 2016: 192).

2. JUDICIARY AND ITS CONSTITUTIONAL PROVISIONS

Bangladesh's Constitution envisages Independence of Judiciary under various articles. As per Art. 95 of the Constitution, "Appointment of Judges of the Supreme Court were made by the President in consultation with the Chief Justice." The Fourth Amendment introduced significant changes regarding the requirement of consultation with the Chief Justice, however, "in practice the Chief Justice is consulted in such appointments". According to the Article 22, separation of the Judiciary from the Executive is ensured by the state. Further, according to the Article 115, "it is the President who makes appointments to subordinate courts. However, though the control and discipline of the subordinate courts including Magistrates is vested in the hands of the President, but he/she shall have to exercise the same in consultation with the Supreme Court." (The Constitution of Bangladesh 2016: 36, 6, 42)

Part IV of the Constitution deals with the Judiciary. According to the Constitution, "all powers in the Republic belong to the people, and their exercise on behalf of the people shall be affected only under, and by the authority of this Constitution. So, every legal step of the Republic should be according to the Constitution. Also, as stated by the Constitution, any person accused of a criminal offence has the right to a speedy and public trial by an independent and impartial court or tribunal established by law (Article 359(3)). It demands independence of the Supreme Court Judges, and it also provides for independence of the Subordinate Judiciary (HCD Special original Jurisdiction Writ Petition No.8283 2005)." (The Constitution of Bangladesh 2016).

When it comes to the exercise of the judicial function of the judges of the Supreme Court, the Constitution has ensured the independence of the judges of the Supreme Court by making some provisions in the Constitution. As per, "Articles 115, 133 or 136 does not give either the Parliament or the President to curtail or diminish the independence of the

Subordinate Judiciary by recourse to subordinate legislation or rules. Article 135 of the Bangladesh's Constitution deals with the dismissal, removal or reduction in the rank of a person who holds a civil post. The members of judicial service and magistrates exercising judicial functions are no doubt holding civil posts and public offices as they get emolument and render service to the republic." (Islam 2012)

The independency of the judicial officers including the Magistrate in exercise of their judicial functions has been declared under the Article 116A. In this connection, "a landmark judgment by the Supreme Court headed by Justice Mustafa Kamal (the Chief Justice of Bangladesh) came in the case of Secretary, Ministry of Finance Vs Masdar Hossain and others. In this decision, after taking into consideration a number of decisions from Indian and Canadian jurisdictions, the Appellate Division held, inter alia, that the independence of the Judiciary as affirmed and decided by Articles 94(4) and 116A is one of the basic pillars of the constitution and cannot be demolished, whittled down, curtailed or diminished in any manner whatsoever, except under the existing provisions of the Constitution." (The Constitution of Bangladesh 2016).

Further, it is held that "neither the parliament nor the President are given the authority by the Articles 115, 133 or 136, to curtail or diminish the independence of the Subordinate Judiciary by recourse to Subordinate legislation or rules and that what cannot be done directly, cannot also be done indirectly. The decision in the case, popularly known as Masdar Hossain's Case, is acclaimed nationally and internationally as milestone in the judicial history of Bangladesh laying foundation towards achieving independence of Judiciary and it must be regarded as a major and bold step in judicial system of Bangladesh". However, the subject matter of the case was with regard to service conditions, salaries etc of the subordinate Judiciary thus affecting financial security. In the case of Bangladesh Vs Md. Abu Bakar, the respondent a Magistrate was imposed a penalty in a departmental proceeding by the government without consultation with the Supreme Court." (Halim 1998).

Here under some important provisions, especially in relation to independence of the judiciary in Bangladesh has been pointed out with analysis as well as evaluation.

3. APPOINTMENT OF JUDGES

The provisions relating to appointment of judges are given in Article 95 of the Constitution. This Article Provides:

1. "The Chief Justice and other judges shall be appointed by the President.
2. A person shall not be qualified for appointment as a judge unless he is a citizen of Bangladesh and
3. Has not less than ten years, been an advocate of the Supreme Court or
4. Has for not less than ten years, held judicial office in the territory of Bangladesh or has such other qualification as may be prescribed by law for appointments as a judge of the Supreme Court." [The Constitution of Bangladesh, 2016 Article 95.]

From Article 95 aforesaid, "it is seen that unlike the Indian Constitution and the 1962 Constitution of Pakistan, the President has been given exclusive authority to appoint the Chief Justice and other judges of the Supreme Court. But according to the 1962 Constitution of Pakistan, the Chief justice of the Supreme Court was to be appointed by the President and other judges to be appointed by the President after consultation with Chief Justice. On the other hand the Constitution of India, 1950 provides that in the matter of appointment of the Chief Justice of India, the president shall consult such judges of the Supreme Court and of the High court as may deem necessary. And in case of appointment of other judges of the Supreme Court, consultation with the Chief Justice of India, in addition to the above, is obligatory. Article 95 of the Constitution of Bangladesh as originally enacted in 1972, which was amended subsequently. Provided that the Chief justice of Bangladesh and other judges were to be appointed by the President and once the Chief Justice was appointed other judges could only be appointed after consultation with the chief Justice." (Talukder 1994).

4. AMENDMENTS IN THE CONSTITUTION OF BANGLADESH

The power and process of constitutional amendment are inherently complex. Constitutional provisions may be categorized as "comparatively hard," "particularly hard," or even "impossible" to amend. Many constitutions adopt comparatively rigid amendment procedures by requiring a qualified legislative majority, such as two-thirds or three-fourths approval, for constitutional change. Other constitutions, most notably that of the United States, establish particularly stringent amendment procedures by imposing additional requirements, including ratification and concurrent action by institutions beyond the legislature. Although no constitution has yet declared the entirety of its provisions to be unamendable, several jurisdictions have attempted to entrench certain constitutional principles through the incorporation of eternity or perpetuity clauses. As Yaniv Roznai observes, the global trend toward such constitutional entrenchment is increasingly expanding (Roznai, 2014). This phenomenon of legislative entrenchment through perpetual or eternity clauses described by Richard Albert as "codified unamendability" complements the judicially developed doctrine of "interpretative unamendability" articulated under the doctrine of basic structure (Albert, 2019).

Within a short span of 45 years, the Constitution of Bangladesh has undergone 16 amendments. But the 16th Constitutional Amendment was scrapped by the Constitution on 3rd July 2107 stated that, "Parliament no longer has the power to impeach judges of the apex Court". A seven-member bench of the Appellate Division which was headed by Chief Justice Surendra Kumar Sinha, maintained the High Court's decision declaring the amendment unconstitutional, thereby rejecting the state's appeal. The judgement was widely viewed as a significant step toward preserving judicial independence and constitutional balance. "From now on, the Supreme Judicial Council will deal with the impeachment matters, not parliament". The 16th Amendment was passed by parliament on September 17, 2014, "empowering the members of parliament (MPs) to impeach the top court judges for incapability or misconduct via two-thirds majority". While reviewing the constitutionality of the 16th Amendment, the court observed that the amendment had created a public perception of weakened judicial independence within the country's prevailing political culture. The High Court

said, “If the judiciary is not independent in public perception, it cannot be sustained at all”. The court observed that, “there was no consensus on pressing national issues between the major political parties, the society was sharply polarized and there might not be two-thirds majority of the ruling party at all times”. The following is a brief account of 15 amendments and 2018, 17 amendments.

4.1 First Amendment Act

In order to put the 195-armed personnel of the Pakistani army guilty of War Crimes on trial, the Constitution First amendment Act 1973 was passed on 15th July 1973. It amended, “Article 47 of the Constitution by inserting an additional clause to it which allowed prosecutions and punishment of any person accused of genocide crimes against humanity or war crimes and other crimes under international law. A new Article 47A specifying inapplicability of certain fundamental rights in those cases was also inserted”.

4.2 The Second Amendment Act

The Second constitutional Amendment Act. was enacted on September 22, 1973. As per this act, “Amendment of Articles 26, 63, 72 and 142 of the constitution; (i) Substitution of Article 33 and (iii) the insertion of a new part i.e. IXA in the constitution. (iii) Provisions were made through this amendment for the suspension of some fundamental rights of citizens in an emergency”.

4.3 The Third Amendment Act

The Third Constitutional Amendment Act of 1974 was enacted on November 28, 1974, introducing significant constitutional changes that drew critical debate in, “Article 2 of the constitution with a view to giving effect to an agreement between Bangladesh and India in respect of exchange of certain enclaves and fixation of boundary lines between India and Bangladesh”.

4.4 The Fourth Amendment Act

The Fourth Constitutional Amendment Act of 1975 was voted for on January 25, 1975, bringing key changes to the Constitution that significantly concentrated power in the executive and weakened democratic governance and judicial independence like, “The Presidential form of government was introduced in place of the parliamentary system, a one-party system in place of a multi-party system was introduced; The powers of the Jatiya Sangsad (National Assembly) were curtailed; The Judiciary lost much of its independence and the Supreme Court was deprived of its jurisdiction over the protection and enforcement of fundamental rights.”

4.5 The Fifth Amendment Act

This Amendment Act was passed by the Jatiya Sangsad on April 6, 1979. It amended the Fourth Schedule of the Constitution through the insertion of a new paragraph 18. This provision is often criticized for legitimizing unconstitutional actions and damaging democratic accountability. As per this act., “all amendments, additions, modifications, substitutions and omissions made in the constitution during the period between 15 August 1975 and 9 April 1979 (both days inclusive) by any Proclamation or Proclamation Order of the Martial Law Authorities had been validly made and would not be called in question in or before any court or tribunal or authority on any ground whatsoever”.

4.6 The Sixth Amendment Act

The Sixth Amendment Act was enacted by the Jatiya Sangsad to amend Articles 51 and 66 of the Constitution, a move widely criticized for serving immediate political interests rather than strengthening democratic constitutionalism.

4.7 The Seventh Amendment Act

The Seventh Constitutional Amendment Act was enacted on November 11, 1986 which amended, “Article 96 of the constitution; it also amended the Fourth Schedule to the constitution by inserting a new paragraph 19 thereto, providing among others that all proclamations, proclamation orders, Chief Martial Law Administrator's Orders, Martial Law Regulations, Martial Law Orders, Martial Law Instructions, ordinances and other laws made during the period between 24 March 1982 and 11 November 1986 (both days inclusive) had been validly made and would not be called in question in or before any court or tribunal or authority on any ground whatsoever”.

4.8 The Eighth Amendment Act

This Amendment Act was passed on June 7, 1988, introducing changes to Articles 2, 3, 5, 30, and 100 of the Constitution. The amendment was widely debated for its politically sensitive declaration, which raised concerns regarding constitutional inclusiveness and secular democratic principles where, “Islam as the state religion; Decentralized the judiciary by setting up six permanent benches of the High Court Division outside Dhaka; Amended the word 'Bengali' into 'Bangla' and 'Dacca' into 'Dhaka' in Article 5 of the constitution; Amended Article 30 of the constitution by prohibiting acceptance of any title, honours, award or decoration from any foreign state by any citizen of Bangladesh without the prior approval of the president”.

4.9 The Ninth Amendment Act

The Ninth Amendment Act 1989 was passed in July 1989 which stated that, “direct election of the vice-president; it restricted a person in holding the office of the President for two consecutive terms of five years each; it also provided

that a vice-president might be appointed in case of a vacancy, but the appointment must be approved by the Jatiya Sangsad”.

4.10. The Tenth Amendment Act

The Tenth Amendment Act, 1990 (12 June) amended, “Article 65 of the constitution, providing for reservation of thirty seats for the next 10 years in the Jatiya Sangsad exclusively for women members, to be elected by the members of the Sangsad”.

4.11. The Eleventh Amendment Act

The Act, passed on 6 August 1991, this Act amended the Fourth Schedule to legitimize the appointment of Chief Justice Shahabuddin Ahmed as Vice-President and the resignation of President Ershad, a move seen as constitutionally controversial but politically necessary during the transition period. This Act, “ratified, confirmed and validated all powers exercised, all laws and ordinances promulgated, all orders made and acts and things done, and actions and proceedings taken by the vice-president as acting president during the period between 6 December 1990 and the day (9 October 1991) of taking over the office of the president by the new President Abdur Rahman Biswas, duly elected under the amended provisions of the constitution. The Act also confirmed and made possible the return of Vice-president Shahabuddin Ahmed to his previous position of the Chief Justice of Bangladesh”.

4.12. The Twelfth Amendment Act

The Act, passed on 6 August 1991, this Amendment Act marked a significant turning point in Bangladesh’s constitutional history by restoring the parliamentary form of government and redefining the balance of political power. The Act, amended, “Articles 48, 55, 56, 57, 58, 59, 60, 70, 72, 109, 119, 124, 141A and 142”. The other major reforms are, “the President became the constitutional head of the state; The Prime Minister became the executive head; the cabinet headed by the prime minister became responsible to the Jatiya Sangsad; the post of the vice-president was abolished; The President was required to be elected by the members of the Jatiya Sangsad”.

4.13 Thirteenth Amendment Act

The Thirteenth Amendment Act, 1996 was passed on March 26, 1996 by a Parliament widely criticized for lacking democratic legitimacy due to the controversial February 1996 election boycotted by major opposition parties. The Act, provides, “a non-party Caretaker Government which, acting as an interim government, would give all possible aid and assistance to the Election Commission for holding the general election of members of the Jatiya Sangsad peacefully, fairly and impartially. The non-party caretaker government, comprising the Chief Adviser and not more than 10 other advisers, would be collectively responsible to the president and would stand dissolved on the date on which the prime minister entered upon his office after the constitution of the new Sangsad”.

4.14 Fourteenth Amendment Act

The Fourteenth Amendment Act, 2004 was passed on May 16, 2004, introducing amendments to several constitutional provisions. The Act, Provides, “Insertion of new Article 4 A after Article 4 for preservation and display of the portraits of the President and the Prime Minister. Amendment of clause (3) of Article 65 in the Constitution regarding reserved number of seats exclusively for women members in the Parliament; Amendment of Article 96(1), 129 and 139 of the constitution enhancing the retirement age of the Judges of the Supreme Court, Auditor General and Chairman and other members of Public Service Commission; Enhancement of retirement age of the supreme Court Judges; Enhancement of retirement age of the Auditor General and Chairman & Member of P.S.C; Amendment of Article 148 of the Constitution making provision for administering oath of the newly elected members of the Parliament by the Chief Election Commissioner is unprecedented”.

4.15 Fifteenth Amendment Act

This Act, passed on June 30, 2011, based on the High Court/Supreme Court verdicts on 5th, 7th and 13th. The key issues of this amendment follows, “Caretaker system abolished; Elections to be held under incumbent cabinet; Islam as State religion and ‘Bismillah-Ar-Rahman-Ar-Rahim’ retained above the preamble; Removal of ‘Absolute Faith and Trust in Allah’ from the constitution; Revival of Article 12 to restore Secularism and freedom of religion; Maintains the provision allowing religion-based politics; Denies recognizing the indigenous people, will be termed as tribal and ethnic minorities; The people of Bangladesh shall be known as Bengalese as a nation and citizens of Bangladesh shall be known as Bangladeshis; Inserted articles 7A and 7B in the Constitution after Article 7 in a bid to end take-over of power through extra-constitutional means and highest level of punishment would be awarded for those power capturers by extra constitutional means; Basic provisions of the constitution are not amendable; The Chief Justice shall be appointed by the President, and the other judges shall be appointed by the President in consultation with the Chief Justice”.

4.16 Seventeenth Amendment Act

On 8 July 2018, the Parliament unanimously passed the Seventeenth Amendment to the Constitution, extending the tenure of the 50 reserved seats for women in Parliament for an additional 25 years. The amendment bill was adopted by a division vote of 298–0, with the Speaker placing the motion before the House. Law Minister Anisul Huq introduced the bill with the objective of retaining the constitutional provision for women’s reserved representation in Parliament, while Speaker Shirin Sharmin Chaudhury presided over the session. The amendment was considered necessary because,

in the absence of such a provision, the reserved seats would have expired with the next Parliament on 10 April. Prior to its passage, the bill had been referred to the relevant Parliamentary Standing Committee for further examination. Several lawmakers from the opposition “Jatiya Party” and independent members proposed amendments to include additional provisions in the bill; however, these motions were rejected through a voice vote and later by a division vote of 295–0. The dissenting members argued that certain provisions of the amendment were unconstitutional and proposed extending the tenure for only 10 years instead of 25 years (The Daily Star, 2018).

Article 65(3) of the Constitution reserved 50 parliamentary seats for women for ten years following the Fourteenth Amendment in 2004, though the system was criticized for limiting direct electoral participation of women. The Constitution further provides that the Jatiya Sangsad shall comprise 300 members elected directly through general elections, in addition to 50 reserved seats allocated to women on the basis of proportional representation of political parties in the House. Consequently, the incumbent Tenth Parliament consisted of a total of 350 members, including 300 directly elected representatives and 50 women members elected to the reserved seats (The Constitution of Bangladesh, 2016).

5. CONSTITUTIONALLY CHALLENGED SIXTEENTH AMENDMENT AND ITS EFFECT

The impugned 16th Constitutional Amendment of the Constitution of Bangladesh empowered, “the Parliament to remove a judge from his office”. However, the Constitution explicitly provides for an impartial and independent judiciary as one of its cornerstones. Looking at the history of the removal of judges in brief, “Article 96 in the original 1972 constitution relating to the removal of judges was materially affected by the 4th Amendment in 1975 which deleted clause (3) of Article 96. Thereafter by the 15th Amendment provisions for removal of judges by the Supreme judicial council was introduced. The 5th Amendment was held to be unconstitutional by the High court division in *Bangladesh Italian Marble Works Ltd. V. Government of Bangladesh and others*, 62 DLR [Dhaka Law Reports] (HCD) (2010) 70, which was also confirmed by the Hon’ble Appellate Division in *Khondker Delwar Hossain Secretary, BNP and another v. Bangladesh Italian Marble Works and other* reported in 62 DLR (AD) [Appellate Division.] (2010) 298. In that case, the Hon’ble Appellate Division had the occasion to examine different provisions of 5th amendment. With regard to the provisions of Article 96 of the Constitution, the Hon’ble Appellate division made a clear observation favouring to retain the provision for Supreme Judicial Council” (Akkas 2004).

The consequences of the Sixteenth Amendment were argued to undermine the security of tenure of judges, thereby creating the possibility of weakening judicial independence. It has been contended that the amendment exposed the judiciary to undue political influence and external pressure, which, in turn, posed a significant threat to the maintenance of the rule of law in the country. The Appellate Division in the 5th amendment case also observed that; “the Fifth Amendment ratifying and validating the martial law Proclamations, Regulations and orders not only violated the supremacy of the Constitution but also the rule of law and by preventing judicial review of the legislature and administrative action, also violated two other more basic features of the Constitution, namely, Independence of Judiciary and its power of Judicial review. The impugned 16th Constitutional Amendment clearly is in conflict with, Article 7 B and hence the 16th Amendment should be struck down as it would undermine the independence of judiciary”.

In “*Anwar Hossain Chowdhury etc. v. Bangladesh and others*. BLD 1989 (SPI) I”, *Badrul Haider Chowdhury, J* observed that; “An amending law becomes part of the Constitution, but an amending law cannot be valid if it is inconsistent with the Constitution. The Contention of the Attorney general on the non-obstante clause in the article 142 is bereft of any substance because that clause merely confers enabling power for amendment but by interpretative decision cannot be given the status for swallowing up the Constitutional fabric”. [Writ petition no. 9989 of 2014 in the matter of *Advocate Asaduzzaman Siddiqui and others vs Bangladesh and others*.]

It is further pertinent to observe that, subsequent to the enactment of the impugned Sixteenth Constitutional Amendment, “Parliament failed to establish any comprehensive statutory or procedural framework regulating the impeachment process for judges”. The absence of such procedural safeguards generated considerable constitutional uncertainty concerning the mechanisms for investigating allegations against members of the judiciary, the competent authority entrusted with conducting such inquiries, and the extent to which judges accused of misconduct would be guaranteed fundamental principles of natural justice, including the right to legal representation, the opportunity to present a full defence, and adjudication before an independent and impartial body. As a result, the amendment has been scrutinized for potentially establishing institutional weaknesses. It may also expose the judiciary to political control and whimsical interference. In this perspective, it might be contended that the contested Sixteenth Amendment significantly undermined the constitutional principles of judicial independence and separation of powers, which are fundamental to constitutional governance and the rule of law.

6. PUBLIC INTEREST LITIGATION (PIL) AND CONSTITUTIONALISM

Public Interest Litigation (PIL) is an important judicial tool for promoting constitutionalism and defending public rights via litigation. Over the years, it has indeed become an essential judicial tool for promoting constitutionalism and protecting public rights through litigation since it was first recognized in 1996. The institutionalization of PIL was not only influenced by the comparative judicial developments particularly in India but it also represented the indigenous constitutional interpretation of the Bangladeshi court/s on the basis of justice, constitutionalism and most importantly the rule of law (Thiruvengadam 2008).

The judiciary, particularly through the Public Interest Litigation (PIL), has shown a tremendous degree of judicial involvement in diverse socio-economic and constitutional issues. The issues range from the fields of collective rights to environmental justice question. The Court has taken up issues relating to child health, protection of the homeless and weaker sections of the community including slum-dwellers, conservation of public parks and waterways and topics of

public health and sanitation. In numerous issues concerning the question of political rights and constitutional governance, the judiciary has been engaged in trying to protect judicial independence, boost democratic political culture, and foster participatory democracy at the grassroots. Moreover, the Court has employed judicial monitoring to prevent police brutality, fight sexual harassment in workplaces and educational institutions, discourage executive corruption, and protect the rights of socially and economically disadvantaged groups. One of the most important fields of judicial intervention in these areas has been in the cases related to environmental justice. The Court, as historic rulings, has taken a broad and forward-looking approach to interpreting the requirements of environmental protection and sustainable governance. Judicial activism in this area has often been seen as the new remedial tools, such as the issuance of continuing mandamus, orders requiring periodic reporting of progress by government agencies, and the imposition on state agencies of affirmative duties to achieve environmental compliance. In many cases, the judiciary has also pronounced binding guidelines in the absence of adequate legislative or executive action. Also, judicial intervention in the extreme pollution of the rivers surrounding Dhaka is an important example of such intervention. Continuous directives of the court led to a number of governmental measures for the restoration of the environment, control of pollution, and more importantly the protection of ecological resources (*Human Rights and Peace for Bangladesh v. Bangladesh* 14 BLC HCD [Bangladesh Legal Decisions, High Court Divisions] : 759).

Like the environmental PIL cases, the initial creation of PIL jurisprudence in Bangladesh was largely inclined towards the pursuit of social justice. These litigations aimed at advancing collective and socio-economic rights, largely through the enforcement of statutory obligations and constitutional guarantees, especially through the broad interpretation of the constitutional “right to life.” Judicial activism on socio-economic rights in Bangladesh has been comparatively limited and less developed than the more extensive jurisprudence of the Indian Supreme Court. However, notably, the scope and frequency of constitutionally inspired PIL cases have increased substantially in recent years. Such interventions indicate that the court has become more sensitive to the need to uphold the supremacy of the Constitution and to deal with various forms of illegitimate State activity. In this regard, the Court has demonstrated a growing willingness to scrutinize executive and administrative conduct in order to ensure adherence to constitutional principles, transparency, accountability, and the rule of law. A notable illustration of such judicial intervention can be found in the Court’s decision invalidating governmental approval granted to a foreign private company for the construction of a container terminal at Chittagong Port. The Court held that the decision-making process lacked the requisite standards of transparency and accountability in public administration, thereby rendering the governmental action constitutionally defective (*Engineer Mahmud-ul Islam v. Govt. of Bangladesh* 23 BLD HCD 2003: 80).

In some other notable actions, “the Court invalidated a ‘local government law’ that undermined the principle of representative governance; directed the government to establish special courts in the Chittagong Hill Tracts region for the protection of women and children” (BLAST [Bangladesh Legal Aid and Services Trust.] v. Bangladesh 61 DLR HCD 2009), “a provision of mandatory death penalty (BLAST v. Bangladesh 30 BLD HCD 2010: 194)) and required the police on one occasion to submit to it fortnightly reports of the investigation concerning the 2007 terrorist attacks that killed many including two judges” (*Z.I. Khan Panna v. Bangladesh* WP No. 8621 2005).

Notably, judges in Public Interest Litigation (PIL) cases have increasingly assumed an active role in judicial law-making and policy formulation. This development marks a significant change in the orientation of the Court where it seems to have been substantially influenced by the democratic transition that followed the 2007–08 Emergency period. As discussed below, the post-Emergency judiciary in Bangladesh has actively sought to restore public confidence and rehabilitate its institutional legitimacy by embracing a form of “new judicial activism” in both ordinary litigation and PIL adjudication. This judicial assertiveness has, in turn, contributed to the revitalization of previously weak social and legal activism within the country.

A notable example of judicial activism was the Court’s intervention through PIL against governmental failure to address widespread sexual harassment of women. The Court in *BNWLA [Bangladesh National Women’s Lawyer Association.] v. Bangladesh* (14 BLC HCD 2009: 694) found that, “despite constitutional mandates for gender equality and the equal legal protection for all, there was virtually no law to effectively prevent and punish unsocial behaviour known as sexual harassment of women. The Court issued detailed guidelines ‘in the nature of law’, binding the employers and educational institutions to follow them in preventing and suppressing sexual harassment of women until ‘effective legislation’ is made. The formulation of the guidelines looks almost like a legislative statute, and they largely resemble the guidelines against sexual harassment that the Indian Supreme Court issued in *Vishaka v. State of Rajasthan* (1979) (AIR SC 3011 1997).”

The Court sought to legitimize such wide adjudicative involvement by highlighting constitutional principles of Bangladesh, particularly the guarantees of equality and protection of fundamental rights. But the larger normative force and the legitimating justification for these judicial changes came importantly from comparative constitutional jurisprudence and the interpretive influence of international human rights instruments. In this sense, the Court’s approach is reflective of an expanding transnational judicial technique whereby domestic constitutional interpretation is more impacted by foreign legal precedents and following international human rights principles. In *BNWLA* and other important PIL cases we actually saw comparative law being implemented, “in the sense that comparative law worked there really very well. The Court’s reliance on *Vishaka* (ibid) as a whole, though not stated in the ruling, reflects the extent to which Indian PIL developments have affected PIL law in Bangladesh”. This is what Sujit Choudhry has termed “dialogical use of comparative public law, albeit in a peculiarly Bangladeshi way, whereby the Court has sought both to sharpen its reasoning and to draw justificatory force from the neighbouring jurisdiction with like legal culture” (Choudhry 1999).

But the above analysis should not be taken to mean that PIL-based judicial activism in Bangladesh is free from any doctrinal, institutional and practical flaws or limitations. The readiness of the judiciary to intervene in cases of injustice

and abuses of constitutional rights has often been lacking in adequate consistency, clarity and immediate focus. While the Court has demonstrated a significant degree of judicial assertiveness in matters concerning the maintenance of judicial independence, it has been somewhat reluctant to develop a full jurisprudence on public law compensation for serious cases of constitutional violations, including cases of administrative failure and abuse of public authority. In addition, the Court has not yet established a sufficiently collaborative and implementation-oriented model of PIL adjudication that should genuinely engage with public officials and administrative agencies in the remedial process. These limitations tell us that there is an uneven track of judicial activity marked by normative ambition which has not always been matched by doctrinal clarity or effective enforcement tools. There is a gap. Notwithstanding these structural and jurisprudential inadequacies, Public Interest Litigation continues to be a crucial constitutional instrument for proactive and socially conscious judges to advance the larger agendas of justice, people's rights, accountability and constitutional governance in Bangladesh.

7. An Analysis

An analysis of the constitutional developments demonstrates that there are gaps and flaws in the judicial system of Bangladesh which are typically produced by partisan political goals. The Constitution is the guarantor of fundamental rights and liberties. However, there is still a lot of debate between jurists, attorneys, intellectuals and politicians on the legitimacy of declaring constitutional amendments illegal. Many of the amendments that have been rejected in recent years are strongly related to political power and governance. Critics say the judiciary has encroached upon political affairs in an ever-expanding applicability of the basic structure theory. In particular, the Appellate Division's ruling on the 13th Amendment has broad political ramifications. This is an indication of what many academics regard it to be a problematic and inconsistent application of the basic structure doctrine (Haque, 2015: 278).

Scholars say that the ruling in the 7th Amendment case mirrored the political views of the judges sitting at the time and was a clear case of partisan bias. On the other hand, the invalidation of the 16th Amendment was seen as an important step in the preservation of judicial independence. The amendment intended to place judges of the higher courts under political control through methods of removal. By striking down the amendment, the Supreme Court attempted to protect the independence and public credibility of the court. Various amendments to the Constitution have been held illegal on the ground that they are inconsistent with the spirit of the preamble of the Constitution and violate the basic principles of state policy contained in Part II. Critics say that such alterations undermine the constitutional foundations and distort the democratic and normative vision of the state.

The analysis also shows that the Constitution places the Supreme Court as the ultimate custodian of constitutionalism. It has the power to declare laws, executive actions, judicial decisions and even constitutional amendments void if they contravene constitutional constraints. The main reason that various amendments were declared ultra vires or unconstitutional, was because of their contradiction with constitutional supremacy, the limited capacity of Parliament to alter and the deterioration of the essential framework of the Constitution. The changes that were implemented during martial law regimes damaged the democratic government and harmed the independence of the judiciary. But critics say the frequent invalidation of amendments also shows the increasing judicialization of politics, as often, constitutional adjudication overlaps more and more with partisan political fights and judicial activism.

8. CONCLUSION

The Constitution is not merely a legal instrument for the establishment of state institutions. It is the basic structure and contour that determines the limitations, legitimacy and responsibility of state power. In that sense, it is central to the life of the citizens. The Constitution is the source of authority for every institution of state. Constitutional supremacy is therefore vital for democratic administration and the protection of the rights of the citizens. Within this framework, the judiciary acquires a special role as the protector of constitutionalism and the rule of law. Moreover, the judiciary is also responsible for controlling arbitrary abuses of authority, defending fundamental rights and making it sure that the acts of the executive and legislative are in line with the constitutional principles. Its efficiency, however, rests on three pillars of judicial independence, public confidence and institutional integrity. A politicized or weak court can erode accountability and create openings for authoritarianism, whereas in some cases we have witnessed that an independent judiciary enhances democracy by dispensing justice, curbing the misuse of power, and protecting citizens from oppression and injustices.

Despite having significant legal Constitutional provisions, Judiciary in Bangladesh is still subjected to political interference today. As a general principle, judicial independence is one of the crucial conditions for the health of democracy in any country. But the institutional structures are not favorable to that. There have been constitutional provisions and revisions which are restrictive and sometimes hamper judicial independence as well as judicial performance in Bangladesh. The qualifications prescribed for appointment of judges are vague and incentivise politically motivated judicial appointments. This too needs immediate attention and redressal.

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