

Sixteenth Amendment of the Constitution of Bangladesh: A Governance Perspective

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Abstract: *Historically, it is perceived that the constitutional amendments of Bangladesh have been guided by a single principle - the political interest of the ruling party. Thus, every constitutional amendment has specific perspectives to address the needs of the State machinery as well as unique characteristics to influence the governance process. The latest amendment of the constitution of Bangladesh, the Sixteen Amendment, brought a fundamental change in the constitution of Bangladesh by initiating a move towards establishing prime supremacy of the parliament over judiciary. Recently, the Supreme Court of the country has declared the amendment unconstitutional and illegal. Here, in this article an attempt has been made to explore the distinct features of the Sixteenth Amendment of the Bangladesh Constitution and its impact on governance.*

Keywords: Constitutional Amendment, Governance, Independence of Judiciary, Impeachment

1. Introduction

In a general sense it is expected that a constitutional amendment is initiated to bring some positive changes in the governance process of a country. But unfortunately in the context of Bangladesh after the enactment of any constitutional amendment the major opposition parties as well as the civil society of the country tend to dissect the amendment to define to what extent it is politically biased or ill motivated. The politics of mistrust influences the general people to think that the constitutional changes are brought to legitimize the future political activities of the ruling party- the age old political tradition shapes the mindset of the people to think in that particular way.

The latest amendment of the constitution of Bangladesh, the Sixteen Amendment, brings a fundamental change in the constitution of Bangladesh by initiating a move towards establishing prime supremacy of the parliament over judiciary. Recently, the Supreme Court of the country has declared the amendment unconstitutional and illegal. 'Why the change is being made?' - has become a talk of the time.

2. Basic changes introduced by the sixteenth amendment

The Sixteenth Amendment of the constitution empowered the parliament to impeach the Supreme Court judges for misconduct and incapacity which had been previously looked after by the Supreme Judicial Council (SJC) - a three member committee of the Appellate Division judges comprising the Chief Justice and two other senior most judges next to him. Basically, the amendment is the restoration of the Article 96 of the constitution of 1972. As per this amendment minimum two-thirds of total parliament members would be able to impeach any judge for his or her misconduct or incapacity. But, the impeachment could not be executed without the order of the President. The sixteenth Amendment would also make it possible for the parliament to remove the top positions of the Election Commission (EC) and the Public Service Commission (PSC) because as per the Article 118 and Article 139 of the constitution no election commissioner and official of PSC can be removed by any other procedure except those applicable to the Supreme Court judges. (Bangladesh Const. Amend. XVI)

Table 1: Sixteenth Amendment at a Glance

Sixteenth Amendment of the Bangladesh Constitution	The draft of the Constitution (16th amendment) Bill, 2014 passed on August 18, 2014
	The Constitution (16th amendment) Act, 2014 passed on September 17, 2014 (Votes 327-0)
	Nine Supreme Court lawyers filed a writ petition on November 5, 2014 stating that the provision might curb the Independence of Judiciary
	The Supreme Court declared the amendment illegal on May 5, 2016
	The State filled an appeal against the verdict on January 4, 2017
	The Supreme Court dismissed the government appeal on July 3, 2017

3. Amended Section 96 of the Constitution: Changes Over Time

Under the section 96 of the original constitution of 1972, parliament had the authority to impeach Supreme Court

judges for misconduct and physical or mental incapacity. Changes in the form of government from parliamentary to presidential and successive martial law regimes tried to influence the judiciary by bringing changes in the section 96 of the constitution. (Islam, 2014)

The constitution of 1972 was formulated to uphold the spirit and ideals of the War of Liberation and to promote the true essence of democracy. The parliament was vested with the authority of determining the tenure of the judges of the Supreme Court and their removal through section 96 of the constitution. The fourth amendment of 1975 abolished the parliamentary supremacy in dealing with the SC judges. There was a vacuum between 1972 and 1975 as no law had been promulgated to properly address the issue. But, in 1978 after the assassination of Bangabandhu Sheikh Mujibur Rahman, in absence of parliament, through the Fifth Amendment the authority was transferred to the Supreme Judicial Council by a martial law proclamation initiated by military ruler Ziaur Rahman. When in 2007 the higher judiciary was separated from the executive organ by the then interim government, the Fifth Amendment was subsequently held unconstitutional by the Supreme Court but the Supreme Judicial Council survived. (Islam, 2014)

4. Context of the Sixteenth Amendment

In 2011 during the ninth parliament (ruling by the last grand alliance) the issue of empowerment of parliament to impeach Supreme Court judges was first brought to light. In the following year a number of parliament members had raised their voice for the removal of a High Court judge centering a ruling of the then parliament Speaker Advocate Abdul Hamid and had demanded to restore the power of parliament to impeach the Supreme Court judges. Even the especial committee for Fifteenth Amendment had made recommendation for restoring the section 96 of the constitution of 1972 which ensures the judicial impeachment power of parliament, but for an unknown reason it was not included in the fifteenth amendment. (The Daily Janakantha, September 8, 2014)

A thought in this regard 'the preparatory work on 16th amendment started after a landmark verdict by the appellate division of Bangladesh Supreme Court made it mandatory for Bangladesh constitution to be guided by the dreams of the founder of the state Bangabandhu Sheikh Mujibur Rahman.' (The Daily Star, July 02, 2014). Therefore, the party in power is claiming that it is a peregrination towards 72's constitution to sense the emotion of the Bangladesh Liberation War of 1971, on the other hand the Supreme Court of the country is claiming that the amendment is ill-motivated and initiated to hinder the independence of the judiciary.

5. Arguments in Favor of the Sixteenth Amendment

While answering the questions 'Why a change is being made to make Supreme Court judges accountable to the parliament?' the political leaders of the ruling party tried to defend their position by placing some arguments in favor of the Sixteenth Amendment. The arguments are briefly given below:

- Many democratic countries including India, UK, US, Australia, Canada, Sri Lanka, South Africa, Germany, New Zealand and other countries, the parliament has the

powers of impeachment in accordance to their respective constitutions. (The Daily ProthomAlo, August 8, 2014)

- The martial law proclamation was totally contradictory to the article 7 of the constitution (the people are the owners of all power). Most importantly when the system of supreme judicial council was introduced public opinion was not taken in consideration. (The Daily Janakantha, September 8, 2014)
- The amendment is consistent with article 54, 57(2) and 74 (ga) and with the main provision of article 96 of the constitution of 1972. The President of Bangladesh could be impeached through two thirds majority of the parliament as per article 54 of the constitution, while the Speaker of the parliament could be impeached with simple majority of parliament members according to article 74 (ga) and according to 57 (2) article "no-confidence" motion could be adopted against the Prime Minister with simple majority of the MPs. (BSS, August 18, 2015)
- The amendment is brought to start a journey towards 72's constitution to uphold the major aspiration of democracy. (The Daily Janakantha, August 18, 2014)
- The amendment will make the Supreme Court judges accountable to the parliament which represents people. (The Daily Star, August 18, 2014)
- 'A good outcome of the proposed amendment to the Constitution is that the process of impeachment would gain transparency. In the past, allegations against judges may have been investigated by the SJC, but the public has not been able to know what the recommendations of the council were.' (Rizwanul Islam, Impeachment of Judges: A suggestion, The Daily Star, August 27, 2014)

6. Arguments against the Sixteenth Amendment

The Sixteenth Amendment has been criticized under various grounds. The most common criticism of the amendment is 'hurriedly passed, rejecting the proposal to take public opinion and not given parliamentary standing committee adequate time for scrutiny.' (The Daily ProthomAlo, Editorial, September 19, 2014) Four leading jurists of the country- Dr Kamal Hossain, Amir-Ul-Islam, Mahmudul Islam and Rakanuddin Mahmud criticized the amendment on various grounds. They referred the book of HM Seervai's 'The position of the Judiciary under the Constitution of India', "The former Attorney-General of India, H.M. Seervai, a leading constitutional law expert, has raised questions as regards the efficacy of the impeachment process. Thus, he writes, 'Since it is left to the members of the legislative body to decide whether a judge should be removed, political, party, and provincial considerations may enter into the legislator's verdict', and further that: 'In England no judge has been removed since 1830 and the procedure for the removal of a judge poses no problems but 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.'" (The Daily Star, September 08, 2014)

The Executive Director of Transparency International Bangladesh (TIB) Dr Iftekharuzzaman said, 'The judicial process may be vulnerable to partisan influence leading to politically-induced culture of impunity on one hand and miscarried justice on the other' and expressed his fear about undermining the judicial independence, integrity and objectivity and the prospect of the rule of law and justice may be exposed to newer challenges. (The Daily Observer, September 13, 2014)

Professor M Rafiqul Islam in his article 'Parliamentary impeachment of senior judges amid powerful executive: A paradox?' published in the Daily Star on 26 August 2014 highlighted the major arguments why the amendment will not bring any positive change under the current parliament. He gave emphasis on the point that there is no provision for floor crossing (Article 70) in Parliament which centralized all the power in the hands of the party leaders including judicial impeachment. He emphasized on the unaccountability of the ministerial executive to parliament and their use of new parliamentary acts to defend many indefensible ministerial conducts for example- the amendment of the Anti Corruption Commission (ACC) Act 2004 which curtails ACC power to sue public officials including ministers and the National Broadcast Policy 2014 which limits press freedom. (Islam, 2014)

The High Court verdict described the political culture of Bangladesh 'peculiar' and said, 'If the judiciary is not independent in public perception, it cannot be sustained at all.' (Dhaka Tribune, July 2, 2017). It also termed the Sixteenth Amendment as against 'the principle of *Separation of Power*' and 'independence of the Judiciary' (banglanews24.com, August 1, 2017).

7. Impact of the sixteenth amendment on governance: negative or positive?

A brief discussion about the debates, specifically the political debates associated with the Sixteenth Amendment of the constitution of Bangladesh has been presented in the previous sections. This section shed light on how the change brought by the Sixteenth Amendment is related to governance and how the change might affect the future governance process as well as how the alternation could transform the characteristics of the indicators of good governance.

Firstly, it is important to define - '*What is Governance?*' The most popular definition of governance is - 'the manner in which power is exercised in the management of a country's economic and social resources for development' (World Bank, 1992). The subject matter of the Sixteenth Amendment (judicial impeachment) which it is not directly linked with this definition but, it has indirect implications on various indicators of governance. Let's give a look to the relatedness among judicial impeachment and indicators of governance- placing interest-driven criticism and skepticism aside-

a) Elements of Good Governance and Judicial Impeachment

Accountability-In general sense the parliament as well as the Supreme Court judges should be accountable to the public. They should be answerable to the people for their actions. Parliamentary authority to impeach the Supreme Court judges would make the judges accountable to the representative of the people. If the representatives of the people of legislature are responsive to the people in a real sense, the Sixteenth Amendment has the potential to bring qualitative changes in the governance process and might function as an accountability mechanism.

Transparency-Transparency in governance system means information should be made available to the general public and there should be lucidity in rules and regulations. This provision of Judicial Impeachment would facilitate the process of transparency by providing information to the mass people-how the process of impeachment is actually taking place. When the Supreme Judicial Council impeaches a judge there is no provision to make the process public. Thus, the Sixteenth Amendment has the potential to disclose the issues related to the removal of Supreme Court judges for public scrutiny.

Rule of law- Rule of law in governance system means- 'Legal frameworks should be fair and enforced impartially, particularly the laws on human rights' (UNDP, 1997). The Supreme Court judges are the safeguards for the rule of law. Parliamentary power to impeach judges might force the judges to enforce laws impartially. In this way the amendment could play a vital role in good governance by establishing rule of law.

Participation-Direct participation of citizens in the State decision making process is not possible in representative democracy, but if the parliament is truly representative in nature and if a mechanism could be developed to properly address the public demand regarding an impeachment of a judge -the amendment could ensure improved participation of people in the State decision making process.

On the other hand, if the legislatures are not elected in a fair way through public mandate and if they are guided by political self-interest, they would not be accountable to the people and they would try to intimidate the Supreme Court judges for their political gain. It would be resulted in lack of popular participation, lack of transparency and the rule of law would be affected adversely.

b) Sixteenth Amendment & Governance: An Analysis

The impact of sixteenth amendment on governance might be positive or negative. If we tend to examine the impact of the Sixteenth Amendment on governance we have to consider different conditional situations behind a parliamentary impeachment of a Supreme Court judge. If we consider an ideal situation - in democratic process 'the will of people is the ultimate source of power'. People are expected to participate in electoral process to choose their own representatives of the parliament. When a parliament is elected through a free and fair election, consequently the decisions of the legitimate parliament would reflect the voice

of the mass people. If the situation demands they might tend to impeach a judge on valid grounds bearing in mind that they are accountable to the people. As we discussed earlier the overall situation would positively facilitate the indicators of good governance. Again the improved governance

situation will reinforce another free and fair election and the good governance cycle would go on and on. Under this circumstances the amendment could positively impact the governance process.

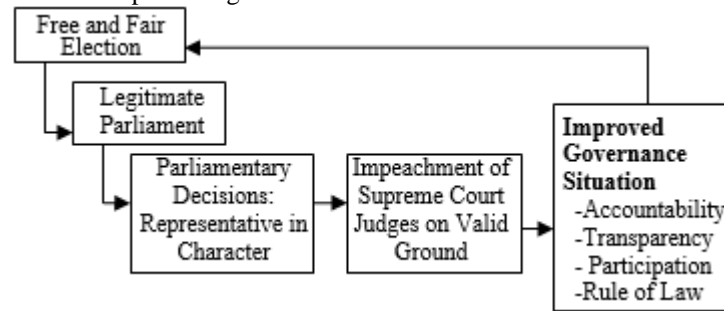


Figure 1: A valid Process of Judicial Impeachment and its impact on Governance

Source: Author

On the other hand in a deviated situation, like if the parliament is not citizen oriented the provision of the Sixteenth Amendment could backfire. For example, the parliament members might act in a biased way to save their own interests and consequently, the independence of the

Judiciary would be at high risk. The figure below highlights what could be the tentative impact of the Sixteenth Amendment on governance.

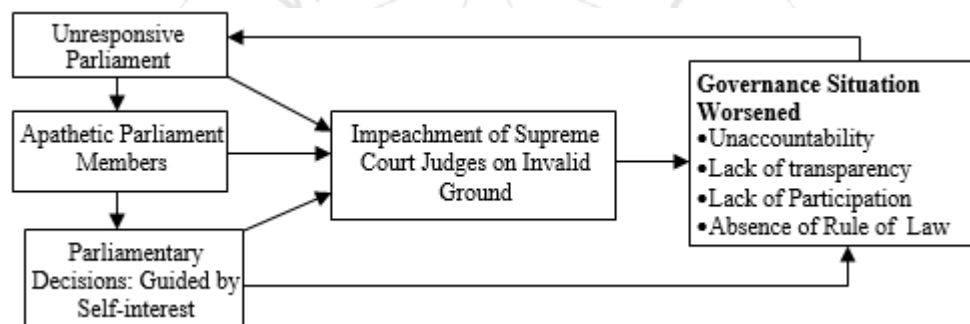


Figure 2: An invalid Process of Judicial Impeachment and its impact on Governance.

Source: Author

Here we can see if the parliament is not responsive to the need of citizens the parliamentary decisions would be guided by self-interest and the parliament would try to intimidate the Supreme Court judges to deliver verdicts in its favor. The overall process worsen the governance situation, resulting in unaccountability, lack of transparency, lack of participation and absence of rule of law and the cycle of mal-governance would go on and on.

8. Conclusion

Here, the analysis is being made based on some hypothetical situations - if the Article 96 of the constitution of 1972 had never been changed, we might think in a different way. The decision of the Appellate Division of the Supreme Court implies that, actually, we fear changes. The culture of resistance to change has become an indispensable part of our national life that we cannot consider the bright parts of a change. Thus, judicial accountability is important for ensuring good governance. But the question is to whom the judges would be accountable- *Is the parliament accountable to the people?*

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