IN THE SUPREME COURT OF BANGLADESH

APPELLATE DIVISION

PRESENT:

Mr. Justice Surendra Kumar Sinha, Chief Justice

Mr. Justice Md. Abdul Wahhab Miah

Mrs. Justice Nazmun Ara Sultana

Mr. Justice Syed Mahmud Hossain

Mr. Justice Muhammad Imman Ali

Mr. Justice Hasan Foez Siddique

Mr. Justice Mirza Hussain Haider

CIVIL APPEAL NO.06 OF 2017.

(From the judgment and order dated 05.05.2016 passed by the High Court Division in Writ Petition No.9989 of 2014.)

Government of Bangladesh and others: Appellants.

=Versus=

Advocate Asaduzzaman Siddiqui and others: Respondents.

For the Appellants: Mr. Mahbubey Alam, Attorney General, with Mr. Murad Reza, Additional Attorney General, Mr. Momtaz Uddin Fakir, Additional Attorney General, Mr. Biswajit Debnath, Deputy Attorney General, Mr. Motaher Hossain Sazu, Deputy Attorney General, Mr. Md. Ekramul Hoque, Deputy Attorney General, Mr. Kh. Diliruzzaman, Deputy Attorney General, Mr. Masud Hasan Chowdhury, Deputy Attorney General, Mr. Amit Talukdar, Deputy Attorney General, Mr. Sheikh Saifuzzaman, Assistant Attorney General, Mr. Bashir Ahmed, Assistant Attorney General, Ms. Mahfuza Begum, Assistant Attorney General, instructed by Mr. Haridas Paul, Advocate-on-Record. Mr. Abdul Matin Khasru – Intervenor.

For the Respondents: Mr. Manzill Murshid, Advocate, instructed by Mr. M. Ashrafuzzaman Khan, Advocate-on-Record.

As Amici: Mr. T.H. Khan, Senior Advocate, Dr. Kamal Hossain, Senior Advocate, Mr. Abdul Wadud Bhuiyan, Senior Advocate, Mr. M. Amirul Islam, Senior Advocate, Mr.Rokanuddin Mahmud, Senior Advocate, Mr. Ajmalul Hossain, Senior Advocate, Mr. A. J. Mohammad Ali, Senior Advocate, Mr. A.F. Hassan Ariff,

Senior Advocate, Mr. M.I.Farooqui,
Senior Advocate, Mr. Fida M. Kamal,
Senior Advocate.

Date of hearing: 8th, 9th, 21st, 22nd, 23rd, 24th, 25th, 28th, 29th, 30th May, 2017 and 1st June, 2017.

Date of Judgment: 3rd July, 2017.

J U D G M E N T

Surendra Kumar Sinha, CJ: "We have upon us the whole armour of the Constitution and walk henceforth in its enlightened ways, wearing the breast plate of its protecting provisions and flashing the flaming sword of its inspiration."

The eloquent words quoted above were expressed by Justice Vivian Bose in a speech in 1954. He was one of the Justices, who for the first time took oath and assumed office in the Supreme Court of India on 26th January, 1950. The 'flaming sword' that Justice Bose contemplated is in article 142 of Indian constitution for "Enforcement of decrees, order of Supreme Court and orders as to discovery etc." corresponding to article 104 of our constitution which reads as under:

"The Appellate Division shall have power to issue such directions, orders, decrees or

> writs as may be necessary for doing complete justice in any cause or matter pending before it, including orders for the purpose of securing the attendance of any person or the discovery or production of any document."

It empowers this court in exercise of its jurisdiction to pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it. No other court has this power. It has conferred the power deliberately on this highest court of the country to stress that obviously the fountain of justice under the constitution is the apex court and on some rare occasions when any enacted law diverts the true course of justice, power is vested in this court and this court alone, to make such orders as are necessary in the interest of justice. This is what the Founders of our constitution intended. This is the trust reposed by the Founding Fathers upon the highest court of the nation.

Similar views have been expressed by a sitting Justice of the Supreme Court of the United States, Justice Stephen Breyer, in his book, 'The court and the world' as under:

'The Founders of our nation believed the constitution would work better if an independent group of Judges – not the President and the Congress – could decide whether the President's action and the laws enacted by Congress would be consistent with the constitution.' Similar consideration worked in the minds of Founders of the USA in reposing trust upon the highest court that the people expect Judges to decide matters independently. So, all the time in dispensation of justice, the Judges keep in mind the reason behind reservation of this power upon the highest court only. It is only to be exercised by the Judges of this highest court because they, above all others, were to be trusted; they could not be expected to do wrong. This is/was the faith that the constitution had on the Judges of the highest court of the country with any other group of Judges, administrators, or bureaucrats. The independence of

judiciary and the 'flaming sword' that Justice Bose contemplated, the fount of justice can be administered freely without any pressure from any corner. Before I deal with the issue, it is necessary to consider at this juncture different aspects of the constitutional law.

The constitution will live only if it is alive in the hearts and minds of the people of a country. A written constitution, should be viewed as a 'living tree' though rooted in such factors, is also one whose branches should be allowed to grow over time through a developing common law jurisprudence of that same community's constitutional morality. This is what observed by W.J. Waluchow, Queen's University, Kingston, Ontario in a book called "A Common Law Theory of Judicial Review". The author covered a broad range of disciplines-law, philosophy, political theory, constitutional theory and special interest- in his dissertation about the role of unelected Judges in a democracy- particularly the role of Supreme Court in shaping constitutional policy. The author sought to resolve the impasse over the

question of judicial review of written constitution. He described two groups—one group which upheld, and the other, which criticized the Canadian Charter of Rights—he called them the 'boosters' and the 'bashers'. For the 'boosters', the rigidity of the constitution was what made it valuable; for 'bashers', this was one of the chief ills of a written constitution. The author makes a convincing case of how this enables an approach to constitutionalism that is both authoritative and flexible. He says that the protection of rights must be left to the traditional institutional mechanism, which is necessarily the unelected judiciary.

According to Gwyer, C.J., a broad and liberal spirit should inspire those whose duty is to interpret the constitution; but this does not imply that they are free to stretch or pervert the language of the enactment in the interests of any legal or constitutional theory, or even for the purposes of supplying omissions or of correcting supposed errors. A Federal Court will not strengthen, but only derogate from, its position; if it seeks to do

anything but declare the law; but it may rightly reflect that a constitution of government is a living and organic thing, which of all instruments have the greatest claim to be construed *ut res magis valent quam pareat* i.e. it stands for trying to construe a law in a way to make sense, rather than to void it. The law should be given effect rather than be destroyed (1939) FCR 18,36(39).

The moot question that raised in this appeal that requires a clear answer from this court is whether the Constitution (Sixteenth Amendment) Act, 2014 has violated the basic structure of the constitution. It is indeed the crux of this appeal. Apparently, this question may look very harmless and straightforward, but in fact it is not that simple issue to answer. Rather the answer to this question involves some immensely complex and unfathomably deep issues and events which have taken place in our political history during the last seven decades (1947 - 2016) in general and during the last four and half decade in particular (1971– 2016). If it has been a simple challenge of a constitutional amendment, it

would have been much easier to answer and give a verdict; but since this question has a long and chequered history, the answer should not be a short verdict containing only the core opinion of this Court.

The questions that have been raised in this appeal were surfacing on many occasions in our country but due to uncertainty and instability in our national life, no definitive answers have been given yet. The question which involves one of the fundamental debates common to any democratic polity is: if the removal mechanism of the Judges of the Supreme Court is given upon the Parliament, whether, the independence of the Judiciary will be affected and/or hampered. The first ever modern democracy in the history, the U.S. also went through this similar debate and it took hundreds of years to refine a sound politico-judicial culture which gives stability in exercise of state power. Even after 220 years of the foundation of their Republic, the debate is not over yet. But for the U.S., this unfinished debate does not mean incompleteness or chaos, rather every

time they are creatively exploring different options for more coherent, sound and harmonious ways to devise, define and redefine their democratic institutions so that their society becomes more stable and capable of delivering the pledges inscribed in their constitution. This is a creative evolution of a political community which goes ahead with the life of that community with a healthy checks and balances mechanism called trial and error. But history also has some paradoxes. Not all political communities capable of withstanding the unpredictable wave of this creative trial and error in their political life. All cannot withstand this test of time because it is not only strong economy, not only skyscrapers, not only large and long over bridges and bridges that guarantee a country for its stability and flourishment rather, most importantly it requires a "collective political wisdom".

Most unfortunate country in this world is that which possesses all as have been mentioned earlier but does not possess "collective political wisdom". What it means by 'economic prosperity' for a nation

is a relative notion which changes from century to century but what does not ever change is the notion of wisdom on which the invisible structure of the nation is built on. I will come to this point of "collective political wisdom" in later part of this judgment.

Unfortunately, in history often time comes when even the most senior, most veteran and most respected people of the society need reminding of some very basic and obvious facts which form the very ground or foundation of their existence. With all of my humility, may I give a kind reminder to many of my fellow citizens, especially who are in very high and responsible position of the Republic, about a very simple fact that: Bangladesh has a 'written' constitution. I have put special emphasis on the word 'written' intentionally. This word signifies a quantum leap in the evolution of the socio-political history of the humankind. Before advent of the age of written constitution, the political life of the human community was folk, rustic and truly medieval. The most crucial difference between a medieval kingdom

and a modern Republic is that in the former the king is the lawmaker and lawgiver - the king is the Judge - the king also is in the charge of the execution.

As opposed to that the politicians and political philosophers have constantly thought about establishing a system where the unfettered, despotic and totalitarian power of the King can be put under a "balanced restriction" so that he cannot transgress the limit. This is how the idea of modern constitution has emerged. Modern constitution is essentially a written constitution. A medieval king does not need nor does he care for a constitution, far less a 'written' constitution. Therefore, if we give a composite reading of the evolution of the political history of the mankind for last two thousand years, we will see a gradual but constant development in the field of political science. This development, amongst others, was about finding and devising instruments and ways to make the State more stable and flourishing.

And lastly people have devised the idea of having a written constitution. We should ask

ourselves a very plain question— why our Forefathers departed from the stage of not having a constitution to having a 'written' constitution? The irresistible and obvious answer to this question is our Forefathers wanted to establish a State where exercise of all powers and authority are clearly stated in a sacred inviolable document and whoever exercises whatever powers in the State must not exceed his limit as it is already defined in the constitution. This is what I call a "balanced restriction". Having a 'written' constitution is nothing but having a power to exercise, but that power is essentially restricted in the sense that it is not unfettered or unlimited, and it is balanced in the sense that while exercising that power, all State organs shall not work in isolation rather they will combine their efforts together so that maximum benefits to the people are ensured.

Exercising power under a written constitution is as if working with a jigsaw puzzle. This is a tiling puzzle that requires the assembly of often oddly shaped interlocking and tessellated pieces. Each

piece usually has a small part of a picture on it; when complete, a jigsaw puzzle produces a complete picture. The modern State machinery is undoubtedly complex, the separation of power is not absolute, therefore, it often overlaps creating a puzzling situation but through the design of the constitution, this also puts things in an orderly manner so that nothing remains separated or disintegrated forever.

Our country's name is "People's Republic of Bangladesh" and this Republic has a 'written' constitution. The foregoing paragraphs will help us to understand and appreciate the facts, factors and rationales that have been relied upon for reaching this verdict.

It is the common contention of Mr. Mahbubey Alam, learned Attorney General and Mr. Murad Reza, learned Additional Attorney General that the procedure for removal of the Judges is absolutely a policy decision which is the domain of the Parliament. The verdict by the High Court Division declaring Sixteenth Amendment *ultra vires* the constitution is in violation of the principles of the

separation of powers and, is therefore, illegitimate. Both of them stress upon the point that an unelected Judge is appointed by the Executive. He does not represent the people, rather he performs his judicial functions, and nothing more. They added that this unelected Judge took the role of a legislature in deciding the policy decision illegally invoking the power under article 102.

All judicial review— all manner of adjudication by courts— is itself an exercise in judicial accountability—accountability to the people who are affected by a Judge's rulings. The accountability gets evidenced in critical comments on judicial decisions when a Judge behaves as he should be as a moral custodian of the constitution. Judges perform their functions — enhance the sprit of constitutionalism. They should realize the solemnity and importance of the functions reposed upon them by the constitution. "The ideal judge of today, if he is to be a constitutional mentor, must move around, in and outside court, with the constitution in his pocket, like the priest who is never without the

Bible (or the Bhagavad Gita). Because, the more you read the provisions of our constitution, the more you get to know of how to apply its provisions to present-day problems." (Before Memory Fades-Fali S. Nariman).

In 1776, America's Founders gathered in Philadelphia to draft the Declaration of Independence, which dissolved the political ties that had bound the American people to Great Britain. A new nation was thus born, free and independent, the United States of America. Eleven years later, in 1887, after American Patriots had won the independence on the battlefield, many of them who had met earlier in Philadelphia, plus others, met there again to draft a plan for governing the new nation, the constitution of the United States. In 1789, after the plan had been ratified, the new government was established. Together, the Declaration and the Constitution are America's founding documents. In the Declaration the Founders outlined their moral vision and the government it implied. Addressing 'a candid world' the Founders' immediate aim in the Declaration

was to justify their decision to declare independence. Toward that end, they set forth a theory of legitimate government, then demonstrated how far British rule had strayed from that ideal. The Declaration's seminal passage opens with perhaps the most important line in the document. "We hold these Truths to be self-evident." Grounded on that reason, 'self-evident' truths invoke the long tradition of natural law, which holds that there is a higher law, of right and wrong from which to derive human law and against which criticize that law at any time. (The Declaration of Independence and the Constitution of the United States of America).

Once a very relevant and interesting debate arose as to whether America is a fully sovereign nation, or merely a confederation of sovereign States allied for the purposes of common defense and foreign policy, did not begin with the Civil War, or, for that matter, with the quixotic challenge to American unity mounted by paleo-libertarians and neo-Confederates in more recent years, but goes back to the earliest years under the constitution. As Henry

Adams writes in his massive History of the United States of America during the Administrations of Thomas Jefferson, in the period preceding the election of Jefferson in 1800, Americans, particularly in the South and New England, were convulsed over the question "whether the nature of the United States was single or multiple, whether they were a nation or a league."

Seeing the issue stated as baldly as that, and realizing that even back then people were asserting that the United States was nothing more than a "league," instantly would bring the reader to the opening words of the constitution: "We the People of the United States …" "We the People" clearly signifies that the United States are one people, i.e., one nation. If the Founding generation had thought of themselves as an alliance of separate nations they would probably have described themselves as "We the People of the United States." But they did not do that.

The same can be said for another key phrase in the Constitution:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; …

"Supreme Law of the Land" conveys the idea that this is one land, one country, not a league of separate countries.

Jefferson said, 'We the people' wrote the constitution, and only 'we the people' – that is, the legislature – had the right to interpret it. (Cited in Beveridge, Life of John Marshall, 3: 605–606). Kentucky Republican John Breckenridge, expanding Jefferson's argument to the Senate commended that constitution had 'intended a separation of the power vested in the three great departments, giving to each exclusive authority on the subjects committed to each'. The Legislature had the exclusive right to interpret the constitution as regards the law-making process and the Judges were bound to execute the laws they made. Let gentlemen consider well before they insist on a power in the judiciary which places the

Legislature at their feet. (Annals, 7th Congress, 1st Session, 179-180).

American Congress repealed the Judiciary Act, 1801 and replaced it by a new Judiciary Act, 1802, which effectively dismantled the Federal Judiciary and closed the Supreme Court for two years. The new law reset the number of circuit courts at six, eliminated more than a dozen judgeships, restored the number of Supreme Court Justices to six, and forced the justices to resume 'riding the circuit' to distant district courts. The Act eliminated the summer session of the Supreme Court. It would meet only two weeks, once a year instead of twice a year. By scattering the justices around the country the rest of the year, the new law would prevent Chief Justice Marshall from organising his colleagues into a powerful, co-hesive third branch of government. (John Marshall, P.196-7)

Jefferson, the President of America charged the Marbury verdict (Marbury V. Madison, 5 US (1 Cranch) 137 (1803) by saying that this is a decision by an unelected body like Supreme Court contained 'the germ

of dissolution of our federal government'. He called the court 'irresponsible... advancing its noise-less step like a thief over the field of jurisdiction, until all such be usurped from the states' after the judgment in Marbury. (Thomas Jefferson to Charles Hammond, August 18, 1821, Kaminski, Quotable Jefferson, 260-261). Thus, America's Second President Jefferson questioned the finality of the court's decision.

When Marshall returned to Washington, eleven of the Judges ousted by the Judiciary Act, 1802 asked congress for reinstatement and payment of past salaries. Their dismissals, they claimed, had violated their constitutional rights as Federal Judges to 'hold their offices during good behaviour and ... receive...compensation.' At Jefferson's direction the Republican majority in congress rejected the demand, declaring congress, not courts, sole Judge of what was and was not constitutional. 'Let them do. If the Supreme Court shall arrogate this power (claim of the Judges) to themselves and declare our law to be unconstitutional, it will then

behoove us to act. Our duty is clear'. (Annals of Congress, II: 434-436). Two weeks later after hearing William Marbury's Commission as a justice of the peace, John Marshall pronounced the most important decision in Supreme Court's history.

Marshall effectively amended the constitution by assuming the power of judicial review for the Supreme Court, allowing it to void an Act of Congress it deemed unconstitutional. Nowhere in the American constitution had the Framers written 'that a law repugnant to the constitution is void' or given Supreme Court the power to void a law. In Marbury, the Supreme Court declared both the President and Secretary of State guilty of violating the constitution, and, for the first time, it voided part of an Act of Congress (John Marshall – P-210).

President Jefferson claimed in Marbury 'Nothing in the constitution has given them the right.... to decide what laws are constitutional and what not.' Such powers 'would make judiciary a despotic branch.' (Thomas Jefferson to Abigail Adams, September 11, 1804, 12:162).

In 1803, Chief Justice Marshall speaking for the constitution of the United States said, "It is emphatically the province and duty of the Judicial Department to say what the law is. Those who apply the rule to particular cases must, of necessity, expound and interpret that rule. If two laws conflict with each other, the Courts must decide on the operation of each." After Marbury, the Supreme Court established it as supreme arbiter of the constitution and American laws and the Federal judiciary as the third co-equal branch of the Federal Government alongside the Executive and Legislative branches.

Before the independence of India and Pakistan, there were three Round Table Conferences in England for the solution of Indian Independence problem. The conferences were followed by a White Paper which contained the proposals of the British government for an Indian constitution. After these proposals had been considered by a Joint Select Committee, a Bill based on the Joint Committee's recommendations was introduced in the British Parliament in December, 1934, and after prolonged debate, it became the

Government of India Act, 1935, which came into force on 1st April, 1937 as a legal framework for a constitution of India. For the first time the Act introduced a Federal form of government and it conferred full provincial autonomy on the Provinces subject to certain 'safeguards'. As a corollary to a federal constitution, the Act established a Federal Court in India. Under the Act, provincial elections were held in 1937.

On 14th August, Pakistan and on 15th August, 1947 India got independence. On 29th August, 1947, the Indian Constituent Assembly appointed a drafting committee which presented a draft constitution in February, 1948. The Indian constitution came into force on 26th January, 1950. The other chapter about formation of Constituent Assembly and the drafting of constitution were plagued by power struggles by military and bureaucrats. (H.M. Seervai – Constitutional Law of India, Vol-1 P-9)

On 16th October, 1951 Liaquat Ali Khan, the first Prime Minister of Pakistan was assassinated. "A tussle for grabbing power among persons who held

positions of advantage in the Government thereupon ensued and under its weight the foundation of the State started quivering' (Asma Jilani V. Government of Punjab, PLD 1972 SC 139). On 24th October, 1954 Ghulam Muhammad, hand picked Governor General by a proclamation dissolved Constituent Assembly and placed armed guards outside the Assembly Hall (ibid). In accordance with the opinion given by the Federal Court a new Constituent Assembly was elected and a constitution ultimately came into force on 23rd March, 1956. In the Constituent Assembly, Shiekh Mujibur Rahman, a member of the Constituent Assembly, made a historic speech pinpointing the discriminatory treatment exercised by the central government as under:

> "Sir, I am only pointing it out to you. Sir, it is like this there are two hands to the body of Pakistan. One is West Pakistan and the other is East Pakistan. They are making one hand strong and the other hand weak. Sir, this policy is wrong and will ruin the country. In the Central Government

Services, those who form 56 per cent population are not getting 5 per cent share. The East Bengal people are educated but they are not getting their share. Sir we do not blame the West Pakistan people. In fact we want autonomy for them also. If East Pakistan gets autonomy, the West Pakistan people will also get autonomy. We blame the ruling junta. These jagirdars, zaminders, these big landlords and ruling junta of West Pakistan has suppressed the people's opinion of West Pakistan. They are so much suppressed, they cannot cry, they cannot demand, but the people of East Pakistan are politically conscious. They challenge anybody and everybody. They challenge Mr. Fazlul Haq, Mr. Suhrawardy, Moulana Bhashani; they challenge their leaders. They tell their leaders "You have done this wrong and we will not vote for you, but they have been suppressed, persecuted and they have been economically ruined. They have no land;

no shelter. But, Sir, we have nothing against the people of West Pakistan, but against the ruling junta, who have entered the Constituent Assembly through the backdoor, one who were not even in the District Board and have become Foreign Minister of Pakistan and such people want to speak on behalf of the people of East Pakistan and say that the people of East Bengal support this draft Constitution.

Sir, I have just come from East Pakistan and know the mind of the people there. I know that they have rejected this un-Islamic, undemocratic and dictorial Constitution, and it cannot be accepted by the people of Pakistan, Particularly the people of East Pakistan. These people are thinking that they will sit in Karachi like Mr. Pathar he will never go back to East Pakistan; he is domiciled here. So these people are also thinking that they will earn some money and make a house here. They

> cannot go back because they are going against the demand of full regional autonomy which is the demand of the people. You can kill us, you can jail us. Sometimes we hear that our lives are in danger, but we are not afraid. We have been elected by the people on the basis of 21- point Programme on the basis of regional autonomy. They can betray but we cannot."
>
> (Quoted from the written argument of Attorney General)

Iskander Mirza did not allow a National Assembly to be formed under the constitution of 1956, assumed power and by Proclamation dated 7th October, 1958, abrogated the constitution, dissolved the National and Provincial Assemblies, imposed Martial Law throughout the country and General Muhammad Ayub Khan was appointed as Commander-in-Chief and Chief-Martial-Law Administrator. Iskander Mirza ultimately could not retain power and he was overthrown by Muhammad Ayub Khan and the country was put under Martial Law. Muhammad Ayub Khan was elected as

President in 1965 by introducing a peculiar type of democracy, under the name 'Basic Democracy'. The people knew that he became the President through a rigged election. In 1968, he was observing his so called decade of development but the common citizen was not touched by it, and thus very soon he saw his authority to govern was being vigorously challenged. The agitation of the people, coupled with the mass upsurge of 1969, reached to such an extent and the disturbances broken out throughout the provinces of Pakistan were so serious that it was not possible on his part to maintain law and order situation in the country. Ultimately, he could not continue at the helm of the affairs and handed over the power to Muhammad Yahya Khan, as Commander-in-Chief. He took oath pledging that he would be faithful to the constitution of 1962. Within a very short time of taking his oath, he again issued Proclamation on 26th March, 1969, abrogated the constitution, dissolved the National and Provincial Assemblies and imposed Martial Law throughout the country.

The next episode is very pathetic to the citizens of this country. Under the Legal Frame Work, Muhammad Yahya Khan ultimately gave election which was held in December, 1970. It was beyond imagination of the Pakistani Rulers, Awami League headed by Shiekh Mujibur Rahman could secure a clear majority in the National Assembly and Provincial Assembly of East Pakistan. This election was held for the purpose of framing a constitution for the entire country. Muhammad Yahya Khan ultimately did not hand over power to the elected majority leader of the entire Pakistan, Shiekh Mujibur Rahman; rather he waged a war against unarmed and innocent people and committed the most heinous genocide in the history of the modern world. He postponed the holding of National Assembly and massacred innumerable number of helpless Bangalees that led to the declaration of independence by Shiekh Mujibur Rahman on 26th March, 1971.

The liberation struggle continued for nine months and with the sacrifice of three million martyrs and honour of hundred thousand mothers and

sisters, we achieved our victory on 16th December, 1971.

In his written argument, the learned Attorney General has elaborately quoted the speeches of Bangabandu Shiekh Mujibur Rahman, Father of the Nation, given on 10th April, 1972 before the Constituent Assembly of Bangladesh - he also elaborately quoted from the speeches of Dr. Kamal Hossain, Syed Nazrul Islam, M. Munsur Ali, Asaduzzaman Khan, A.K.M. Kamruzzaman and Taj Uddin Ahmed. After a detailed discussion, debate and elaboration on many important points by the members, the constitution was adopted by the Constituent Assembly on 4th November, 1972 and it was published in the official gazette on 14th December, 1972.

In the preceding paragraphs, I have purposefully given a relatively detailed description of the trajectory of our combined political struggle throughout the Pakistani era which culminated in the establishment of a sovereign State of Bangladesh. Very unique as it may sound, yet it is the historical fact that this nation is probably the only nation on

the face of the earth who fought a most gruesome battle to achieve a democratic constitution. India and Pakistan though born on (15th and 14th August 1947 respectively) pursued diagonally opposite political course to run their countries. Within less than two years India adopted its constitution in 1949, whereas, Pakistan adopted its first constitution after nine years of its independence in 1956. And this nine years were full of political treachery, horse-trading, usurping power by the individuals sitting at the top of the political hierarchy, killing of Prime Minister, arbitrarily dissolving Constituent Assembly so on and so forth. But this was not the end there. From 1947 to 1971 Pakistan adopted two constitutions, two Martial Laws, a peculiar political system called basic democracy and ruled by treacherous and ruthless rulers like Iskandar Mirza, Ayub Khan, Yahya Khan. In addition to a malignant political regime in Pakistan as stated above, that system was also extremely oppressive, there were inhuman economic disparity in the two wings of the country, rampant abuse of power by the law and order

agency to silence the dissident political voices, political prisoners were kept incarcerated years after years without trials etc.

Thus, if we are to summarize the long and dark two and half decades of struggle against the Pakistani rulers— we come to an unavoidable conclusion that as nation, we went through the toughest struggle to achieve a constitution. In fact, throughout the Pakistani era, all our struggles were aimed at a single purpose and that purpose was to achieve a democratic constitution. The Pakistani framework was unable to give this, and hence we "through a historic struggle for national liberation, established the independent, sovereign People's Republic of Bangladesh". This is how I see the constitution of Bangladesh. The constitution that our Founding Fathers adopted in 1972 was not a spark of a moment— it was not an accidental achievement, rather it was the result of a prolonged and deep contemplation of this nation germinated over centuries. And this document is an excellent example of our "collective political wisdom."

The history and ethos of our independence and those of India, USA, South Africa and other countries of the globe are completely different. The independence of India, Pakistan, South Africa, Zimbabwe, Sri Lanka, Burma, Singapore, Malaysia and many other countries were achieved largely through negotiations. The independence of Bangladesh and that of United State of America (USA) were achieved through war. So, the constitution of each country has to be interpreted in the light of her own historical background and commitment of that struggle and sacrifices. This attitude towards interpretation is not optional rather mandatory, because our constitution emerged with a pledge, with a sacred promise made to the martyrs who laid down their lives for a "purpose". While interpreting the constitution of Bangladesh, first and foremost, this purpose must be kept in mind and it must also guide the reasons and rationale of the court in giving meaning to any provision of the constitution.

The meaning of 'we the people' mentioned in the beginning of the preamble of the constitution of

Bangladesh has a different meaning than that of the same phrase that has been used in the preamble of the Indian and American constitution and these constitutions have to be interpreted in that context. One may pose a question as to the meaning of the term of the constitution. Constitution may be defined as to body of rules and maxims in accordance with which the power sovereignty are habitually exercised. A constitution is valuable in proportion as it is suited to the circumstances, desires, and aspirations of the people, and as it contains within itself the elements of stability, permanence, and security against disorder and revolution. Ultimately it is valuable only to the extent that it is recognised and can be enforced. Although every State may be said in some sense to have a constitution, the term constitutional government is only applied to those whose fundamental rules or maxims not only applied to those shall be chosen or designated to whom the exercise of sovereign powers shall be confined, but also impose efficient restraints on the exercise for the purpose of protecting individual rights and

privileges, and shielding them against any assumption of arbitrary power. (Calhoun, Disquisition on Government, Works, i. 11 and Cooly, Constitutional Limitation, 8th Edn.4)

A constitution of a country is the supreme legal framework by which the State is organsied and run. To comprehend about a constitution of a country it is necessary to keep in mind, what were the objects which the Framers of the constitution set out to achieve through this document? What were the modest will to which the framers turned? What were the pitfalls the Framers tried to avoid?

At this juncture, I want to deal with the aspects of American's constitution. In its preamble, it is stated "We the people of the United States,... do ordain and establish this Constitution..." These words did more than promise popular self-governance. They also embodied and enacted it— like the phrase "I do" in an exchange of wedding vows and 'I accept' in a contract — the Preamble's words actually performed the very thing they described. Thus the Founders' 'Constitution' was not merely a text but a deed-a

constituting – 'We the People do Ordain.' This was the most democratic deed the world had ever seen in 1780s. In a Grand Parade held on July 4, 1788, in Philadelphia, Wilson delivered and argued for vote on the supreme law under which the people and their posterity would govern. By that date Americans had said 'we do' so as to guarantee that the constitution would go into effect. Writing as Publius in 'The Federalist No.84, Alexander Hamilton explained in New York that 'here, in strictness, the people …… retain everything (and) have no need of particular reservations. 'WE THE PEOPLE …., to secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution…….' Here is a (clear) recognition of 'popular rights'. By 'popular rights' Publius meant rights of the people qua sovereign, including their right to revise what they had created. Following Virginia lead, new York used its ratification instrument to underscore its understanding of the Preamble's principles; 'All power is originally vested in, and consequently derived from, the people …… The powers of government

may be reassumed by the people whensoever it shall become necessary to their happiness. (Jonathan Elliot's, ed. The Debates in the several state conventions on the adoption of the Federal Constitution (1888)).

These assorted speeches, essays, and ratification texts emphasizing the 'popular rights' that 'the people' 'retain' and 'reserve' and may 'resume', and 'resume' exemplified what the First Congress had centrally in mind in 1789 when it proposed certain amendments as part of a general bill of rights. (The Bill of Rights; Creation and Reconstruction).

From a twenty-first-century perspective, the idea that the constitution was truly established by 'the people' might seem a bad joke. What about slaves and freeborn women? Later generations of the American people had surged through the Preamble's portal and widened its gate. Like constitution, amendments are not just words but deeds-flesh-and-blood struggles to redeem America's promise while making amends for some of the sins of Founders. In both words and deeds,

America's amendments have included many of the groups initially excluded at the Founding. In the wake of the Civil War, 'We the people' abolished slavery in the Thirteenth Amendment, promised equal citizenship to all Americans in the Fourteenth Amendment, and extended the vote to black men in the Fifteenth Amendment. A half-century later, they guaranteed the right of women suffrage in the Nineteenth Amendment, and during a still later civil-rights movement, they freed the federal election process from poll taxes and secured the vote for young adults in the Twenty-fourth and Twenty-sixth Amendments, respectively. No amendment has ever back on prior voting rights or rights of equal inclusion.

Previously excluded groups have played leading roles in the amendment process itself, even as amendments have promised these groups additional political rights. Black voters, already enfranchised in many States, propelled the Federal Fifteenth Amendment forward; women voters helped birth the Nineteenth; and the poor and the young spearheaded movements to secure their own constitutionally

protected suffrage. Through these dramatic acts and texts of amendment, 'We the People' of later eras have breathed new life into the Preamble's old prose. (America's Constitution, Akhil Reed Amar).

Mr. Murad Reza tried to persuade the court that by judicial pronouncement in *Dred Scott V. Sandford* blacks became citizens of the United States. His submission is partially correct, but if the American constitutional history is looked into it was not so easy to comprehend. Nothing was in the original constitution aimed to eliminate slavery, even in the long run. No clause in the constitution declared that "slavery shall cease to exist by July 4, 1876, and Congress shall have power to legislate toward this end." Article I temporarily barred Congress from using its otherwise plenary power over immigration and international trade to end the importation of African and Caribbean slaves. Not until 1808 Congress was not permitted to stop the inflow of slave ships; even then, Congress would be under no obligation to act. Another clause of Article I, regulating congressional apportionment, gave States perverse

incentives to maintain and even expand slavery. If a State freed its slaves and the freedmen then moved away, the State might actually lose Horse seats; conversely, if it imported or bred more slaves, it could increase its congressional clout.

Article II likewise handed slave States extra seats in the Electoral College, giving the South a sizable head start in presidential elections. Presidents inclined toward slavery could in turn be expected to nominate proslavery candidates. Article III vested all Federal Courts with judicial power of the United States. Article IV obliged free states to send fugitive slaves back to slavery, in contravention of background choice-of-law rules and general principles of comity. That article also imposed no immediate or long-run constitutional restrictions on slaveholding in Federal territory. Article V gave the international slave trade temporary immunity from constitutional amendment, in seeming violation of the people’s inalienable right to amend at any time, and came close to handing slave

States an absolute veto over all future constitutional modifications under that article.

In the near term, such compromises made possible a continental union of North and South that provided bountiful benefits to freeborn Americans. But in the long run, the Founders' failure to put slavery on a path of ultimate extinction would lead to massive military conflict on American soil-the very sort of conflict whose avoidance was literally the primary purpose of the constitution of 1788. (America's Constitution, ibid)

"We the People of the united States …." United how? When? Few questions have cast a longer shadow across American history. Jefferson Davis had one set of answers, Abraham Lincoln had another. And the war came. "The Preamble began the proposed constitution; article VII ended it. The Preamble said that Americans would 'establish this constitution'; article VII said how the people 'would establish this constitution". The preamble said this deed would be done by 'the People'; article VII clarified that the people would act via specially elected 'Conventions'.

The Preamble invoked the people of 'the United States'; Article VII defined what that phrase meant both before and after the act of constitution. The preamble consisted of a single sentence; so did article VII. The conspicuous complementarily of these two sentences suggests that they might have been placed side by side, but the Philadelphia architects preferred instead to erect them at opposite ends of the grand edifice so that both the documents' front portal and rear portico would project the message of popular sovereignty, American style.(Ibid)

The preamble promised Americans more direct democratic participation in ordaining their supreme law than anyone had ever seen on a continental scale. Echoing the Preamble's invocation of 'the People', article I promised something similar for ordinary law making. The House of Representatives would be elected biennially 'by the People of the several States'. By 1787 American judiciary had began to rise in repute. The constitution guaranteed the President's rights to hire and fire his cabinet subordinates but failed to guarantee any Supreme Court role in the appointment

or removal of lower court Judges. While each congressional house could cleanse itself by expelling members who misbehaved, neither the Supreme Court nor the judiciary as a whole enjoyed comparable inherent power to clean the judicial house. (Raoul Berger, Impeachment; the Constitutional Problems, (1974), 127-34).)

Congress could impeach and remove Judges, yet Judges lacked counterbalancing authority to oust congressmen. In all these ways, implicating the essential power to fill up and empty out the branches, the judiciary was not just last but least. Article III featured a 'court' that it called 'supreme', but this adjective hardly meant that the judiciary outranked the Legislature and Executive. Rather, the word primarily addressed the hierarchy within the judiciary itself, placing America's highest court above any lower Federal Courts that might be created. Thus each of article III's first two sentences juxtaposed the 'Supreme Court' against other 'inferior' Federal Courts, as did earlier language in article I empowering Congress to

‘constitute Tribunals inferior to the Supreme Court”. Yet, even this ‘Supreme Court’ was given rather few constitutional tools to keep its underlings in line. (Ibid)

Article III thus offered the Federal Judiciary a uniquely protective package. “Good Behaviour” now meant what it said: A Federal Judge could be ousted from office only if he misbehaved, with adjudication of misbehavior taking place in a judicial forum.(Ibid)

In respect of Indian constitution, it is necessary to look into its legal Frame Work, that is to say, what were the objects which the Framers of the Constitution set out to achieve in their Draft Constitution? What were the models to which they turned? What were the pitfalls they tried to avoid? Dr. Ambedkar, the Chairman of the drafting committee, answered some of these questions when he moved that the Constituent Assembly should take the Draft Constitution into consideration. Indian constitution adopted the system of parliamentary form in preference to the presidential system adopted in the

United States. This was the result of course which political struggle had taken place in India. Although the Indian constitution derives its legal authority from the Indian Independence Act, 1947, which conferred on the Constituent Assembly the power to frame the constitution, the Founders were influenced by the result of struggle for political freedom. Section 102 of the Government of India Act, 1935 gave statutory recognition to the fact that in times of war the Federal Government should have power to legislate even on subjects of the exclusive provincial legislation. Two other characteristic features of Indian constitution may be noticed here, and both of them have been taken over from the Government of India Act, 1935. The first relates to the legislative powers of the Chief Executive on the Union and in the States, and the second relates to the failure of the constitutional machinery. Section 42 of the Government of India Act, 1935, empowered the Governor General to promulgate Ordinances during the recess of the Federal legislature; and Section 88 of that Act empowered the Governor to promulgate

Ordinances during the recess of the State legislature. These sections were strongly assailed as involving "rule by ordinance". But their incorporation in Indian Constitution shows that the objection was not to the nature and scope of the power but to the authorities by whom it was to be exercised. Those provisions were retained in articles 123 and 213. (Ibid. H.M.Seervai)

India was declared to be a Union of States. Legislative powers were divided between the Parliament of the Union and the Legislative Assemblies of each State. The executive powers of the Union were vested in the President acting in accordance with the advice of the Council of Ministers headed by the Prime Minister and accountable to the lower house of Parliament, the House of the People or the Lok Sabha. The executive powers of each State were vested in the Governor acting on the advice of the Council of Ministers headed by the Chief Minister accountable to the Legislative Assembly.

Article 124 of the constitution established the Supreme Court of India consisting of the Chief Justice and other Judges. By article 131 the Supreme Court was given original and exclusive jurisdiction in any dispute between the government of India and State or between States involving any question of law or fact on which the existence of the extent of a legal right depends. By article 132, an appeal to the Supreme Court from a High Court lies in any civil, criminal, or other proceedings if a High Court certifies that a substantial question of law as to the interpretation of the constitution is involved. By article 133 civil and criminal appeals lie from any decision of the High Court on a question of law, and with leave. In addition, by article 136 the Supreme Court may grant special leave to appeal from any decision 'in any cause or matter passed or made by any court or tribunal in the territory of India'. By article 144, all authorities, civil and judicial in the territory of India shall act in aid of the Supreme Court. Thus, the Supreme Court was given

extensive powers to interfere in any proceedings to secure justice.

The preamble of Indian constitution was amended in 1976, which affirms the resolve of the people of India to constitute India into a Sovereign, Socialist, Secular, Democratic Republic and to secure to all its citizens Justice, social economic and political, liberty of thought, expression, belief, faith and worship and equality of status and opportunity. Article 32 confers on every citizen the right to move the Supreme Court for the enforcement of fundamental rights.

The Supreme Court of India has been very innovative in the construction of the ambit of the Fundamental Rights. Article 21 of the constitution, which protects life and liberty 'except according to procedures established by law' was held to confer the right to legal aid which the court ordered the States to provide (Khatri V. State of Bihar, (1981) 3 SCR 145).

So far as the constitution of the People's Republic of Bangladesh is concerned, I have already

mentioned the historical background of our constitution and the preamble which aptly contains the reflection of the spirit of the national liberation struggle and the sacrifice of the lives of the people. In the preamble it is stated; 'We, the people of Bangladesh, having proclaimed our independence …. through a historic struggle established independent, sovereign ….. which inspired our heroic people to dedicate themselves to and our brave martyrs to sacrifice lives in, the liberation struggle.'

In the preamble it also indicated the future principles of the State that 'through a 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 dignity, will be secured for all citizens.' (emphasis supplied) It was also declared to safeguard, protect and defend the constitution and maintain the supremacy as the embodiment of the will of the people of Bangladesh so that we may prosper in freedom.

This preamble is completely different from those of other countries. I mentioned earlier that there is a bit similarity as regards the independence of our county with USA. Though in the preamble we notice the expression 'We the people' in other constitutions as well, but the connotation and denotation of the word 'We' is not same in all documents.

American independence was also achieved by sacrifice of lives, but in that preamble no such details have been mentioned as in ours. It simply mentioned "we, the people of the United States, in order to form a more perfect union, establish justice, insure, domestic tranquility, provide for the common defence, promote the general welfare, and secure the blessings of Liberty to ourselves and our Prosperity, do ordain and establish this Constitution for the United States of America."

The first word of the first sentence of the preamble of our constitution of the People's Republic of Bangladesh is "WE". The strength of a nation lies in this word and spirit of "WE". This 'weness' is the

key to nation building. A community remains a community unless all those who belong to the community can assimilate themselves in this mysterious chemistry of 'weness', the moment they are elevated to this stage they become a 'nation'. And our Founding Fathers very rightfully understood, realized and recognised this quintessential element of nation building and this is why they wrote the first sentence of the constitution "We, the people of Bangladesh, having proclaimed our independence on the 26th day of March, 1971 and, through a historic struggle for national liberation, established the independent, sovereign People's Republic of Bangladesh."

These words mean that people are the source of all supreme power; People are the true achiever of the sovereignty and hence the constitution. The members of the Constituent Assembly were all people's representatives. The preamble, therefore, indicates that the legal basis of our constitution is the people-the ultimate source of all power.

In the history of military no war was ever won with so small and meagre supply of arms, with so small numbers of trained fighters, as the people of Bangladesh did in 1971. We fought a ferocious military force equipped with all modern weaponry and trained personnel - we fought against them with courage and valour - what really gave us the advantage over them? Were it arms and weapon only? The answer is No. It was the stupendous courage of 'We the people' of this land - it was the readiness for supreme sacrifice if necessary and unsurmountable feeling of commonness for fellow people of this land that made us unconquerable by the Pakistani military power. And this unparalleled feeling for commonness has been rightly reflected in the very first word of our supreme social document - the constitution.

Our Founding Fathers keeping in mind of our struggle against the tyrannical rulers gave all powers of the Republic upon the people under article 7, which runs:

"7. (1) 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.

(2) This Constitution is, as the solemn expression of the will of the people, the supreme law of the Republic, and if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void."

Thus, if we carefully look into the philosophy of our political existence we unfailingly see that the citizens of our country are woven by a common thread called 'we the people'. And the solemn expression of the will of the people is the supreme law of the Republic, i.e. the constitution. The triumph in 1971 was obvious because the feeling of 'weness' was unbreakable. There were numerous conspiracies to break this unity but the enemy utterly failed to inject even the slightest shred of doubt among us. Now that we are living in a free, independent and sovereign country, however, we are indulging into arrogance and ignorance which threaten the very precious tie and thread of 'we'.

No nation - no country is made of or by one person. If we want to truly live up to the dream of Sonar Bangla as advocated by our father of the nation, we must keep ourselves free from this suicidal ambition and addiction of 'I'ness. That only one person or one man did all this and etc. If we look at the example from USA's town planning; they recognised the person who worked for their town planning. For abolition of slavery, Mary Todd, wife of 16th President Abraham Lincoln, got recognition. For the establishment of women rights there are other persons who got the recognition and they also remember with great acknowledgment of four Army Generals. But in our country a disease has infected us and the name of that disease is 'myopic politicization'. This is a virus and unfortunately this has infected our political culture to such a length that many of our policy makers now are hardly able to see or envision a future meant for a nation, not for a person. Due to this rotting disease, they have personified each and everything. For their narrow and parochial party interest they have

established a fake and 'pseudo democracy' taking the shameful unfair advantage of our constitution - a constitution written with the blood ink of our martyrs in 1971.

We must get rid of this obnoxious 'our men' doctrine and suicidal 'I alone' attitude. Not party allegiance or money but merit alone should be given the highest priority at all levels of national life and institution building. Person who is making tremendous sacrifice and humongous contribution for development and social progress must be recognised. And in doing so we must only see his or her contribution to this society not to his political colour or inclination. If we cannot get ourselves out of this narrow parochialism and cannot overcome the greed of party nepotisms, then this will be the biggest assault to the very foundation of our liberation war- and the rock solid idea of 'We' which brought us the long cherished independence and to immortalize this momentum, the word 'we' have been put in the very first sentence of our constitution as the very first word of this sagacious document.

Lamer, CJ. of Canada once described preamble while interpreting judicial independence as "the Grand Indents Hall to the Castle of the Constitution". (Provincial Court Judges (1997) 3 SCR 3).

Our preamble clearly spells the backgrounds, and objectives of this Republic. The Framers of the constitution clearly stated this philosophy, aims at objectives of the constitution and to describe the qualitative aspect of the polity the constitution is designed to achieve. (Anwar Hossain Chowdhury V. Bangladesh, 34 DLR(AD)1).

Therefore, the Framers of the constitution intended to bring about the result which the literal construction produces and the court while interpreting the constitution is required to search for a meaning in conformity with the spirit the objectives of the constitution as indicated in the preamble. It is because the substantive provisions have been spelt out to achieve the objects and purposes. The words 'historic struggle for national liberation' mentioned in the preamble clearly indicated that our Parliament would not do anything

by way of amendment of the constitution ignoring the spirit of the sacrifice of millions of people. By the same time, we should not make any change in our historic document about the democratic process, fundamental rights, equality and justice, rule of law, which should predominate in the administration of the country. These basic principles should be institutionalized - not curtailed lest the sacrifice of martyrs would be nipped in the bud. This preamble was changed by the military rulers and by the constitutional Fifth Amendment Case, this court restored to its original position.

It brings in the concept of distributive justice which aims at the removal of economic inequalities and undoing of justice resolving from transactions and dealings between unequal persons in the society. Though the qualifying words 'for national liberation' ended with the 'national independence' it should not be comprehended that our national liberation or independence is over, rather it is quite the opposite - it is a continuing process to achieve the august goal for which our martyrs sacrificed their lives.

The trial of the offenders of the crimes against humanity, genocide, war crimes etc. by the International Crimes Tribunal is the best example to show that the sacrifice of the martyrs is not over yet. Our independence will be meaningful when we can achieve 'the rule of law, fundamental human rights and freedom, equality and justice, political, economic and social' equality for all citizens after eliminating those who did not believe in our historic struggle for national liberation and also those who wanted to mutilate our history of national struggle. This is what our preamble stands for and every time we interpret it, we must keep ourselves alert about the intrinsic link between the spirit of our historic struggle for national liberation and the scheme of our constitution which embody that spirit.

The characteristic feature of an undeveloped country is the stark reality between its economic and social state and the minimum aspirations of a mid-twentieth century State modelled upon the values and objectives of the developed countries of the west. All these countries have an overwhelming need for

rapid socio-economic change. Much of this must express itself in legal change in constitutions, statutes, and administrative regulations. Law in such a State of Social evolution is less and less the recorder of established social, commercial and other customs; it becomes pioneer, the articulated expression of new forces that seek to mould the life of the community according to new patterns. (Legal Theory – W. Friedmann – P429)

This is why Juan Williams in his book 'We the People' in Chapter VII under the heading "Liberty and Justice for all" stated that two centuries later Elenor Roosevelt opened a new chapter in US history by expanding the way of American's think about who qualifies for the protection under the Founding Father's idea of natural rights. As first lady from 1933-1945, she used the White House Belli Pulpid 'to make the case that all human beings–both men and women, Jews as well as Christians, West Virginia core minors and Japanese, Internees during world war tour, blacks as well as white, refugees asylum and provides immigrants-are born with God given, natural right to

personal liberty”. He further stated that the States of Eleanor Roosevelt works ratcheted earth in the post war era. Americans trump as a global military power in world war two elevated the nations of new heights of moral authority on issue of right or wrong, justice and injustice.

People everywhere wanted clear moral rules and how to treat each other in the aftermath of horrific human rights abuses committed by nazi fascists and terrorists. It was the key, everyone felt to preventing future works. As one of the first US delegates to the newly created United Nations, Mrs. Roosevelt began exporting the American concept of natural rights before her work on UN’s Universal Declaration of Human Rights - the world had never heard an argument for global action to protect all people because they have got given, natural rights. And no one had made the case that international action to defend those natural rights superseded claims of any sovereign government to set his own groups and do as it pledge with its citizen within its own boarders.

This is what I believe in expression 'We the People' mentioned in our preamble. There is no doubt that the elected representatives of Bangladesh Awami League led the liberation struggle, but people from all walks of life, like labourers, workers, fishermen, housewives, prisoners, educationalists, students, industrialists, intellectuals, Police, Army, Ansars, BDRs and supporters of other political parties participated, except few religiously fanatic ideologue and their evil companions. Our liberation war was not an isolated event rather it was an all engaging phenomena, turning each and everyone essentially a freedom fighter. Some of them directly fought face to face in the battle field - some of them supported with logistics - some of them encouraged them to achieve their goal - some of them travelled across the world to let people know of the horrific atrocities perpetrated by the military junta and their cohorts—some of them made the international community aware of the real picture so that they could support our cause— some of them collected money by different means to support the freedom fighters—

some of them who could not cross the border gave shelter to the freedom fighter—some of them played dual role and secretly sent messages and information to the freedom fighters.

The dream of an egalitarian society based on welfare philosophy was excellently drawn in the preamble of our constitution. Our Preamble is truly a *magna carta* for this nation. Anybody who reads it will be touched with emotion and spirit of sacrifice and higher purposes of this State for which it was established. The preamble of our constitution being the dream of a war-born nation was so succinctly and perfectly depicted in those only two hundred and thirteen words that it is easily possible to visualize it as a masterpiece of a veteran artist. But the ink that has been used to draw this masterpiece is the blood of innumerable martyrs who sacrificed their lives for a noble purpose. The martyrs dreamed that the "FUNDAMENTAL AIM of the State Bangladesh, is to realize <u>through the democratic process</u> a socialist society, <u>free from exploitation</u> a <u>society in which the rule of law</u>,

fundamental human rights and FREEDOM, EQUALITY and JUSTICE, political, economic and social, will be secured for all citizens;" (emphasis added). But alas! This grand ideology was later defaced, distorted, ravaged and molested with the dirty hands of power-mongers, and lastly, this *magnum opus* of our nation (the constitution) was thrown away aside by the power-greedy politicians and military adventurists. Our hard-earned freedom was snatched away from us and our hundred years of struggle for democracy, rule of law and freedom from poverty and hunger was brutally suppressed.

One of the main reasons that we were able to achieve our independence within a short span of nine months time is that in true sense of the word it was a people's war—all the citizens wholeheartedly engaged and supported the all-out effort for liberation. The engagement of the mass people and their unprecedented support for the war acted as great source of strength for the freedom fighters, the political leaders, and others who were directly involved in the frontlines of the war. In the history

of the world hardly any nations had been able to achieve independence through a war of liberation within such short time. It had been possible because 'we the people' wanted it. It is 'we the people,' who established "Bangladesh" and it "is a unitary, independent, sovereign Republic to be known as the People's Republic of Bangladesh" (article 1). This "we the people" has been more elaborately and more expressively acknowledged in article 7 as quoted above.

A creative approach has been adopted in our constitution while organizing the power structure of the State. Clause (2) of article 7 make it abundantly clear that, "This constitution is, as the solemn expression of the will of the people, the supreme law of the Republic, and if any other law is inconsistent with this constitution that other law shall, to the extent of the inconsistency, be void." (emphasis added) Now a very natural question may arise that in the constitution who has been given the responsibility to declare a law void in case it conflicts or is 'inconsistent' with article 7 of the

constitution? Has this power been given to the Executive? The answer is an emphatic 'no'. Has this power been given to the Parliament? The answer is emphatically 'no'. This heavy burden of scrutinizing constitutionality of any law made by the Parliament or the administrative body of the State has been rested upon the shoulder of the Supreme Court. For that matter the Supreme Court has been assigned with the power of 'judicial review' by the constitution itself.

The most celebrated constitutional law case ever decided pivoted on one of the constitution's most recondite provision - according to John Marshall's opinion for the Court in Marbury V. Madison (1803) 5 US 137, part of Congress's 1789 Judiciary Act attempted to do what the Judicial article did not permit-namely, expand the Court's original jurisdiction. Marshall's Court famously proceeded to disregard this part of the act, thereby exercising a power that later Americans would call 'judicial review'. Most constitutional law casebooks begin with

Marbury and lavish attention on the topic of judicial review.'

The power of judicial review was implicit in the Government of India Act, 1935, and had been frequently exercised by the courts of India. The power was, however, expressly conferred by the Indian constitution. Motilal C. Setalvad, in his book 'My life – Law and other things' stated that after Marbury's decision explaining why such a function was the legitimate function of the judicial department, it was perhaps to avoid a controversy of this kind that Indian constitution makers had made express provision for judicial review.

Judicial review needs to be set in the context of mechanisms which seek to activate broader political accountability. The exercise of government power must be controlled in order that it should not be destructive of the very values which it was intended to promote (Lord Steyn, "The Weakest and Least Dangerous Department of Government"). There is a growing appreciation that the courts and Parliament have distinct and complementary constitutional roles

so that the courts will no longer avoid adjudicating on the legality of a decision merely because it has been debated and approved in Parliament. (R V. Secretary of State Home Department (2001) EWCA Civ 789). Judicial review also goes some way to answering the age-old question of 'who guards the guards?" by ensuring that public authorities responsible for ensuring accountability of government do so within the boundaries of their own lawful powers. (De Smith's Judicial Review. P.6-7).

In this juncture it is apt to quote the observations of Prof. Schwartz, the Constitution of the United States, Vol –I:

"An organic instrument is naught but empty words if it cannot be enforced by the Courts. It is judicial review that makes the provisions of a constitution more than mere maxims of political morality....." The universal sense of America has come to realize that there can be no constitution without law administered through the Supreme Court. When, in a real controversy, an appeal is made to law, the issue must be left entirely to the judgment

of the highest tribunal. This principle, in the phrase of an English constitutional lawyer, provide the only adequate safeguard which has hitherto been invented against unconstitutional legislation. It is, in truth, the *sine qua non* of the constitutional structure. So long, therefore, as the constitution shall endure, this tribunal must exist with it, deciding in the peaceful forms of judicial proceedings the angry and irritating controversies between sovereignties, which in other countries have been determined by the arbitrariness of force. Again, speaking of the rule of law, Prof. Schwartz observed:

> "Closely related to what has just been said is a third essential of the rule of law – that there are certain fundamental principles above the State itself, which the State, sovereign power though it be, cannot abrogate. Government action is valid only if it does not conflict with these principles. The principles in question are those we usually comprehend by the expression individual rights of the person. They are

> what an earlier age called 'the natural rights of man' and are the sort of thing guaranteed in the American bills of rights. 'It must be conceded', the Supreme Court has affirmed, 'that there are such rights in every free government beyond the control of the State. A government which recognized no such rights, which held the lives, the liberty, and the property of its citizens subject at all time to the absolute disposition and unlimited control of even the most democratic depository of power, is after all but a despotism. It is true it is a despotism of the many, of the majority, if you chose to call it so, but it is nonetheless a despotism."

In A.K. Kaul V. Union of India, (1995) 4 SCC 73, the Supreme Court of India observed that in 'a written constitution the powers of the various organs of the State are limited by the constitution. The extent of those limitations has to be determined on the interpretation of the relevant provisions of the

Constitution …. The task of interpreting the provisions of the constitution is entrusted to the judiciary which is vested with the power to test the validity of the actions of any authority functioning under the Constitution … in order to ensure that the authority exercising the power conferred by the constitution does not transgress the limitations imposed by the Constitution on the exercise of that power. This power of judicial review is therefore implicit in a written constitution and unless expressly excluded by the provisions of the constitution, the power of judicial review is available in respect of the exercise of powers under any provision of the Constitution.'

Without going through all landmark decisions in the judicial history on the question of judicial review some observations, remarks of a renowned jurist are apt to mention here. On the inaugural sitting of the Supreme Court of India, Harilal Kanai, Chief Justice of India, said, the court must be 'quite untouchable by the legislature or the executive authority in the performance of its duties.

Beyond this Judges should be, and perceived to be unmoved by the 'extraneous considerations feared likely to influence them'. ((1950) SCR 1). Referring to the role of the court to interpreting the constitution; Chief Justice then concluded his speech on the question of its independence:

> "The Supreme Court, an all-India Court will stand firm and aloof from party politics and political theories. It is unconcerned with the changes in the government. The Court stands to administer the law for the time being in force, has goodwill and sympathy for all, but is allied to none. Occupying that position, we hope and trust it will play a great part in the building up of the nation, and in stabilizing the roots of civilization which have twice been threatened and shaken by two world wars, and maintain the fundamental principles of justice which are the emblem of God."

The journey of judicial review on constitutional amendments of India started from the First Amendment

Act, 1951, which had inserted article 31B. In Shankari Prashad V. Union of India, AIR 1951 SC 458, the court held that to make a law which contravenes the constitution constitutionally valid is a matter of constitutional amendment and as such falls within the exclusive power of Parliament. The Shankari Prashad case was revisited in Sajjan Singh V. State of Rajasthan, AIR 1965 SC 845. The Constitution Seventeenth Amendment Act, 1964 had placed a still larger number of State enactments in the Ninth Schedule to obviate a challenge against them as being in violation of fundamental rights. This amendment to the constitution was upheld by a Bench of five Judges.

It was ultimately in Golak Nath V. State of Punjab, AIR 1967 SC 1643, where a Bench of eleven members considered whether any part of the fundamental rights guaranteed in the constitution could be abrogated or amended by constitutional amendment. The court by majority viewed that none of the fundamental rights were amenable to the amending power of article 368 because an amendment to the

constitution was a law under article 13(2) and under that article, all laws in contravention of any of the fundamental rights in Part III of the constitution were expressly declared to be void.

Six years later in 1973, a larger Bench of thirteen Judges had to consider the validity of some of the later amendments, the Twenty Fourth, Twenty Fifth and Twenty Ninth Amendment of the constitution. The case was practically based on considering the correctness of the decision of Golaknath. (Kesavananda Bharati V. State of Kerala, AIR 1973 SC 1461).

In Kesavananda the following points were agitated:

(a) "Parliament, in exercise of its amending power, cannot abrogate or abridge the fundamental rights. These were the basic human freedoms which the people of India had reserved for themselves while giving to themselves the Constitution;

(b) In any event, Parliament, in exercise of its amending power, cannot alter or destroy

the basic structure or the essential features for the Constitution;

(c) A free and independent judiciary - without it, all rights would be writ in water;

(d) The balance between the legislature, the executive and the judiciary - none of the three organs of the State could use its powers to destroy the powers of the other two, nor could any of them abdicate its power in favour of another."

The Indian Supreme Court by a majority held that though Parliament can amend any part of the constitution in exercise of its amending power, it cannot alter the basic structure or framework of the constitution. (Golaknath was overruled). Though the judgment was clearly by a majority, it was apparent that the division was sharp- 6:6. Khanna, J. who was with the majority, did not accept that all fundamental rights enshrined in Part III were part of the basic structure. He said that the right to property was not. Except for this, he was in

agreement with the rest of the majority opinion that the basic features of the constitution cannot be amended in such a way as to destroy or damage its basic structure …

The majority opinion was as follows:

> "(1). Parliament's amending power is limited. While Parliament has the right to abridge any fundamental right or amend any provision of the Constitution, the amending power does not extend to damaging or destroying any of the essential features of the constitution. The fundamental rights are among the essential features of the constitution; therefore, while they may be abridged, the abridgement cannot extend to the point of damage to or destruction of the core of the fundamental rights. Thus, it was unnecessary to decide whether the

Golaknath case was rightly decided or not, since after the 24th Amendment, Parliament has the power to abridge any fundamental right without damaging or destroying its core.

(2) While the property of any person may be taken away on payment of an 'amount' which may not be the market value or constitute 'compensation' in the eye of the law, the amount or the principles on which it is based must have a reasonable relation to the property.

(3). Article 31C is void since it takes away most valuable fundamental rights, even those unconnected with property.

And other six Judges held as under:

1) The power of amendment is unlimited.

2) On a fair construction of Article 31(2) as altered by the 25th Amendment, the

state's right to acquire or requisition property on payment of an 'amount' must, according to some of these judges, be so exercised that the amounts is not illusory and does not constitute a fraud upon the right to property.

3) Article 31C is valid, even though it damages or destroys the essential features of the Constitution."

Since there was Division by six into six, Khanna, J. agreed with none of these 12 Judges and decided the case midway between the two conflicting views holding that (a) the power of amendment is limited; it does not enable Parliament to alter the basic structure of framework of the constitution; and (b) the substantive provision of article 31C, which abrogates the fundamental rights, is valid on the ground that it does not alter the basic structure or framework of the constitution.

Now turning to the point as to the interpretation of the constitution, there is no doubt that in interpreting a constitutional document the

meaning and intention of Framers of the constitution must be ascertained from the language of that constitution itself; with the motives of those who framed it, the court has no concern. (In re 1938 (1939) FCR 18, 36, (39)). After quoting the observations of Lord Wright in James V. Common Wealth, (1936) AC 578 Gwyer CJ stated that "a Constitution must not be construed in a narrow or pendantic manner, and that construction most beneficial to the widest possible amplitude".

Professor Cross in his book on Statutory Constructions, 1976, has given a careful analysis of the expression "the intention of Parliament". According to him, it is meaningless to speak of the intention of Parliament unless it is recognized that the expression is used by analogy but in no way synonymous with the intention of any individual concerning the general and particular affects of a document he prepares and signs. He adds that Parliament is treated as though it was an individual law maker, whose intention is to be ascertained from the language which he has used in making and

promulgating the law. It is said, constitution must be construed as on the day after it was enacted. Dr. Wynes phrase 'generic interpretation' clearly brings out the true nature of this principle of interpretation. He wrote: -

'…generic interpretation' … asserts no more than that new developments of the same subject and new means of executing an unchanging power do arise from time to time and are capable of control and exercise by the appropriate organ to which the power has been committed … while the power remains the same, its extent and ambit may grow with the progress of history. Hence it will be seen that suppositions as to what the Framers might have done if their minds had been directed to future developments are irrelevant and that the question whether a novel development is or is not included in the terms of the constitution finds its solution in the application of the ordinary principles of interpretation, namely, what is the meaning of the terms in which his intention has been expressed?" (R. v. Brislan; p. (1935) 54C.L.R. 262).

Questions relating to extrinsic aids to construction have been increasingly engaging the attention of courts in India and England. Therefore, we must consider the recent trends in statutory interpretation before considering their impact on the interpretation of the constitution. The importance attached to 'context' in statutory interpretation, has gone hand in hand with an analysis of the phrase 'intention of Parliament' and of the factors that go to make up the whole legislative process resulting in an Act of Parliament. Once it is realized that the 'intention of Parliament' 'is not a description but a linguistic convenience' the whole legislative process assumes importance for statutory interpretation. This new approach emphasizes, first the realities of the legislative process; secondly, the close relationship between the draftsman of an Act and the court of construction; and thirdly, the practical grounds on which English courts limit the use of 'travaux preperatories' (preparatory work) as an aid to construction.

Sometimes the parliamentary debates are taken into consideration in interpreting a constitutional provision. In this regard Patanjali Sastri, CJ. ruled that speeches made in the Constituent Assembly in course of draft constitution could be used as aids for interpreting any article of the constitution. He observed that:

> "… the use made by … Judges below of the speeches made by the members of the Constituent Assembly in the course of the debates on the draft Constitution is unwarranted. That this form of extrinsic aid to the interpretation of statutes is not admissible has been generally accepted in England, and the same rule has been observed in the construction of Indian Statutes. The reason behind the rule was explained by one of us in Gopalan that "A speech made in the course of the debate on a bill could at best be indicative of the intent of the speaker, but it could not reflect the inarticulate mental process lying behind the majority

> vote which carried the Bill. Nor is it reasonable to assume that the minds of all those legislator were in accord" or, as it more tersely pot in an American case-'those who did not speak may not have agreed with those who did; and those who spoke might differ from each other". (Trav-Cochin V. Bombay Co. Ltd., 1952(SCR) 1112).

Accordingly, in Kesavananda, it was observed that it is not necessary to refer to judgments which have relied upon speeches made in the Constituent Assembly without considering the question whether they were admissible for interpreting the Constitution. In that case Sikri, CJ. Hedge, Mukherjea and Chandrachud,JJ. held that speeches were not admissible extrinsic aids to the interpretation of the constitution. Keeping the above principles on the genesis of the constitutional law, let us look at the findings of the High Court Division.

The High Court Division upon analysing the views taken in the Exparte Sidebotham, (1880) 14 Ch. W. 458; Tariq Transport Company V. Sargotha Bhera Bus

Service, 11 DLR (SC) 140; Mian Fazl Din V. Lahore Improvement Trust, 21 DLR (SC) 225; Legal Control of Government by Schwartz and Wade, page 291; R.V. Metropolitan Police Commissioner (1968) 1 All ER 763; Blackburn V. Attorney General (1971) 2 All ER 1380; R.V. Metropolitan Police Commissioner (1973) All ER 324, on the question of maintainability of the writ petition held that with the increase of governmental function, the courts in India and England found the necessity of liberalising the standing rule to preserve the rule of law and that the duty owed by the public authority was to the general public and not to an individual or to a determinate class of persons, and therefore, the writ petitioners have locus standi as they have sufficient interest in the performance of public duty.

On the question of public interest litigation, the High Court Division has considered the cases of Mumbai Kamgar Sava V. Aledulbhai, AIR 1976 S.C. 1455; S.P. Gupta V. President of India, AIR 1982 S.C. 149; Kazi Moklesure Rahman V. Bangladesh, 26 DLR (AD) 44; Dr. Mohiuddin Farooque V. Bangladesh, 49 DLR (AD) 1;

Ekushey Television V. Dr. Chowdhury Mahmud Hasan, 54 DLR (AD) 130; Anwar Hossain Chowdhury V. Bangladesh, BLD (spl) 1; M. Saleemullah V. Bangladesh, 2005 BLD 195 and held that the horizon of judicial review is being expanded through judicial activism with the passage of time facilitating citizens access to justice; that a great duty is cast upon the lawyers for onward march of our constitutional journey to the desired destination; that the writ petitioners are very much concerned with the independence of the judiciary, inasmuch as, they are the stakeholders in the administration of justice without hindrance; that the concern expressed by the writ petitioners about the independence of higher judiciary and separation of powers among the three organs of the State is a public concern. I fully endorse the views expressed by the majority of the High Court Division and with a view to avoiding repetition, I have refrained from making any further opinion supplementing those of the High Court Division.

On the question of judicial accountability, the High Court Division has relied upon the Commonwealth

Latimar House Principles and held that the Judges are accountable to the constitution and the law; that the proper procedures for the removal of Judges on grounds of incapacity misbehaviour that are required to support the principles of independence of the judiciary – any such procedures should be fairly and objectively administered; that the Westminster system of Parliamentary removal has not proved to be most popular among Commonwealth jurisdictions; that ad-hoc tribunals and permanent disciplinary councils are akin to the Chief Justice – led Supreme Judicial Council; that 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 law; that it leaves no room for doubt that the task of administration of justice is entrusted to the Judges who are unelected people and thus the Judges exercise sovereign judicial power of the people and by the authority of the constitution; that being the

guardian of the constitution, the Supreme Court is empowered to interpret and expound the constitution.

The High Court Division further held that the Parliament's amending power of the constitution is not absolute and it cannot make any law in derogation of the provisions and the basic features of the constitution; that the Parliament cannot transgress the constitutional limitation and if it does so, it can be termed as colourable legislation; that amendment to the constitution should be made subject to the retention of basic structure of the constitution; that article 70 of the constitution has fettered the members of Parliament unreasonably and shockingly-it has imposed a tight rein on them-they cannot go against their party line or opposition and on any issue of the Parliament; that 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; that unless and until articles 115 and 116 are restored to their original position, the lower judiciary will continue to remain under the

sway and influence of the executive impinging upon the independence; that the constitution does not allow any judicial role by the Parliament and the role of each organ of the State is clearly defined and carefully kept separate with a view to maintaining its harmony and integrity; that the law to be promulgated by the Parliament under the amended article 96(3) is incongruous, inasmuch as, it being an ordinary law 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 judiciary; that Sixteenth Amendment has facilitated the political executives to control the judiciary; and that the amendment is also beyond the pale of amending power of the constitution in view of article 7B of the constitution.

Mr. Mahbubey Alam, Mr. Murad Reza, Mr. Ajmalul Hossain, Mr. Abdul Matin Khasru, supported the Constitution Sixteenth Amendment and submitted written arguments. Their arguments are almost identical. According to them the writ petition is not

maintainable, that the writ petition is premature; that the judiciary as one of the essential organs of the Republic ought to be made accountable to the people; that the removal of the Judges should be left with the representatives of the people; that the Sixteenth Amendment has not curtailed the independence of judiciary; that this amendment has not violated article 7B of the constitution; that this amendment restored the original provision contained in article 96 and thereby it has not interfered with the basic structure of the constitution and that the High Court Division erred in its majority view in declaring the Constitution Sixteenth Amendment ultra vires the constitution.

Mr. Murad Reza raised the issue of writ petitioners' locus standi to maintain the writ petition and also the maintainability of the writ petition. In support of his contention he has relied upon some cases which were considered by the High Court Division.

The Philosophy of Public interest litigation (PIL) has developed in recent decades and marks a

significant departure from traditional judicial proceedings. It is an idea that was in the making for some time before its vigorous growth in the early eighties. It now dominates the public perception of the Supreme Court of Bangladesh and other courts of the region. This court is an institution not only for reaching out to provide relief to citizens, but even venturing into formulating policy which the State must follow including the Parliament's domain to amend the constitution. Initially it was taken on the philosophy that most of the citizens were unaware of their legal rights, and much less in a position to assert them, and therefore, a public spirited person may seek judicial redress by interpreting the words 'any person aggrieved' not only individuals but also people as a collective and consolidated personality. The court has shifted from its traditional rule of standing which confines access to the judicial process only to those to whom injuries are caused or legal wrong is done and on the contrary, where a legal wrong or legal injury is caused to a person or to a determinate class of persons by reason of

violation of any constitutional legal right or any burden is imposed in contravention of any constitutional legal provision without legal authority of law any member of the public can maintain a petition for judicial review redressing for the legal wrong or injury.

Bhagwati, J. of the Supreme Court of India quoted a passage from Professor Thio's book on locus standi and judicial review (1982) ASC, P-189 and observed that the judicial function is that it is primarily aimed at preserving legal order by confining the Legislative and Executive organs of government within their powers in the interest of the public rests on the theory that the courts are the final arbiters of what is legal and illegal requirements of locus standi are, therefore, unnecessary in this case since they merely impede the purpose of the function as conceived here. He concluded his opinion by observing as under:

> "We would, therefore, hold that any member of the public having sufficient interest can maintain an action for judicial

redress for public injury arising from breach of public duty or from violation of some provision of the Constitution or the law and seek enforcement of such public duty and observance of such constitutional or legal provision. This is absolutely essential for maintaining the rule of law, furthering the cause of justice and accelerating the pace of realization of the constitutional objective".

In the Supreme Court Judges case S.P. Gupta V. India, AIR 1982 S.C 149, it was observed as under:

"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 legal burden is threatened and such person or determinate class of persons is by reasons of poverty,

> helplessness or disability or socially or economically disadvantaged position, unable to approach the Court for any relief, any member of the public can maintain an application for an appropriate direction, order or writ in the High Court under Article 226 and in case of breach of any fundamental right of such person or class of persons, in this Court under Article 32 seeking judicial redress for the legal wrong or injury caused to such person or determinate class of persons." (S.P.Gupta V. Union of India, 1981 supp SCC 87 at P.210).

Thereafter a Constitution Bench of the Supreme Court in M.C. Mehta V. Union of India, AIR 1987 SC. 1086 has given a judicial innovation as to how the Judges could leave their footprints on the sands of the nation's legal history as under:

> "this court should be prepared to receive light from whatever source it comes, but it has to build up its own jurisprudence, evolve new principles and lay

down new norms which would adequately deal with the new problems which arise in a highly industrialised economy."

I fully endorse the above view. In Anwar Hossain Chowdhury (supra), the importance of independence of judiciary was highlighted holding that the concept of independence of judiciary as part of the basic feature of the constitution, to secure rule of law, a lawyer is entitled to challenge the Constitutional Amendment for safeguarding the independence of judiciary. The High Court Division has assigned proper reasons in holding that the writ petitioners have locus standi to maintain the writ petition. I find no reason to depart from the same.

The Supreme Court of India traveled to the extent that if the court takes cognizance of a PIL, it will not allow the petitioner to withdraw the petition on his free will. In Sheela Varsi V. Union of India, (1988) 4 SCC 266 and SP Anand V. HD Debugoura, (1996) 6 SCC 734, it was observed "In PIL

cases the petitioner is not entitled to withdraw his petition at his sweet will unless the court sees reason to permit withdrawal. In granting permission the court would be guided by the considerations of public interest and would also ensure that it does not result in abuse of process of the law." I fully endorse the views and find no reason to depart from the same principle, because in publicly important cases the Supreme Court being the guardian of the constitution after seizing the issue cannot remain a silent spectator even after noticing that there was violation of the constitution or the law. This Court always keeps in mind that PIL is not a litigation of an adversary character undertaken for the purpose of holding the government or its officers responsible for making reparation but it is a dispute which involves a collaborative and co-operative effort on the part of the State or its Officers, the lawyers appearing in the case and the court for the purpose of making human rights meaningful for the community or protecting the independence of the judiciary.

Mr. Murad Reza has made strong resentment towards the role of most of the learned Amici and submits that they have exceeded their power in expressing their opinions. I am indeed shocked at the manner the learned Additional Attorney General has criticized the learned Amici Curiae. In this connection, I will not be able to explain this point better than the opinions expressed by J.S. Verma, C.J. in a seminar on 'The Constitutional Obligation of the Judiciary' under R.C. Memorial Lecture (1997) 7 SCC 1, which are as under:

'It must be said to the credit of the Bar, and this I say from personal experience over the years, the most busy lawyers who charge large fees which I often openly criticize, if called upon to appear as amicus curiae in any such matter, leave every other work and without charging a single rupee put in their best effort in a PIL matter. That credit is due to the Bar. That is the beauty of the justice delivery system and that goes to show that the legal profession has not yet become wholly mercenary. Professionalism remains and professionalism is the

essential trait of any such service-oriented enterprise.'

In traditional adversarial system, the lawyers of the parties present points which are at issue to enable the court to decide for or against a party. In PIL there are no winners or losers and the mindset of both lawyers and Judges can be different from that in ordinary litigation. The court, the parties and the lawyers are expected to participate in resolution of a given public problem. (Dr. Upendra Baxi V. State of U.P. (1986) 4 SCC 106).

Mr. Manzill Murshid while adopting the arguments made in the High Court Division also submits that the writ petition is maintainable. He has also submitted about the background of the Sixteenth Amendment. According to him, the Supreme Court interfered with the Contempt of Court Act, 2013; the relevant provisions of the Durniti Daman Commission Ain, 2004 and direction to arrest the accused in Narayangonj's sensational seven murder case that prompted the Parliament with a view to taking control of higher judiciary by amending the provisions of removal

mechanism of Judges of the highest court. He also submitted that most of the members of the Parliament are involved in development works and their personal business. At times, they are affected by the order of the highest court of the country. Under the amended provision in any case, a member of Parliament can bring a motion against a Judge and discuss it in the Parliament and due to this reason, no Judge will be able to perform his duties independently. Ultimately the justice would be frustrated and administration of justice would collapse without any delay. In his submission he has mentioned the procedure for removal of Judges by Parliament in some other countries like USA, UK, India, Sri Lanka and drawn the court's attention of the devastating effect of the Parliamentary removal system of Judges. He has also mentioned some countries where Judges are removed by Supreme Judicial Council/Tribunal etc. He has specially mentioned the removal procedure of Judges in Pakistan, Zambia, Fiji, Namibia, Singapore and Bulgaria. He has also mentioned the Appointment, Tenure and Removal of Judges under Commonwealth

Principles, specially Commonwealth (Latimer House) Principles on the three Branches of Government; The Universal Charter of the Judges; UN Basic Principles on the Independence of Judiciary, International Bar Association (IBA) Minimum Standards of Judicial Conducts; Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region; the International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors'.

Mr. T.H. Khan, Mr. M. Amirul Islam, Mr. M.I. Farooqui, Dr. Kamal Hossain, Mr. Abdul Wadud Bhuiyan, Mr. A.F. Hassan Ariff, Mr. Rokanuddin Mahmud, Mr. Fida M. Kamal and Mr. A.J. Muhammad Ali supported the judgment of the High Court Division declaring the Sixteenth Amendment illegal, *ultra vires* the constitution and they have also submitted written arguments.

According to them the judgment the Fifth Amendment case approved and upheld the Supreme Judicial Council mechanism for removal of the Judges of the higher judiciary; that the impugned amendment is unconstitutional; that this amendment curtailed

the independence of judiciary; that article 70 of the constitution has imposed a tight rein on the members of Parliament and therefore, they have no freedom to question their Party's stance; that the Supreme Judicial Council mechanism reinforces the independence of judiciary and that the impugned amendment contravenes article 7B and the basic structures of the Constitution.

Before I deal with the points raised by the learned senior counsel, it is pertinent to recapitulate the trajectory of various amendments made to the different provisions relating to the constitution for correct resolution of the issues involved in the matter which are as under:

Preamble /Articles	1972	4th Amendment	5th Amendment	7th Amendment	8th Amendment	13th Amendment	14th Amendment	15th Amendment	16th Amendment
Preamble			In the beginning of the Constitution, above the Preamble, the following shall be inserted, namely— "BISMILLA-AR-RAHMAN-AR-RAHIM (In the name of Allah, the Beneficent, the Merciful)"					[BISMILLAH-AR-RAHMAN-AR-RAHIM (In the name of Allah, the Beneficent, the Merciful)/In the name of the Creator, the Merciful.]	
2A					The State religion of the Republic is Islam, but other religions may be practised in peace and harmony in the Republic			The State religion of the Republic is Islam, but the state shall ensure equal status and equal right in the practice of the Hindu, Buddhist, Christian and other religions	
6	Citizenship of Bangladesh shall be determined and regulated by law; citizens of Bangladesh shall be known as Bangalees		The citizenship of Bangladesh shall be determined and regulated by law. The citizens of Bangladesh shall be known as Bangladeshis					The citizenship of Bangladesh shall be determined and regulated by law. The people of Bangladesh shall be known as Bangalees as a nation and the citizens of	

Preamble /Articles	1972	4th Amendment	5th Amendment	7th Amendment	8th Amendment	13th Amendment	14th Amendment	15th Amendment	16th Amendment
6 (contd.)								Bangladesh shall be known as Bangladeshis.	
7A								If any person, by show of force or use of force or by any other un-constitutional means— abrogates, repeals or suspends or attempts or conspires to abrogate, repeal or suspend this Constitution or any of its article; or subverts or attempts or conspires to subvert the confidence, belief or reliance of the citizens to this Constitution or any of its article; his such act be sedition and such person shall be guilty of sedition. If any person— abets or instigates any act mentioned in	

Preamble /Articles	1972	4th Amendment	5th Amendment	7th Amendment	8th Amendment	13th Amendment	14th Amendment	15th Amendment	16th Amendment
7A (contd.)								clauses (1); or approves, condones, supports or ratifies such act, his such act shall also be the same offence. Any person alleged to have committed the offence mentioned in this article shall be sentenced with the highest punishment prescribed for other offences by the existing laws.	
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	

Preamble /Articles	1972	4th Amendment	5th Amendment	7th Amendment	8th Amendment	13th Amendment	14th Amendment	15th Amendment	16th Amendment
7B (contd.)								of Part XI shall not be amendable by way of insertion, modification, substitution, repeal or by any other means.	
42			In article 42, for clause (2) the following shall be substituted, namely:-- "(2) A law made under clause (1) shall provide for the acquisition, nationalisation or requisition with compensation and shall either fix the amount of compensation or specify the principles on which, and the manner in which, the compensation is to be assessed and paid; but no such law shall be called in question in any court on the ground that any provision					(2) A law made under clause (1) of this article shall provide for the acquisition, nationalisation or requisition with compensation and shall fix the amount of compensation or specify the principles on which, and the manner in which, the compensation is to be assessed and paid; but no such law shall be called in question in any court on the ground that any provision of the law in respect of such compensation is not adequate	

Preamble /Articles	1972	4th Amendment	5th Amendment	7th Amendment	8th Amendment	13th Amendment	14th Amendment	15th Amendment	16th Amendment
42 (contd.)			in respect of such compensation is not adequate..."						
47			Original proviso to clause (2) of article 47 was substituted as follows: "Provided that nothing in this article shall prevent amendment, modification or repeal of any such law."					Proviso to clause (2) of article 47 "Provided that nothing in this article shall prevent amendment, modification or repeal of any such law."	
95	(1) The Chief Justice shall be appointed by the President, and the other Judges shall be appointed by the President after consultation with the Chief Justice. (2) A person shall not be qualified for appointment as a Judge unless he is a citizen of Bangladesh and–	(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– (a) has, for not less than ten years, been an advocate of the Supreme Court;	(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 – (a) has, for not less than ten years, been an advocate of the					... (b) has, for not less than ten years, held judicial office in the territory of Bangladesh; or (c) has such qualifications as may be prescribed by law for appointment as a judge of the Supreme Court.	

Preamble /Articles	1972	4th Amendment	5th Amendment	7th Amendment	8th Amendment	13th Amendment	14th Amendment	15th Amendment	16th Amendment
95 (contd.)	(a) has, for not less than ten years, been an advocate of the Supreme Court; or (b) has, for not less than ten years, held judicial office or been an advocate, in the territory of Bangladesh and has, for not less than three years, exercised the powers of a district Judge. (3) In this article "Supreme Court" includes a court which at any time before the commencement of this Constitution exercised jurisdiction as a High Court in the territory of Bangladesh.	or (b) has, for not less than ten years, held judicial office or been an advocate, in the territory of Bangladesh and has, for not less than three years, exercised the powers of a district Judge. (3) In this article "Supreme Court" includes a court which at any time before the commencement of this Constitution exercised jurisdiction as a High Court in the territory of Bangladesh.	Supreme Court; or (b) has, for not less than ten years, held judicial office in the territory of Bangladesh; or (c) has such other qualifications as may be prescribed by law for appointment as a Judge of the Supreme Court. (3) In this article, "Supreme Court" includes a court which at any time before the commencement of the Second Proclamation (Tenth Amendment) Order, 1977, exercised jurisdiction as a High Court or Supreme Court in the territory now					(3) In this article, "Supreme Court" includes a court which at any time before the commencement of this Constitution, exercised jurisdiction as a High Court in the territory of Bangladesh.	

Preamble /Articles	1972	4th Amendment	5th Amendment	7th Amendment	8th Amendment	13th Amendment	14th Amendment	15th Amendment	16th Amendment
			forming part of Bangladesh.						
96	(1) Subject to the provisions of this article a Judge shall hold office until he attains the age of sixty-two 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	(1) Subject to the provisions of this article a Judge shall hold office until he attains the age of sixty-two years. (2) A Judge may be removed from his office by order of the President on the ground of misbehaviour or incapacity: Provided that no judge shall be removed until he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him. (3) Omitted (4) A Judge may resign his office by writing under his	(1) Subject to the other provisions of this article, a Judge shall hold office until he attains the age of sixty-two years. (2) A Judge shall not be removed from office except in accordance with the following provisions of this article. (3) There shall be a Supreme Judicial Council, in his 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	(1) Subject to the other provisions of this article, a Judge shall hold office until he attains the age of sixty-five years. (2) ...			(1) Subject to the other provisions of this article, a Judge shall hold office until he attains the age of sixty-seven years. (2) ...	(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	(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

Preamble /Articles	1972	4th Amendment	5th Amendment	7th Amendment	8th Amendment	13th Amendment	14th Amendment	15th Amendment	16th Amendment
96 (contd.)	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.	hand addressed to the President.	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 functions of the Council shall be – (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.					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 – (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	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.

Preamble /Articles	1972	4th Amendment	5th Amendment	7th Amendment	8th Amendment	13th Amendment	14th Amendment	15th Amendment	16th Amendment
96 (contd.)			(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					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.	

Preamble /Articles	1972	4th Amendment	5th Amendment	7th Amendment	8th Amendment	13th Amendment	14th Amendment	15th Amendment	16th Amendment
96 (contd.)			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 purposes 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.					(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.	
98	Notwithstanding the provisions of article 94, if the President is satisfied, after	Notwithstanding the provisions of article 94, if the President is satisfied that the	Notwithstanding the provisions of article 94, if the President is					Notwithstanding the provisions of article 94, if the President is satisfied that the	

Preamble /Articles	1972	4th Amendment	5th Amendment	7th Amendment	8th Amendment	13th Amendment	14th Amendment	15th Amendment	16th Amendment
98 (contd.)	consultation with the Chief Justice, that the number of the Judges of a division of the Supreme Court should be for the time being increased, the President may appoint one or more duly qualified persons to be Additional Judges of that division for such period not exceeding two years as he may specify, or, if he thinks fit, may require a Judge of the High Court Division to sit in the Appellate Division for any temporary period: Provided that nothing in this article shall prevent a person appointed as an Additional Judge from being appointed as a Judge under article 95 or as an Additional Judge for	number of the Judges of a division of the Supreme Court should be for the time being increased, the President may appoint one or more duly qualified persons to be Additional Judges of that division for such period not exceeding two years as he may specify, or, if he thinks fit, may require a Judge of the High Court Division to sit in the Appellate Division for any temporary period: Provided that nothing in this article shall prevent a person appointed as an Additional Judge from being appointed as a Judge under article 95 or as an Additional Judge for a further period under this article.	satisfied that the number of the Judges of a division of the Supreme Court should be for the time being increased, the President may appoint one or more duly qualified persons to be Additional Judges of that division for such period not exceeding two years as he may specify, or, if he thinks fit, may require a Judge of the High Court Division to sit in the Appellate Division for any temporary period as an *ad hoc* Judge and such Judge while so sitting, shall exercise the same jurisdictions, powers and functions as a Judge or the					number of the Judges of a division of the Supreme Court should be for the time being increased, the President may appoint one or more duly qualified persons to be Additional Judges of that division for such period not exceeding two years as he may specify, or, if he thinks fit, may require a Judge of the High Court Division to sit in the Appellate Division for any temporary period: Provided that nothing in this article shall prevent a person appointed as an Additional Judge from being appointed as a Judge under article 95 or as an Additional Judge for a further period under this article.	

Preamble /Articles	1972	4th Amendment	5th Amendment	7th Amendment	8th Amendment	13th Amendment	14th Amendment	15th Amendment	16th Amendment
98 (contd.)	a further period under this article.		Appellate Division: Provided that nothing in this article shall prevent a person appointed as an Additional Judge from being appointed as a Judge under article 95 or as an Additional Judge for a further period under this article.					**(4th Amendment position retained).**	
99	A person who has held office as a Judge (otherwise than as an Additional Judge pursuant to the provisions of article 98) shall not after his retirement or removal therefrom plead or act before any court or authority, or be eligible for any appointment in the service of the Republic.		(1) Except as provided in clause (2), a person who has held office as a Judge otherwise than as an Additional Judge shall not, after his retirement or removal therefrom, plead or act before any court or authority or hold any office of profit in the service of the Republic not being a judicial or quasi-			(1) Except as provided in clause (2), a person who has held office as a Judge otherwise than as an Additional Judge shall not, after his retirement or removal therefrom, plead or act before any court or authority or hold any office of profit in the service of the		(1) A person who has held office as a Judge (otherwise than as an Additional Judge pursuant to the provisions of article 98), shall not, after his retirement or removal therefrom, plead or act before any court or authority or hold any office of profit in the service of the Republic not being a judicial or quasi-judicial office.	

Preamble /Articles	1972	4th Amendment	5th Amendment	7th Amendment	8th Amendment	13th Amendment	14th Amendment	15th Amendment	16th Amendment
99 (contd.)			judicial office. (2) A persons who has held office as a Judge of the High Court Division may, after his retirement or removal therefrom, plead or act before the Appellate Division.			Republic not being a judicial or quasi-judicial office or of the Office of Chief Adviser or Adviser. (2) A persons who has held office as a Judge of the High Court Division may, after his retirement or removal therefrom, plead or act before the Appellate Division.		(2) Notwithstanding anything contained in clause (1), a person who has held office as a Judge of the High Court Division may, after his retirement or removal therefrom, plead or act before the Appellate Division.	
100	The permanent seat of the Supreme Court shall be in the capital, but sessions of the High Court Division may be held at such other place or places as the Chief Justice may, with the approval of the President, from time				(1) Subject to this article, the permanent seat of the Supreme Court shall be in the capital. (2) The High Court Division and the Judges thereof shall sit at			The permanent seat of the Supreme Court shall be in the capital, but sessions of the High Court Division may be held at such other place or places as the Chief Justice may, with the approval of the President from time	

Preamble /Articles	1972	4th Amendment	5th Amendment	7th Amendment	8th Amendment	13th Amendment	14th Amendment	15th Amendment	16th Amendment
100 (contd.)	to time appoint.				the permanent seat of the Supreme Court and at the seats of its permanent Benches. (3) The High Court Division shall have a permanent Bench at Barisal, Chittagong, Comilla, Jessore, Rangpur and Sylhet, and each permanent Bench shall have such Benches as the Chief Justice may determine from time to time. (4) A permanent Bench shall consist of such number of Judges of the High Court Division as the Chief Justice may deem it necessary to nominate to			to time appoint.	

Preamble /Articles	1972	4th Amendment	5th Amendment	7th Amendment	8th Amendment	13th Amendment	14th Amendment	15th Amendment	16th Amendment
100 (contd.)					that Bench from time to time and on such nomination the Judges shall be deemed to have been transferred to that Bench. (5) The President shall, in consultation with the Chief Justice, assign the area in relation to which each permanent Bench shall have jurisdictions, powers and functions conferred or that may be conferred on the High Court Division by this Constitution or any other law: and the area not so assigned shall be the area in relation to which the High Court				

Preamble /Articles	1972	4th Amendment	5th Amendment	7th Amendment	8th Amendment	13th Amendment	14th Amendment	15th Amendment	16th Amendment
100 (contd.)					Division sitting at the permanent seat of the Supreme Court shall have such jurisdictions, powers and functions. (6) The Chief Justice shall make rules to provide for all incidental, supplemental or consequential matters relating to the permanent Benches.				
101	The High Court Division shall have such original, appellate and other jurisdictions and powers as are conferred on it by this Constitution or any other law.		The High Court Division shall have such original, appellate and other jurisdictions, powers and functions as are or may be conferred on it by this Constitution or any other law.					The High Court Division shall have such original, appellate and other jurisdictions and powers as are conferred on it by this Constitution or any other law.	

Preamble /Articles	1972	4th Amendment	5th Amendment	7th Amendment	8th Amendment	13th Amendment	14th Amendment	15th Amendment	16th Amendment
102	(1) The High Court Division, on the application of any person aggrieved, may give such directions or orders to any person or authority, including any person performing any function in connection with the affairs of the Republic, as may be appropriate for the enforcement of any of the fundamental rights conferred by Part III of this Constitution. (2) The High Court Division may, if satisfied that no other equally efficacious remedy is provided by law – (a) on the application of any person aggrieved, make an order – (i) directing a person	(1) The High Court Division may, if satisfied that no other equally efficacious remedy is provided by law - (a) on the application of any person aggrieved, make an order – (i) directing a person performing any functions in connection with the affairs of the Republic or of a local authority, to refrain from doing that which he is not permitted by law to do or to do that which he is required by law to do; or (ii) declaring that any act done or proceeding taken by a person performing functions in connection with the affairs of the Republic or of a local authority has been	(1) The High Court Division on the application of any person aggrieved, may give such directions or orders to any person or authority, including any person performing any function in connection with the affairs of the Republic, as may be appropriate for the enforcement of any of the fundamental rights conferred by Part III of this Constitution. (2) The High Court Division may, if satisfied that no other equally efficacious remedy is provided by law – (a) on the application of any person aggrieved, make an order –					(1) The High Court Division, on the application of any person aggrieved, may give such directions or orders to any person or authority, including any person performing any function in connection with the affairs of the Republic, as may be appropriate for the enforcement of any ofthe fundamental rights conferred by Part III of this Constitution. (2) The High Court Division may, if satisfied that no other equally efficacious remedy is provided by law – (a) on the application of any person aggrieved, make an order – (i) directing a person performing any	

Preamble /Articles	1972	4th Amendment	5th Amendment	7th Amendment	8th Amendment	13th Amendment	14th Amendment	15th Amendment	16th Amendment
102 (contd.)	performing any functions in connection with the affairs of the Republic or of a local authority, to refrain from doing that which he is not permitted by law to do or to do that which he is required by law to do; or (ii) declaring that any act done or proceeding taken by a person performing functions in connection with the affairs of the Republic or of a local authority has been done or taken without lawful authority, and is of no legal effect; or (b) on the application of any person, make an order – (i) directing that a person in custody be brought before it so that it may satisfy	done or taken without lawful authority, and is of no legal effect; or (b) on the application of any person, make an order – (i) directing that a person in custody be brought before it so that it may satisfy itself that he is not being held in custody without lawful authority or in an unlawful manner; or (ii) requiring a person holding or purporting to hold a public office to show under what authority he claims to hold that office. (2) Notwithstanding anything contained in clause (1), the High Court Division shall have no power under this article to make an interim order or to pass any order in	(i) directing a person performing any functions in connection with the affairs of the Republic or of a local authority to refrain from doing that which he is not permitted by law to do or to do that which he is required by law to do; or (ii) declaring that any act done or proceeding taken by a person performing functions in connection with the affairs of the Republic or of a local authority has been done or taken without lawful authority and is of no legal effect; or (b) on the application of any person, make an order –					functions in connection with the affairs of the Republic or of a local authority, to refrain from doing that which he is not permitted by law to do or to do that which he is required by law to do; or (ii) declaring that any act done or proceeding taken by a person performing functions in connection with the affairs of the Republic or of a local authority, has been done or taken without lawful authority and is of no legal effect; or (b) on the application of any person, make an order – (i) directing that a person in custody be brought before it so that it may satisfy itself that he is not	

Preamble /Articles	1972	4th Amendment	5th Amendment	7th Amendment	8th Amendment	13th Amendment	14th Amendment	15th Amendment	16th Amendment
102 (contd.)	itself that he is not being held in custody without lawful authority or in an unlawful manner; or (ii) requiring a person holding or purporting to hold a public office to show under what authority he claims to hold that office. (3) Notwithstanding anything contained in the forgoing clauses the High Court Division shall have no power under this article to pass any order in relation to any law to which article 47 applies. (4) Whereon an application made under clause (1) or sub-clause (a) of clause (2), an interim order is prayed for and such interim order is likely to have the effect of–	relation to any law to which article 47 applies. (3) In this article, unless the context otherwise requires, "person" includes a statutory public authority and any court or tribunal, other than a court or tribunal established under a law relating to the defence services of Bangladesh or any disciplined force or a tribunal to which article 117 applies.	(i) directing that a person in custody be brought before it so that it may satisfy itself that he is not being held in custody without lawful authority or in an unlawful manner; or (ii) requiring a person holding or purporting to hold a public office to show under what authority he claims to hold that office. (3) Notwithstanding anything contained in the forgoing clauses, the High Court Division shall have no power under this article to pass any interim or other order in relation to any law to which article 47 applies.					being held in custody without lawful authority or in a unlawful manner; or (ii) requiring a person holding or purporting to hold a public office to show under what authority he claims to hold that office. (3) Notwithstanding anything contained in the forgoing clauses, the High Court Division shall have no power under this article to pass any interim or other order in relation to any law to which article 47 applies. (4) Whereon an application made under clause (1) or sub-clause (a) of clause (2), an interim order is prayed for and such interim order is likely to have the effect of – (a) prejudicing or interfering with any	

Preamble /Articles	1972	4th Amendment	5th Amendment	7th Amendment	8th Amendment	13th Amendment	14th Amendment	15th Amendment	16th Amendment
102 (contd.)	(a) prejudicing or interfering with any measure designed to implement any socialist programme, or any development work; or (b) being otherwise harmful to the public interest, the High Court Division shall not make an interim order unless the Attorney-General has been given reasonable notice of the application and he (or an advocate authorised by him in that behalf) has been given an opportunity of being heard, and the High Court Division is satisfied that the interim order would not have the effect referred to in sub-clause (a) or sub-clause (b). (5) In this article, unless the context		(4) Whereon an application made under clause (1) or sub-clause (a) of clause (2), an interim order is prayed for and such interim order is likely to have the effect of – (a) prejudicing or interfering with any measure designed to implement any development programme, or any development work; or (b) being otherwise harmful to the public interest, the High Court Division shall not make an interim order unless the Attorney – General has been given reasonable notice of the application and he (or an advocate					measure designed to implement any socialist programme, or any development work; or (b) being otherwise harmful to the public interest, the High Court Division shall not make an interim order unless the Attorney-General has been given reasonable notice of the application and he (or an advocate authorised by him in that behalf) has been given an opportunity of being heard, and the High Court Division is satisfied that the interim order would not have the effect referred to in sub-clause (a) or sub-clause (b). (5) In this article, unless the context otherwise requires, "person" includes a statutory public	

Preamble /Articles	1972	4th Amendment	5th Amendment	7th Amendment	8th Amendment	13th Amendment	14th Amendment	15th Amendment	16th Amendment
102 (contd.)	otherwise requires, "Person" includes a statutory public authority and any court or tribunal, other than a court or tribunal established under a law relating to the defence services of Bangladesh or a tribunal to which article 117 applies.		authorised by him in that behalf) has been given an opportunity of being heard, and the High Court Division is satisfied that the interim order would not have the effect referred to in sub-clause(a) or sub-clause (b). (5) In this article, unless the context otherwise requires, "Person" includes a statutory public authority and any court or tribunal, other than a court or tribunal established under a law relating to the defence services of Bangladesh or any disciplined force or a tribunal to which article 117 applies.					authority and any court or tribunal, other than a court or tribunal established under a law relating to the defence services of Bangladesh or any disciplined force or a tribunal to which article 117 applies.	

Preamble /Articles	1972	4th Amendment	5th Amendment	7th Amendment	8th Amendment	13th Amendment	14th Amendment	15th Amendment	16th Amendment
107	(1) Subject to any law made by Parliament the Supreme Court may, with the approval of the President, make rules for regulating the practice and procedure of each division of the Supreme Court and of any court subordinate to it. (2) The Supreme Court may delegate any of its functions under clause (1) and article 113, 115 and 116 to a division of that Court or to one or more judges. (3) Subject to any rules made under this article the Chief Justice shall determine which judges are to constitute any Bench of a division of the Supreme Court and		(1) Subject to any law made by Parliament the Supreme Court may, with the approval of the President, make rules for regulating the practice and procedure of each division of the Supreme Court and of any court subordinate to it. (2) The Supreme Court may delegate any of its functions under clause (1) and article 113 to a division of that Court or to one or more judges. (3) Subject to any rules made under this article the Chief Justice shall determine which judges are to constitute any Bench of a division		... (3) Subject to any rules made under this article the Chief Justice shall determine which judges are to constitute any Bench of a division of the Supreme Court or any Bench of a permanent Bench of the High Court Division referred to in clause (3) of article 100 and which judges are to sit for any purpose.			(1) Subject to any law made by Parliament the Supreme Court may, with the approval of the President, make rules for regulating the practice and procedure of each division of the Supreme Court and of any court subordinate to it. (2) The Supreme Court may delegate any of its functions under clause (1) and article 113 and 116 to a division of that Court or to one or more judges. (3) Subject to any rules made under this article the Chief Justice shall determine which judges are to constitute any Bench of a division of the Supreme Court and which judges are to	

Preamble /Articles	1972	4th Amendment	5th Amendment	7th Amendment	8th Amendment	13th Amendment	14th Amendment	15th Amendment	16th Amendment
107 (contd.)	which judges are to sit for any purpose. (4) The Chief Justice may authorise the next most senior judge of either division of the Supreme Court to exercise in that division any of the powers conferred by clause (3) or by rules made under this article.		of the Supreme Court and which judges are to sit for any purpose. (4) The Chief Justice may authorise the next most senior Judge of either division of the Supreme Court to exercise in that division any of the powers conferred by clause (3) or by rules made under this article.					sit for any purpose. (4) The Chief Justice may authorise the next most senior judge of either division of the Supreme Court to exercise in that division any of the powers conferred by clause (3) or by rules made under this article.	
115	(1) Appointments of persons to offices in the judicial service or as magistrates exercising judicial functions shall be made by the President— (a) in the case of district judges, on the recommendation of the Supreme Court; and (b) in the case of any other person, in	Appointments of persons to offices in the judicial service or as magistrates exercising judicial functions shall be made by the President in accordance with rules made by him in that behalf. **(This article is still in force)**							

Preamble /Articles	1972	4th Amendment	5th Amendment	7th Amendment	8th Amendment	13th Amendment	14th Amendment	15th Amendment	16th Amendment
115 (contd.)	accordance with rules made by the President in that behalf after consulting the appropriate public service commission and the Supreme Court. (2) A person shall not be eligible for appointment as a district judge unless he – (a) is at the time of his appointment in the service of the Republic and has, for not less than seven years, held judicial office in that service; or (b) has for not less than ten years been an advocate.								
116	The control (including the power of posting, promotion and grant of leave) and discipline of persons employed in	The control (including the power of posting, promotion and grant of leave) and discipline of persons employed in	The control (including the power of posting, promotion and grant of leave) and discipline of					The control (including the power of posting, promotion and grant of leave) and discipline of persons employed in	

Preamble /Articles	1972	4th Amendment	5th Amendment	7th Amendment	8th Amendment	13th Amendment	14th Amendment	15th Amendment	16th Amendment
116 (contd.)	the judicial service and magistrates exercising judicial functions shall vest in the Supreme Court.	the judicial service and magistrates exercising judicial functions shall vest in the President.	persons employed in the judicial service and magistrates exercising judicial functions shall vest in the President and shall be exercised by him in consultation with the Supreme Court.					the judicial service and magistrates exercising judicial functions shall vest in the President and shall be exercised by him in consultation with the Supreme Court. **(5th Amendment Position retained)**	
116A		Subject to the provisions of the Constitution, all persons employed in the judicial service and all magistrates shall be independent in the exercise of their judicial functions.							

Note: No changes were made to Articles 94, 97, 103-106, 108 and 110-112. Changes made to Articles 109 and 113-114 are not relevant for this discussion.

Mr. Mahbubey Alam, and Mr. Murad Reza submitted that the Sixteenth Amendment will not in any way curtail the independence of judiciary; rather this amendment has restored the original article 96. They add that the constitution is for the people so it should meet the needs of the people, and therefore, it upholds the rule of law. In elaborating their submissions, they argue that article 7 provides that all powers belong to the people and obviously it includes all the institutions including the judiciary, and therefore, the natural consequence is that all institutions and all its' functionaries whoever they might be, are answerable and accountable to the people. If any one denies this fact, it is his apprehension, but the independence of judiciary being a basic feature of the constitution, this amendment will secure the independence of judiciary. They further add that the sovereignty of the people is also a basic feature of the constitution, which is superior most amongst all basic features, inasmuch

as, the people do not belong to the judiciary- the judiciary belongs to the people, and therefore, Judiciary is answerable to the people.

Mr. Ajmalul Hossain while supporting the above submissions adds that the procedure or mechanism by which Judges of the higher judiciary can be removed depends upon a fundamental question about what the procedure and mechanism is. According to him, the procedure and mechanism must be made by the Legislature. He further adds that the rules of natural justice raises the basic indisputable question— "can the judiciary be a Judge of his own cause?" and since the judiciary has an interest in the matter, it cannot be left with the judiciary. He further submits that this amendment has simply brought the constitution to its original provision as was proposed by the Constituent Assembly in 1972. He finally submits that which body should be responsible for removal process and what safeguards such bodies would adopt to ensure fairness should be addressed by Parliament in the first instance as it is the body

which has the constitutional mandate to legislate for these issues.

The points raised by the learned counsel appear to be subtle in nature, though not novel. Such questions require to be examined in a broad range of issues keeping in view the law, philosophy, political theory, constitutional theory and the spirit of constitutionalism. As mentioned earlier, a very onerous responsibility is reposed upon the Supreme Court by the constitution itself. The constitution has deliberately conferred the power of judging any dispute on the highest court to stress the obvious that the fount of justice under the constitution is the apex court of the country. When some enacted law diverts the true course of justice, power is vested in the Supreme Court and the Supreme Court alone is competent under the constitutional mandate to make such orders as are necessary for doing justice.

I have already reproduced the changes made in the constitution in the preamble, articles 7A, 7B, (addition), 47, 47A (addition), article 95 by the

Fourth Amendment, Fifth Amendment and Fifteenth Amendment. So far as article 95 is concerned, after a long journey, it has reached its position by Fifteenth Amendment in 2011. Similarly article 96 has been amended by the Fourth Amendment, Fifth Amendment, Seventh Amendment, Fourteenth Amendment, Fifteenth Amendment and Sixteenth Amendment. In the Seventh Amendment the retirement age of the Judges was increased to 65 years from 62 years and in the Fourteenth Amendment retirement age was increased to 67 years and in the Fifteenth Amendment it has been retained.

Under the original provision of article 96, it was provided that a Judge shall be removed from his office by the President pursuant to a resolution of Parliament supported by two-third majority of the total number of members on the ground of proved misbehaviour or incapacity. This provision has been done away with in the Fourth Amendment and this power was given upon the President to exercise on the ground of misbehaviour or incapacity of a Judge by

affording him with an opportunity of showing cause. Mr. Attorney General submits that the change has been made due to the fact that under the Fourth Amendment the system of the government was changed and a presidential form of government was introduced, and therefore, the power of removal was given upon the President. I find fallacy in his submission. In any event, this provision for removal of Judges was changed in the Fifth Amendment providing a mechanism of Supreme Judicial Council and it has been retained in the Fifteenth Amendment. In this connection, learned Attorney General submits that in the Fifteenth Amendment the Parliament would have restored the original provision but as the amendment was made hastily, it was totally overlooked by the Law Minister. He further submitted that there was no discussion about retaining clauses (2) to (7) of article 96 in the Fifteenth Amendment, and therefore, it cannot be said that in the Fifteenth Amendment, the Supreme Judicial Council mechanism has been retained by the Parliament.

Mr. Manzill Murshid in this connection submits that before the Fifteenth Amendment, a special committee was constituted with the Deputy Leader of Parliament Sayeda Sajeda Chowdhury as chairperson and Suranjit Sen Gupta as co-chairperson, with Amir Hossain Amu, Abdur Razzaque, Tofail Ahmed, Shikh Fazlul Karim Salim, Advocate Rahmat Ali, Syed Ashraful Islam, Advocate Fazley Rabbi Miah, Abdul Matin Khashru, Rashed Khan Manon, Hasanul Huq Enu, Anisul Islam Mahmood, Dr. Hasan Mahmood and Shirin Sharmin Chowdhury as members. In the said special committee, the retention of clauses (2) to (7) of article 96 was discussed, and the special committee then discussed the matter with the Prime Minister. In the said discussion, the Prime Minister said: 'বিচার বিভাগ এখন সম্পূর্ণ স্বাধীন। স্বাধীন বিচার বিভাগের উপর কোন ধরনের হস্তক্ষেপ করা যাবে না। যদিও ২৭শে এপ্রিল বিশেষ কমিটির সঙ্গে বৈঠক শেষে ঐদিন বিকেলে গণভবনে তিনি যে সংবাদ সম্মেলন করেন, সেখানে বিচারপতিদের অভিশংসনের ক্ষমতা সংসদের উপর ন্যস্ত থাকা উচিত বলে মত দিয়েছিলেন।' In support of his contention, he has produced the

extracts of a book under the name 'সংবিধানের পঞ্চদশ সংশোধনী আলোচনা-তর্ক-বির্তক' edited by Ameen-R-Rashid.

Mr. Attorney General has strongly disputed this paper and submitted that the learned counsel has placed an unauthentic paper. However, the learned Attorney General has produced a copy of the same book and at pages 85 and 86, similar statements have been mentioned, and therefore, it cannot be said that the copy submitted by Mr. Manzil Morshid is not an authentic one.

Whether the question of removal of Judges by the Parliament was discussed in the special committee constituted for Fifteenth Amendment or not is not an issue in this matter. Fact remains that this provision has been retained in the Fifteenth Amendment although in that amendment various provisions of the constitution namely, the preamble, articles 2A, 4A, 6, 8, 9, 10, 12, 47, 42, 25, 19(3), 65, 66, 72, 80, 82, 88, 93, 118, 122, 123, 125, 139, 141A, 147, 153, Third Schedule and the Fourth Schedule were amended, and articles 7A, 7B, 18A, 23A,

65(3), 65(3A), 66(e) were added and articles 4A, 6, 9, 12, 38, 44, 61, 70, Chapter I of Part VI relating to Supreme Court articles 142, 145A, 150, and Chapter IIA Non-Party Care-Taker Government were deleted.

By way of addition, alteration and deletion, as evident from the book supplied by the learned Attorney General, the special committee not only thoroughly considered the provisions as to which should be retained and which should not be, but also took opinion of Barrister Rafiqul Huq, Attorney General Mahbubey Alam, Justice Syed Amirul Islam, Barristers Taufique Newaz and Sheikh Fazlay Noor Taposh on 23 September, 2010. On 12th October, 2010, the committee sat with Justice Syed Amirul Islam, Barrister Rafiqul Huq, Mr. Mahmudul Islam, Dr. M. Zahir, Mr. Ajmalul Hossain, Barristers Taufique Newaz and Sheikh Fazlay Noor Taposh. On 15th March, 2011, the committee discussed with Dipongkar Talukder, Promodh Malkin, Jotindra Lal Tripura and Athine Rakhine. It was pointed out that the Prime Minister

had discussed with the special committee on 11th, 12th and 13th meetings.

In the end, the Fifteenth Amendment was published in the official gazette on 3rd July, 2011. The special committee took about one year in finalizing the amendment. Therefore, we find substance in the submission of Mr. M.I. Farooqui that the Parliament by the Constitution Fifteenth Amendment substituted the entire Chapter on the Supreme Court particularly retaining the old article 96. Mr. Farooqui's submission lends support from the amending Act itself. In section 31 of the Fifteenth Amendment Act, it is stated "সংবিধানের ৯৬ অনুচ্ছেদের পরিবর্তে নিম্নরূপ ৯৬ অনুচ্ছেদ প্রতিস্থাপিত হইবে যথা,.." that is to say, the Parliament substituted clauses (2) to (7) of article 96 verbatim which was inserted by the Constitution Fifth Amendment.

Therefore, I find no merit in the contention of the learned Attorney General that as the amendment was made hurriedly, the amendment of article 96 was left out through oversight by the Law Minister. It is

to be noted that in a democratic country and under a written constitution, an amendment is made by the Parliament and not by the Law Minister. Admittedly a constitution amendment committee was constituted and the said committee discussed with various segments of the people including the constitutional experts. The committee took one year in finalising the amendment and therefore, it is not correct to say that this omission was unintentional.

It is contended by learned Attorney General, learned Additional Attorney General and Mr. Ajmalul Hossain that in the Fifth Amendment case, there was condonation of clauses (2) to (7) of article 96 and in the review petition, this court provisionally condoned those provisions in order to avoid disastrous consequence, and therefore, this provision has neither been acquiesced by the Parliament nor by this court. On the other hand, Mr. Manzill Murshid and other learned Amici submitted that this court in the Fifth Amendment case has approved clauses (2), (3), (4), (5), (6) and (7) of article 96 substituted

by the Second Proclamation (Tenth Amendment) Order, 1977 providing the procedure for removal of Judges of the Supreme Court by the Supreme Judicial Council in the manner provided therein instead of earlier method of removal.

This court while condoning these clauses of article 96 in the Fifth Amendment case observed that the 'substituted provisions being more transparent procedure than that of the earlier ones and also safeguarding independence of judiciary, …..” The language used therein is so clear and unambiguous that this court saved clauses (2), (3), (4), (5), (6) and (7) of article 96 not only for the interest of justice, but also for the independence of judiciary on assigning reasons. The word 'condone' according to the Chamber's Dictionary, 10th Edition, is to forgive; to pass over without blame; overlook intentionally; to excuse. According to Concise Oxford English Dictionary, 10th Edition, the word 'condone' includes accept or forgive; approve or sanction, especially reluctantly. Therefore, the meaning of the

word 'condone' also extends to 'approval' or 'acceptance'. So, this court willingly and carefully approved these clauses to be retained in article 96 for the interest of justice, particularly for the independence of judiciary on the reasoning that these provisions are more transparent procedures than the earlier ones. That is to say, the procedure entailed in the Supreme Judicial Council is more in consonance with the spirit of our constitutional scheme. Accordingly, this court approved the amendment by assigning reasons. We hold the view that by the impugned amendment, the independence of judiciary has been undermined and curtailed by making the judiciary vulnerable to a process of removal by the Parliament.

In this connection, learned Attorney General has given emphasis that a martial law provision should not be kept and preserved in a document like the constitution particularly when the court itself has not permanently condoned it. We are not persuaded by the submission of the learned Attorney General, firstly, because it is not the only martial law

provision, which has been approved by this court. Secondly, this is not the only provision that has been kept verbatim in the constitution. The Muslim Family Laws Ordinance, 1961, which came into force on 2nd March, 1961 was also promulgated by the martial law regime of Pakistan. This law had been retained by Pakistan after the withdrawal of Martial Law and after independence; Bangladesh also retained this law. In the preamble of this Ordinance, it is clearly mentioned –

"WHEREAS it is expedient to give effect to certain recommendations of the Commission of Marriage and Family laws;

Now THEREFORE, in pursuance of the Proclamation of the seventh day of October, 1958, and in exercise of all powers enabling him in that behalf, the President is pleased to make and promulgate to following the Ordinance: ……."

Similarly the citizenship of the people contained in article 6 of the constitution as "Bangladeshi" was amended by the Fifth Amendment and

it has been retained in the Fifteenth Amendment. In the original 1972 constitution this article read thus:

"6. The citizenship of Bangladesh shall be determined and regulated by law. (2) The people of Bangladesh shall be known as Bangalees."

During the Martial Law regime, this article was amended through Proclamation Amendment Order, 1977 (Proclamation Order No.1 of 1977). In 2011 by the Fifteenth Amendment it has been amended in the following terms:

"6. The citizenship of Bangladesh shall be determined and regulated by law. (2) The people of Bangladesh shall be known as Bangalees as a nation and the citizens of Bangladesh shall be known as Bangladeshies."

The latest amendment to the article 6 in 2011 was brought by a democratic regime and what we see in clauses (2) of article 6 is that a substantial provision introduced by the martial law government in

1977 has been kept alive in the constitution. More so, by the Second Proclamation (Tenth Amendment) order, 1977, the Supreme Court was again made to 'consist of the Appellate Division and the High Court Division with effect from December, 1, 1977.....', and by the Proclamations (Amendment) Order, 1977, clause (2) of article 42 and Proviso to clause (2) of article 47, and the words "Parliament stands dissolved or is not in session" were added in article 93(1). All these martial law authority's amendments to the constitution have been retained by the constitution Fifteenth Amendment.

Learned Attorney General raised two points. First, in our constitution, which was written with the blood of the martyrs, should not retain any traces of martial law regime. Second, the Parliament has restored the provisions of original constitution regarding the Judges removal mechanism. Both the points are fruitless, inasmuch as, one of the high ideals behind our liberation struggle was to establish a society in which communality and

segregation, based on religion, will have no place. The lifelong political struggle of Bangabandhu also essentially epitomised him as a gladiator for establishing equal rights and equal recognition of all faiths and their followers. This notion of non-segregation and non-communality worked as momentum for our liberation struggle. In the preamble, it was clearly spelt out that the high ideals of nationalism, socialism, democracy and secularism shall be the fundamental principles of the constitution. But by the Proclamations (Amendment) Order, 1977 (Proclamation Order No.1 of 1977), the following words were added to the beginning of the preamble, namely, "BISMILLAH-AR-RAHMAN-AR-RAHIM (In the name of Allah, the Beneficent, the Merciful)." In 2011, the Parliament brought Fifteenth Amendment to the constitution and made various significant and conspicuous changes. Although the Fifteenth Amendment abolished or substituted most of the provisions that were inserted by the martial law authority, it kept the religious invocation [BISMILLAH-AR-RAHMAN-AR-

RAHIM (In the name of Allah, the Beneficent, the Merciful)] at the top of preamble. It was a compromise with the martial law proclamation so far as the religion was concerned.

Being in line with the addition made by the Proclamations (Amendment) Order, 1977 (Proclamation Order No.1 of 1977) in the preamble, another military ruler passed the Constitution (Eight Amendment) Act, 1988 in a rubber stamp Parliament on June 9, 1988. The Eight Amendment incorporated fundamental changes in the constitution by incorporating a new clause as article 2A. This new article introduced Islam as the State religion, which was not in the 1972 constitution. Introduction of State religion was also in direct conflict with "secularism," which was one of the fundamental principles of State policy in the 1972 constitution. Despite the Parliament revived "secularism" as one of the fundamental principles of State policy by passing the Constitution (Fifteenth Amendment) Act, 2011, it retained article 2A.

Thus, as has been shown above, in order to cope with the religious sentiment, an element (religious invocation), which directly goes against the spirit and aspiration of our liberation war and which was inserted in the constitution by a martial law regime in 1979, was retained and legalised by the Parliament through the Constitution Fifteenth Amendment. Thereby, the principle of secularism was totally compromised and thus buried the spirit of original constitution and liberation war, as was espoused in the 1972 constitution.

Likewise, the following amendments made by the martial law regime through the Proclamations (Amendment) Order, 1977 (Proclamation Order No. 1 of 1977), which were not in the 1972 constitution, were retained by the Parliament through the Constitution (Fifteenth Amendment) Act, 2011, which may read thus:

> [In Article 42, for clause (2) the following shall be substituted, namely: -

> "(2) A law made under clause (I) shall provide for the acquisition, nationalisation or requisition Compensation and shall either fix the amount of compensation or specify the principles on which, and the manner in which, the compensation is to be assessed and paid; but no such law shall be called in question in any court on the ground that any provision of the law in respect of such compensation is not adequate."
>
> In article 47, in clause (2), for the provision the following shall be substituted, namely: -
>
> 'Provided that nothing in this article shall prevent amendment, modification or repeal of any such law.'

These changes were included under sections 17, 19, 35, 39 and 40 of the Constitution (Fifteenth Amendment) Act, 2011, and the Parliament retained these provisions, even though those were not in the original constitution.

Point to be noted here is that by the same amendment, i.e. the Fifteenth Amendment, like article

6, article 96 was also regularized and incorporated in the constitution by the same democratic government in 2011. But now Mr. Attorney General wants to highlight an exception by saying that the provision of the repealed article 96 was an act of martial law and thus it should not have any place in a democratic constitution like ours. But he seems to have no answer about retaining and regularizing the martial law provisions of the Muslim Family Laws Ordinance, articles 6, 42, 47 etc, in the constitution as shown above.

In fact, this discussion is a bit tautological yet it demands a clarification. In the first place, I am absolutely in agreement with the learned Attorney General's submission that a provision added by a martial law government cannot be placed in our hard-earned constitution, but a provision which in content and spirit is absolutely in harmony with the scheme of the constitution and was incorporated in the body of the constitution by a democratic government and competent Parliament by way of amendment cannot be

declared all on a sudden as conflicting only because the text of the provision is similar verbatim with the provision that was devised by a martial law regime. The submission of the learned Attorney General contains exactly this missing perspective. He is very much aware that repealed article 96 is the exact resemblance of the martial law provision, but his over emphasis on this point is making his vision blurred to see clearly that article 96 has been unequivocally approved by the Fifth Amendment Judgment considering this provision a relatively far better safeguard for the independence of the higher judiciary and related constitutional posts.

In Asma Jilani V. The Government of Punjab, PLD 1972 SC 139, Hamoodur Rahman, CJ. though declared all Martial Law Regulations, Martial Law Proclamations and Orders illegal, the court approved the views taken in the case of The Attorney General of the Republic V. Mustafa Ibrahim, 1964 CLR 195 observing that 'if it can be shown that it was enacted only in order to avoid consequences which could not otherwise

be avoided, and which if they had followed, would have inflicted upon the people of Cyprus, whom the Executive and Legislative organs of the Republic are bound to protect, inevitable irreparable evil; and furthermore if it can be shown that no more was done than was reasonably necessary for that purpose, was not disproportionate to the evil avoided', the Supreme Court thought it was its duty to do in view of its "all important and responsible function of transmitting legal theory into living law, applied to the facts of daily life for the preservation of social order." His Lordship then opined that recourse has to be taken to the 'doctrine of necessity where ignoring of it would result in disastrous consequences to the body politic and upset the social order....' The Court then posed a question as to how many of the acts, legislative or otherwise, should be condoned or maintained, notwithstanding their illegality in the wider public interest. The court called this 'a principle of condonation and not

legitimization." Applying this test, the Supreme Court condoned:

> "(1) all transactions which are past and closed, for, no useful purpose can be served by reopening them, (2) all acts and legislative measures which are in accordance with, or could have been made under, the abrogated Constitution or the previous legal order, (3) all acts which tend to advance or promote the good of the people, (4) all acts required to be done for the ordinary orderly running of the State and all such measures as would establish or lead to the establishment of, in our case, the Objectives mentioned in the Objectives Resolution of 1954."

The Muslim Family Laws Ordinance, 1961 was retained by the Bangladesh (Adaptation and Existing Laws) Order, 1972 read with the Bangladesh Laws (Revision and Declaration) Act, 1973. In this Act in section 6, it is said, all Acts of Parliament,

Ordinances and President's Order in force in Bangladesh shall be printed in chronological order under the name and style of the Bangladesh Code. The Muslim Family Laws Ordinance is still in force though it was promulgated by Pakistani military junta. Besides, in the Fifth Amendment case, this court also condoned the substituted provision of article 6 of the constitution by Proclamation No.1 of 1977 in place of the word "Bangalees" the word 'Bangladeshis'. The substituted provision of article 6 of the constitution, by the Martial Law Proclamation regarding the status of the citizens as 'Bangladeshis' has been retained in the Fifteenth Amendment.

In the dispensation of justice this court being the guardian of the constitution has to consider its onerous responsibility reposed upon it and with a view to avoiding anomaly and also to preserve continuity, it felt the necessity of passing consequential orders. This Court kept in mind the doctrine of severability to limit the application of

judicial verdict and observed that in doing so; the court can modify or even dismantle a legislation in the interest of justice. The court in such circumstances did not subscribe to the notions that all acts of the usurpers are illegal and illegitimate. The court took into consideration of the acts, things, legislative actions which are useful or which acts, things, deeds tend to advance or promote the need of the people or all acts, things and deeds which are required to be done for the ordinary functioning of the State or the acts, things, deeds and legislative matters which would augment the independence of judiciary and welfare of the people etc. This had been done in Pakistan as well as in Bangladesh.

Therefore, we are unable to accept the emotional submission of the learned Attorney General regarding non-retention of a provision of a martial law regime in the constitution.

In the Fifth Amendment case, this court approved clauses (2), (3), (4), (5), (6) and (7) of article 96

for two reasons, firstly, it was transparent procedure and secondly, if it was retained, it would safeguard the 'independence of judiciary'. Both sides admitted that the independence of judiciary is one of the basic features of the constitution. It is also admitted by both the parties that the basic features of the constitution cannot be changed, altered or amended. Though this court held that this provision had been retained for the independence of judiciary, it is contended on behalf of the State that it is not a basic feature of the constitution and that it has got nothing to do with the independence of judiciary.

Mr. Ajmalul Hossain, the learned Attorney General and the Additional Attorney General submit that the fear of the judiciary about Parliament's removal mechanism is entirely unwarranted. Mr. Hossain adds that there is no evidence before this court to infer that this impugned amendment would curtail the independence of judiciary and that apprehensions are based on conjectures and surmises. It is the common submission of the learned counsel

that under article 7(1), all power of the Republic belongs to the people. There is nothing inherently contradictory between a Judge's subjective or personal independence and his subjective or personal accountability. Quite the contrary, these things are fully complementary. A Judge may find the courage to act independently in the face of outside pressure precisely because the Judge is oath bound to maintain a strong ethical commitment. It has further been contended that the judicial independence is one of the most important basic structures of the constitution and the impugned Sixteenth Amendment undoubtedly ensures the accountability of the Judges to the people of Bangladesh. This forceful argument on behalf of the State for parliamentary removal method takes us to look at the systems prevailing in different countries around the globe.

Mr. M. Amirul Islam, submits that the independence of judiciary depends not only upon the provisions of removal, it is a comprehensive process starting from (a) selection process and criteria for

evaluation of Judges to be selected followed by (b) security of tenure and (c) providing adequate emolument and providing procedure for removal on proven misconduct with adequate opportunity and participation for a Judge to defend his/her position before an independent tribunal duly constituted under a law following international standard. In this connection, he has taken us through the United Nations Basic Principles on the Independence of Judiciary, 1985 which was adopted in order to assist member States in their task for securing and promoting the independence of the judiciary. Learned counsel has also taken us through the Latimer House Guidelines for the Commonwealth, 1998 and submits that according to the Guidelines "jurisdictions should have an appropriate independent process in place for judicial appointments" and that '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 make full defence

and to be Judged by an independent and impartial tribunal.'

On the question of impeachment of Judges, Mr. Islam has drawn our attention to the case of Justice Ramaswami (K.Veeraswami V. Union of India), the Sri Lankan experience, the Malaysian experience and drew our attention that in 30 jurisdictions (62.5%), a disciplinary body that is separate from both the Executive and 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. In 10 other jurisdictions (20.8%) the decision is entrusted to a permanent disciplinary council. All learned Amici other than Mr. Ajmalul Hossain have also accepted the submission of Mr. Islam.

Dr. Kamal Hossain by referring to an article published in Bombay University Press submits that the American experience in impeaching a Judge has been

unsatisfactory. According to him, the Senate, which is a legislative body, has little time for a detailed investigation into the conduct of a Judge; and where such investigation is made, political and party consideration have come into play. He adds that the American scenario of impeachment has been criticized as an unsatisfactory process. Thus according to him, the risk of impeachment being highly politicized will be even more prominent in the current political context in Bangladesh, especially due to the effect of article 70 of the constitution, which stipulates that 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 votes in Parliament against that party. He adds that in view of such provision, it is questionable as to what extent the members of Parliament can be impartial and free from partisan political directives at the time of exercising the power of impeachment. Learned counsel has also drawn our attention to the

impeachment procedure existing in England, Australia and some other regions.

I would like to mention that the American judiciary had faced similar problem as to its independence about 214 years ago. It is better to quote some observations on historical facts made by Chief Justice Earl Warren, one of the prominent Chief Justices in the history of United States, in his book 'The memoirs of Chief Justice' as under:

> "Only two years after John Marshall was appointed Chief Justice, he and the Court were in great trouble with Thomas Jefferson because in his landmark decision of Marbury v. Madison (1803), Marshall held that executive action was subject to judicial review. The party of Jefferson, with his support, undertook to remove the Justices responsible for the decision, and in the following year, Justice Samuel Chase was impeached by the House of Representatives, not for "treason, bribery or other high

> crimes and misdemeanors," as provided in Article II, Section 4 of the Constitution, but for intemperate political criticism of the Administration in his instructions to a grand jury. He was acquitted after a trial in the Senate. He is the only Justice in the history of the Supreme Court to have been impeached, but there is little doubt in the minds of historians that had he been convicted a similar fate awaited Chief Justice Marshall and his colleagues; not for "high crimes and misdemeanors," but for disagreeing with the Administration.'

Thomas Jefferson never recanted on his enmity, and twelve years after he left the presidency he wrote: "The judiciary of the United States is the subtle corps of sappers and miners constantly working underground to undermine the foundations of our confederated fabric. They are construing our Constitution from a co-ordination of a general and

special government to a general and supreme one alone. This will lay all things at their feet."

Later Marshall had similar problems during the Andrew Jackson administration; yet today he is regarded as the most towering figure in USA's judicial history.

> 'Chief Justice Taney, following Marshall from 1833 to the Civil War, had severe difficulties through the outgrowth of the troublesome slavery question.'
>
> And even in this century the two Roosevelts brought the force of their Administrations to bear against the Court. Theodore Roosevelt castigated the Court publicly for not following his policies, and advocated the recall of controversial decisions of the Supreme Court by popular vote. Disappointed because Justice Oliver Wendell Holmes, his first appointee and one of the giants of Court history, failed to support his position in an important

antitrust case, he was reported to have complained that he might as well have appointed someone with a backbone of macaroni.

Franklin D. Roosevelt, angered by decisions of the Court during his Administration, sought to have Congress increase the number of Justices by adding one for each Justice over the age of seventy, of whom there were then six, thus enabling him to bring the number to the maximum of fifteen as fixed by the bill. Called by its proponents the Court Reorganization Bill and by its opponents the Court packing Bill, it was killed in committee and did not reach the floor in either house.

Every man who has sat on the Court must have Known at the time he took office that there always has been and in all probability always will be controversy surrounding that

body. It is inherent in the Court's work. Accordingly, he must have been prepared for attacks upon it. I venture to express the hope that the Court's decisions always will be controversial, because it is human nature for the dominant group in a nation to keep pressing for further domination, and unless the court has the fiber to accord justice to the weakest member of society, regardless of the pressure brought upon it, we never can achieve our goal of "life, liberty and the pursuit of happiness" for everyone.

Perhaps, therefore, before discussing my own approach to the problems of the Supreme Court which have provoked the most feeling, it might be enlightening to explain in non legal terms what the jurisdiction and the procedures to the court are. I say this because in the news media the court is often portrayed as a mysterious body operating behind a veil of secrecy, and the general

> public is led to believe that its "mystique" is beyond the comprehension of normal individuals. This is far from the truth, and after sixteen years on the Court and several in retirement, I am prepared to say that its processes are more available to the public than those of the other branches of the government the Congress and the presidency." (Ibid)

In another landmark decision in United States V. Burr, June 13, 1807, J.M. Papers, 7:37-50, on the issue of withholding evidence, Burr demanded to see documents at the trial. The President had said the documents would prove Burr's guilt but the prosecution and the President refused the demand for producing documents. Marshall, CJ declared:

> "The Uniform practice of this counting has been to permit any individual who was charged with any crime to prepare for his defense.... The genius and character of our laws and usages are friendly, not to

> condemnation at all events, but to a fair and impartial trial. Accordingly they consequently allow to the accused the right of preparing the means to secure such a trial."

When the prosecution retorted by citing the British constitutional principle that 'the king can do no wrong', Marshall replied:

> "By the constitution of the United States, the President may be impeached and removed from office on conviction of high crimes and misdemeanors. By the constitution of Great Britain the Crown is hereditary and the monarch can never become a subject.... The President is elected from the mass of the people, and on expiration of the time for which he is elected, he returns to the mass of the people again.'

Ultimately the jury declared Barr not guilty of the indictment. Jefferson immediately sent the trial records to the Congress demanding that the House

impeach Marshall and write a constitutional amendment that would roll back Marshall's decisions and sharply circumscribe judicial authority. 'We had supposed we possessed fixed laws to guard just equally against treason and oppression', Jefferson raged. "But it now appears we have no law but the will of the Judge." (Thomas Jefferson to Willam Thompson, September 26, 1807, Ford, works of TJ, 10: 501-502).

Jefferson ordered 'Let the Judge be impeached', demanded the Richmond Enquirer which call Federal Judges in general 'too independent of the people' and Marshall in particular 'a disgrace to the bench of justice'. (Enquirer (Richmond), December, 1808). Jefferson's Republican in congress acted to dilute Marshall's powers by increasing the number of Supreme Court Justices to seven to ensure a large enough Republican majority to dispatch Chief Justice John Marshall and his opinions into legal obscurity, but he failed in his endeavour. (John Marshall, page 255).

The High Court Division after exploring the removal mechanism around the globe observed that:

"(a) There are no Commonwealth jurisdiction 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 Organization 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 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."

And the High Court Division concluded its opinion as under:

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 calculation 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/misbehavior 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."

In Bangladesh, we have inherited the legacy of the administration of justice from the British colonial power and still we are following the same

judicial procedures and principles with a little modifications. To begin with, the British system, Chief Justice Coke, one of the greatest English Jurists, wrote at the beginning of the Seventeenth Century; 'The reason of the law is the life of the law, for tho' a man can tell the law, yet if he knows not the reason thereof, he shall soon forget his superficial knowledge, but when he findeth the right reason of the law and so bringeth it to his natural reason that he comprehended it as his own, this will not only serve him for the understanding of that particular case but of many others.' (Historical Introduction to English Law, Co. Litt., f.183b).

If we look at the foundations of the English legal system, we find that the Judiciary as an independent third branch of the State still survives as an ideal, though not as part of the British constitution. Whatever critics of Dicey's theory of the 'Rule of Law' may say of our time and generation, it cannot be doubted that the common law played a tremendous part in the events which led up to the

establishment of British modern constitution and with it the English way of life and thought. (Ibid)

When Parliament was showing an arbitrary temper comparable with that of the Stuart Monarchy in the Seventeenth Century, Wilkes appealed, and not in vain, to the common law. At the same time, when the English Government was refusing to British American colonies the rights for which Parliament had fought nearly a hundred years before, the Framers of the United States constitution saw so clearly the true place of law in the government of the people that they conferred upon the Supreme Court the power to declare invalid the acts of President or of Congress.

This is the lesson for the present age. If the people would live in peace and enjoy their liberties and, because this is a corollary to all liberties, observe their obligations, there must be law, and to declare it, law courts presided over by independent Judges who will "administer justice indifferently to all men". (Historical Introduction to English Law, Fourth Edition of A.K.R. Kiralfy). With the passage

of time, the judicial accountability system has been dramatically changed in respect of United Kingdom. The procedure to be adopted is in the following manner:

"In terms of regulating misconduct in the judiciary, the executive still plays a central role, sharing the responsibility for judicial complaints and discipline jointly with the Lord Chief Justice,(LCJ); under detailed procedures set out in the Concordat and implemented in the Judicial Discipline (Prescribed Procedure) Regulations 2006. The old Lord Chancellors enjoyed considerable discretion over judicial discipline, though the department was generally thought to handle dismissals and discipline 'with considerable natural justice', with a 'quiet word' often used to encourage Judges to step aside. Today, responsibility for complaints is shared between the LCJ and the Lord Chancellor, supported by a Judicial Conduct Investigations Office (JCIO) staffed by civil servants. The Lord Chancellor is accountable to Parliament for the operation of the

discipline system. The JCIO filters out unfounded or trivial complaints, referring serious ones to a nominated judge, who acts as a further filter. Then to an investigating Judge. This triage system ensures that non-trivial complaints receive proper consideration and that Judges are investigated by their peers. If at the end of the process the LCJ and Lord Chancellor wish to take disciplinary action, they must refer the case to a review body composed of two Judges and two lay members.' (The Politics of Judicial Independence in the UK's Changing Constitution P.58-59).

The LCL and Lord Chancellor must decide jointly on disciplinary sanctions but cannot take any action more severe than that recommended by the review panel. At the end of the process only the Lord Chancellor can formally remove a Judge from office, and only at Circuit Judge level and below. For Judges of High Court level or above, the decision to dismiss must be approved by both Houses of Parliament (this has not occurred since 1830). There is also a process

for reviewing the JCIO process itself. Complaints of Judges can raise concerns about the handling of a complaint (but not the merits of the decision made) with the Judicial Appointments and Conduct Ombudsman (JACO). Allegations of serious misconduct remain very rare amongst the senior judiciary. That said the JCIO and the JACO receive significant numbers of complaints an average of around 1,700 a year. This, in turn, requires significant resources: the JCIO has fifteen staff and the JACO ten. A significant proportion of complaints received (normally 50 per cent or more) relate to judicial decisions rather than alleged misconduct and are dismissed for this reason. Between 2008 and 2013 an average of fifteen court judges were disciplined each year for misconduct. A similar number (eighteen) resigned. The average figure for Judges removed from office is very low- less than two per year." (Ibid)

Though the United Kingdom is the only country which is being run by unwritten constitution— the Executive, the Monarch, the Parliament and the

Judiciary are working side by side without intrusion of powers by one organ on the other. It is found that even if in the absence of any constitution and disciplinary mechanism, a Judge of the High Court was removed about 187 years ago. (Ibid)

After passing of the Constitution Reform Act, 2005, the relationship between the Parliament and the judiciary has undergone a structural change. The removal of the UK's highest court of appeal from the House of Lords formally separated the Judges from the legislature and this has inevitably changed the institutional architecture within which Judges and parliamentarians interact. But the provisions of the Act do not tell the whole story of those changes, which did not begin and end in 2005. The removal of the Law Lords was a critical moment, but practices shaping relations between Parliament and Judges were changing before then and have evolved since.

There will always be tensions between Parliament and the Courts. Recent years have provided a number of high profile examples: sustained wrangling over

the proper scope of judicial review in human rights and national security cases, the role of the European Court of Human Rights, and the boundaries of parliamentary privilege. Decisions by courts in relation to human rights and judicial review are often points of friction between Judges and politicians. After the creation of the UK Supreme Court, the roles of President and Deputy have been clearly defined. (Ibid)

The Constitutional Reform Act confers several responsibilities on the offices. 'A number are conferred directly on the President alone, reflecting the fact that this office has a heavier mix of outward-facing and inward-facing functions. In practice, the President and Deputy work closely in issues relating to the Court's judicial role, with both working with the Chief Executive on non-judicial matters. There are five key responsibilities for the President and/or the Deputy President relating to judicial business over and above sitting in and presiding over hearings. First, the President and

Deputy President determine the composition of the panels that hear applications for permission to appeal and full hearings. Second, the President may request senior appellate Judges from England and Wales, Scotland and Northern Ireland to serve as an acting Judge' in the Court on a temporary basis. The President may also ask members of a supplementary panel of retired appellate Judges to sit. Third, the President is responsible for making the Courts Rules. In practice, the Court's first President delegated much of this task to the Deputy President. Fourth, the President has an important role relating to complaints and discipline.' (Ibid P-198)

On the question of judicial accountability and judicial discipline, it is said that "the court is largely self-regulating. The Constitutional Reform Act in UK provides that the Justices hold office during good behaviour, but may be removed from it on the address of both Houses of Parliament. Given that no Judge has been removed by Parliament since 1830, this is a measure of last resort that is unlikely to

be used. Although not required by statute to do so, the Court’s first leadership team introduced a complaint procedure. Complaints relating to the effects of the Court’s judicial decisions are inadmissible, but any disclosing grounds for further consideration are referred to the President, who can decide to take no action or to resolve the complaint informally. If formal disciplinary action is considered, the President must consult with the Lord Chancellor. Formal action involves a tribunal consisting of the Lord Chief Justice, the Lord Chief Justice of Northern Ireland and the Lord President (head of the Scottish judiciary), plus two independent members nominated by the Lord Chancellor. After the tribunal delivers its report, the Lord Chancellor must decide whether to remove the Justice by laying the necessary resolution before both Houses of Parliament.(Ibid P.201-202)

This change has been made to announce the Judges independence. In respect of Scotland and Northern Ireland, the Judges enjoy much greater autonomy over

judicial complaints and discipline than do their counterparts in England and Wales. In each jurisdiction, the investigation of complaints against Judges is run for the most part by the judiciary. However, a key difference is that in England and Wales, the Lord Chancellor still plays a central role: the Lord Chief Justice and the Lord Chancellor have to co-operate both in the making of rules and in reaching disciplinary decisions. (Ibid P- 237)

The judiciary retains significant influence at all stages of the process. Judges below High Court level may be suspended or removed only with the agreement of the Lord Chief Justice of Northern Ireland (LCJ-NI). If the tribunal recommends suspension or dismissal of a High Court or Court of Appeal Judge, the advice of the LCJ-NI must be taken and the matter then goes to the Prime Minister and Lord Chancellor. Judges at this level may be dismissed only by the UK Parliament. (Ibid P.238)

The Judges ultimately agreed to the new approach on condition that the Lord President would have

complete control over the system. The result has been that the Lord President has what amounts to absolute authority to issue rules and manage the complaints and disciplinary system. (Ibid)(emphasis supplied)

The other parliamentary mechanism for removal of Judges is in India. In this connection, the learned counsel Mr. Manzill Murshid and the learned Amici except Mr. Ajmalul Hossain have drawn our attention to the pathetic experiences being faced by it. Mr. M. Amirul Islam has drawn our attention to three notable cases concerning judicial inquiries and impeachment motion which have been initiated.

The very first and the only case that involved the impeachment motion and the Inquiry Committee formed against Justice V. Ramaswami of the Supreme Court found him guilty on account of gross abuse of his financial and administrative powers as the Chief Justice of the Punjab and Haryana High Court and criminal misappropriation of property. The impeachment motion was however vanquished, as it did

not attain a special majority in the Lok Shobha as required.

The second case involved Justice Soumitra Sen of the Calcutta High Court whose removal from office was sought on two grounds by the following motions: (i) misappropriation of large sums of money in his capacity as the receiver appointed by the High Court of Calcutta; and (ii) misrepresentation of facts with regard to this misappropriation of money before the High Court of Calcutta and was initiated in Rajya Sabha on 17 August 2011. However, before his impeachment proceedings began in the Lok Sabha, Justice Soumitra Sen sent his resignation to the President of India, with a copy to the Speaker, LokSabha. However, the impeachment motion subsequently lapsed.

Another such motion was initiated against Chief justice Dinakaran of Sikkim High Court who then resigned from his post. Parliamentary Standing Committee reports on the Judicial Standards and Accountability Bill, 2010(JSAB) in the midst of

impeachment motions against Justice Sen and Dinakaran in India came in for severe criticism from the Campaign for Judicial Accountability and Reforms (CJAR).

The resignations of justices Sen and Dinakaran have exposed the inadequacies of the present system to make Judges answerable for their omissions and commissions because of the inherent politicization of the parliamentary mechanism. The fact that tainted Judges can simply evade parliamentary scrutiny and censure by resigning is a telling commentary on the lacunae in the legal and constitutional provisions in regard to impeachment.

One of the very recent incidents of disciplinary proceeding is against Justice Karnan, a Judge of the Calcutta High Court. Justice Karnan’s shenanigans have exposed many weaknesses in the higher judiciary and point to much more than the acts of just one man. This Judge had called a press conference to accuse a fellow High Court Judge of caste discrimination on the ground that the Judge who sat next to him

‘deliberately’ touched him with his foot. In 2015, he interrupted arguments going on in another courtroom in the Madras High Court regarding judicial appointments, demanding to be heard. In April 2015, he began suo motu contempt proceedings against the Chief Justice of the Madras High Court, Sanjay Kishan Kaul, accusing the latter of harassing and belittling him because he was a Dalit and by giving him ‘insignificant and dummy’ portfolios. The Supreme Court stayed the same. Justice Karnan then accused Kaul of corruption in February last year, following which the Supreme Court transferred him to Calcutta. When the Supreme Court lifted his stay order, he asked the chief police to book a case against the two Judges under the SC/ST (atrocities) Act. The Supreme Court threatened to haul up him for contempt for some of the statements that he made, but Justice Karnan apologized saying that his ‘mental balance’ was severely affected. He finally took charge at the Calcutta High Court. Thereafter, Justice Karnan has been hauled up for sending a letter to the Prime

Minister with a list of sitting and retired High Court and Supreme Court Judges whom he wants to be 'interrogated' by investigative agencies on the grounds of corruption.

The contempt proceedings suggest an attempt to fill this lacuna in the institution. Ultimately the Supreme Court by order dated 11th March, 2017, issued a warrant against Justice Karnan for his keeping a contempt case were to be served by the Bengal Police Chief. In another unprecedented move, Justice Karnan called a 'court' on the lawns of his home in Kolkata and ordered the CBI to investigate the seven Supreme Court Judges who issued a contempt notice against him. 'The Supreme Court is not my master', said the Judge, alleging that he was being targeted because he is a Dalit. Justice Karnan has filed a defamation case against the seven Supreme Court Judges, who have ordered him to appear in court on March 31. "This is a caste issue. A Dalit Judge (is being) prevented from doing work in a public office. That is atrocity,' Justice Karnan told reporters after

holding his 'court' and issuing a 'writ order' to the CBI. "I am going to operate my judicial powers. All seven judges have to resign and should be prosecuted," declared the Judge, also urging the President to cancel the Supreme Court's warrant against him. Chief justice of India JS Khehar and six Judges had summoned Justice Karnan to court for contempt in February after his controversial allegations about corruption in the judiciary. Ultimately, he was sentenced to six months simple imprisonment.

In India it is a talk of the day that the impeachment by Parliament is a long-drawn-out and difficult process. It is in the constitution where judicial independence is rigorously protected. Whatever 'misbehaviour' a Judge is alleged to have committed should be serious enough for Parliament to sit up and take notice before removing her or him from office. It is also the only sanction that can be imposed on an erring Judge. At present, there are certain informal measures that can be taken against

an erring Judge; change their workload to different cases, relieve them of all judicial works, or transfer to another High Court. The first two ways can be done by the Chief Justice in charge of the High Court, while the last requires the cooperation of the government. There is no way for the public (or even the Judge) to know why a Judge might have been 'penalised' this way and what behaviour crossed the line. There also remains a gap in severity between these measures and impeachment.

The controversy surrounding Karnan is part of a larger problem in the judiciary rather than a one-off problem. Late in 2016, the Supreme Court initiated contempt proceedings against former SC Judge Markandey Katju for his ill-thought-out comments against Judges. Multiple Judges of the High Courts and the Supreme Court have faced accusations of sexual harassment. Nirmal Yadav of the Punjab and Haryana High Court also faced charges framed by a CBI court for allegedly receiving a bribe as a sitting Judge in 2008.

Although their attention was drawn to the recent episode of India, neither the Attorney General nor the Additional Attorney General or Mr. Ajmalul Hossain has made any reply in this regard. So, the Indian experience is not happy one and though the India has a strong democracy since 1937 and its Parliament is also very matured, its appointment process of the Judges is more transparent than that of ours and even then, the Judges removal mechanism by Parliament is not working in India.

In Sri Lanka there are two systems of judicial removal mechanism in respect of a Judge of the Supreme Court. Section 107 of its constitution provides as under:

> "107. Every such Judge shall hold office during good behaviour and shall not be removed except by an order of the President made after an address of Parliament supported by a majority of the total number of Members of Parliament (including those not present) has been presented to the

President for such removal on the ground of proved misbehaviour or incapacity.

Provided that no resolution for the presentation of such an address shall be entertained by the Speaker or placed on the Order Paper of Parliament, unless notice of such resolution is signed by not less than one-third of the total number of Members of Parliament and sets out full particulars of the alleged misbehaviour or incapacity."

In respect of Judge of the High Court, section 111 provides that 'the Judge of the High court shall-2(b) be removed and be subject to the disciplinary control of the President on the recommendation of the Judicial Service Commission'. So, in respect of removal of High Court Judges the President shall exercise the power on the recommendation of the Judicial Service Commission, an independent body.

Mr. Islam submitted that the 43rd Chief Justice of Sri Lanka Shirani Bandaranyake was impeached by Parliament in January, 2013 by President Mahinda

Rajapaksa only because she gave a ruling against the government in reprisal for inconveniently declaring unconstitutional part of its legislative agenda including one against a bill proposed by Basil Rajapaksa, then Minister for Economic Development and the brother of President Mahinda Rajapaksa. On 6th November 2012, 14 charges were made against Chief Justice Bandaranyake including professional and financial misconduct and abuse of power. Even though the Speaker revealed these charges which Chief Justice Bandaranayake had denied and refused to resign from her office, a Parliamentary Select Committee (PSC) was formed with seven ruling party MPs along with 4 opposition MPs to conduct an inquiry and the PSC found Bandaranayake guilty on account of a few charges which was enough to remove her from the office. All the four opposition MPs withdrew from the Committee rejecting the reports saying "This was not an inquiry-it was an inquisition". The report was first sent to the President and later to the Parliament for vote on the impeachment motion.

Meanwhile the people opposed the removal of the Chief Justice. On 1st January, 2013, the Supreme Court ruled that the PSC had no power to investigate the charges of allegations against the Chief Justice and the impeachment was therefore unconstitutional. Chief Justice Bandaranayake appealed against the PSC and on 11 January, 2013, the Court of Appeal quashed the PSC's findings declaring the impeachment unconstitutional. Chief Justice Bandaranayake continually refused to recognise the impeachment and lawyer groups refused to work with the new Chief Justice. Chief Justice Bandaranayake's controversial impeachment drew much criticism and concern from within and outside Sri Lanka. After the change of the government on 28 January 2015, she was reinstated and she herself resigned on the following day on 29 January 2015.

Despite significant opposition, the then President's senior advisor, Mohan Peris was appointed as the New Chief Justice in place of Bandarnayake. The impeachment and subsequent appointment of the new

Chief Justice suffered condemnation from international bodies including the USA, UK and Commonwealth, among many others that they refused to recognize the legal standing of the new Chief Justice. Since the constitution of Sri Lanka was enacted in 1978, there has not been much safeguard for Judges against pressure from the Executive and Legislature. Their Security of tenure turned volatile by the lack of transparent and accountable procedures for the appointment, transfer, discipline and removal of Judges of higher judiciary.

The Eighteenth Amendment of the constitution was enacted in September 2010 in Sri Lanka. The new amendment gave the President Mahinda Rajapaksa power to appoint the most important officials of Sri Lanka, members of various tribunals including Judges of the Supreme Court as well as the Court of Appeal and Judicial Service Commission. The removal of Chief Justice Bandaranayake was not merely a political act; it also grievously tarnished the confidence of the public in Sri Lanka that had already rendered fragile

the rule of law, which came under censure by the Media and public opinion at home and abroad.

In respect of Malaysia, Mr. Islam submitted that during Mahathir's tenure as Prime Minister in 1982, several constitutional amendments were made in order to severely weaken the institutional strength of Malaysia's judiciary. Mahathir was a dominant political figure, winning five consecutive general elections and fending off a series of rivals for the leadership of United Malays National Organisation (UMNO) party elections in 1987 and matters then came to a head when Mahathir Mohamad, who believed in the supremacy of the Executive and Legislative branches, became Prime Minister. This crisis was very well known as judicial or constitutional crisis.

In an unexpected decision in February 1988, the High Court ruled that UMNO was an illegal organisation and Mahathir being upset with the judiciary's increasing independence passed constitutional amendments to articles 121 and 145 through Parliament to remove the general power of the

High Courts to conduct judicial review, divesting the courts of the "judicial power of the Federation" and granting them instead such judicial powers as Parliament might grant them. The then Lord President of the Supreme Court, Salleh Abas, with due support of other Judges sent a letter of protest to the Head of State, Agong (King of Malaysia), defending the autonomy of the judiciary. Their removal has not only been criticized locally in their countries but also caused widespread international concern and brought criticism both at home and abroad by international bodies.

The history of parliamentary impeachment in Asian regions does not create any favourable impression until it has brought political intervention in the judiciary as further enunciated in a report of the International Bar Association's Human Rights Institute (IBAHRI) "A Crisis of Legitimacy: The Impeachment of Chief Justice Bandaranayake and the Erosion of the Rule of Law in Sri Lanka." Whereas many Malayisan Scholars in regard

to the independence of Malaysia's judiciary such as Milne and Diane K. Mauzy put it (at page 47 of 'Malaysian Polities Under Mahathir')as: "Henceforth, the powers of the judiciary would no longer be embedded in the constitution; rather they would be conferred by Parliament through statutes. Also, by this Act, the High Courts were stripped of the power of judicial review previously granted in the constitution. Further, the Attorney-General assumed control of instructing the courts on what cases to hear and which courts to use, and assumed responsibility for judicial assignments and transfers. Hence, virtually overnight, the modified separation of powers was terminated and the judiciary was stripped off much of its independence and power."

In matured democracy like India, even after institutionalisation of both the Houses of Parliament, criminalisation of politics and corruption of the Parliamentarians could not be wiped out till now. In a celebrated book 'Religion, Caste & Politics in India' Christope Jaffrelot, a Research

Director at Centre National de la Recherche Scientifics (CNRS) had considered Indian corruption and criminalisation in politics. The author noted that corruption has become an all-pervasive phenomenon in contemporary India (page 621). He took note of the fact that the criminilisation of politics started long back in the country including Uttar Pradesh. The criminals and mafias developed direct nexus with the politician of the State and helped them to be elected. Initially, politicians availed the help of criminals in electoral matters but later on, criminals entered into politics and got themselves elected in the Assemblies and Parliament. In this connection Justice Devi Prasad Singh in his book 'Law & Reality' depicted the real picture of the country as under:

> "The 1996 Legislative Assembly in Uttar Pradesh did not reverse but may have increased the 1993 trend. Not only did the BJP, the BSP, and the SP give tickets to dozens of candidates against whom legal

proceedings had been instituted (33, 18, and 22 respectively), but a certain number of BJP, BSP and Congress MLAs amongst them became ministers when the BJP formed the government, first jointly with the BSP, then alone, from October, 1997. This was achieved by recruiting dozens of MLAs from the BSP and the Congress (and offering up to a few hundred thousand rupees per MLA), with a ministerial post for each. Thus, the Uttar Pradesh cabinet comprised 92 members. The BJP Chief Minister, Kalyan Singh, tried to project himself as clean and set-up a Special Task Force (STF) in 1998 to capture or liquidate criminals. However, public enemy number one, then was Shri Prakash Shukla, who appeared to have colluded with at least eight ministers of Kalyan Singh's government; they protected him, making the task of the STF more complicated (Mishsra 1998: 52).

Uttar Pradesh is not the only State where the entry of the mafia into politics has accelerated in the last few years. Bihar is certainly as seriously affected as Uttar Pradesh. In 2000, 31 Legislative Assembly crimes ranging from murder to dacoity. Most of them contested as 'Independents', but there were BJP, Congress, RJD, and Samata candidates as well. Maharashtra is also suffering from the same disease. During the municipal elections in 1997, 150, 72 and 50 candidates with past or present difficulties with the law (Godbole 1997) were fielded from Mumbai, Nagpur, and Pune respectively. Andhra Pradesh is not lagging behind, since in 1999 an NGO called Lok Satta Election Watch released a list of 46 candidates contesting elections to the Lok Sabha or the Legislative Assembly with, allegedly, some criminal background (The Hindu, 3 September, 1999: 5).

> Delhi is also new in this circle of most criminalized states. In fact, Delhi is gradually taking over from Mumbai as the crime capital of India. This city-state tops the list of number of crimes per head, with 527 in 1996 (against 121 in Bihar) and in terms of percentage change, with +55 per cent change in 1996 over the quinquennial average of 1991 : 5 (Swami 1998: 17). Out of 815 Legislative Assembly candidates in 1998, 120 had more than two criminal cases registered against them, and out of 69 MLAs, 33 had criminal cases against them (The Hindustan Times, 26 October, 1998; The Hindu, 23 November, 1998)."

There are lot of controversies over elections in different States and with a view to obviating and curbing criminalisation in elections, Dipak Misra, J. speaking for the Supreme Court of India in Krishnamoorthy V. Sivakumar (Civil Appeal No.1478 of 2015) on the issue "what constitutes 'undue

influence' in the context of section 260 of the Tamil Nadu Panchayat Act, 1994" observed that the crucial recognised ideal which is recognised to be realised is eradication of criminalisation of politics and corruption in public life. The core issue in the case was non-disclosure of full particulars of criminal cases pending against a candidate, at the time of filing nomination. After evaluating all decisions of the court on corrupt practice in election matters, the court was of the view that much improved election system is required to be evolved to make election process both transparent and accountable so that influence of money and physical force of criminals do not make democracy a farce –the citizen's fundamental 'right of information' should be recognised and effectuated. Accordingly he directed to follow the following guideline:

(a) Disclosure of criminal antecedents of a candidate, especially, pertaining to heinous or serious offence or offences relating to corruption or moral turpitude at the time of

filing of nomination paper as mandated by law is a categorical imperative.

(b) When there is non-disclosure of the offences pertaining to the areas mentioned in the preceding clause, it creates an impediment in the free exercise of electoral right.

(c) Concealment or suppression of this nature deprives the voters to make an informed and advised choice as a consequence of which it would come within the compartment or direct or indirect interference or attempt to interfere with the free exercise of the right to vote by the electorate, on the part of the candidate.

(d) As the candidate has the special knowledge of the pending cases where cognizance has been taken or charges have been framed and there is a non-disclosure on his part, it would amount to undue influence and, therefore, the election is to be declared

null and void by the Election Tribunal under Section 100(1)(b) of the 1951 Act.

(e) The question whether it materially affects the election or not will not arise in a case of this nature.

There may arise similar incidents of conflict in Bangladesh where the election disputes are heard by the Judges of the High Court Division and on appeal by this Court. There are many cases pending against the Executives and Parliament members and the disposal of which may not be fair if the judicial removal mechanism is kept with the Parliament. It may lead towards a destruction of judicial Independence. For instance, article 49 of The Representation of the People Order, 1972 avers that "(1) No election shall be called in question except by an election petition presented by a candidate for that election in accordance with the provisions of this Chapter.

(2) An election petition shall be presented to the High Court Division within such time as may be prescribed."

Those countries' experiences towards the Parliament-led mechanism for removal of Judges of the Higher Judiciary are pathetic, politicized and unworkable. The systems being followed are not working and all these countries are facing a lot of criticisms from home and abroad. Those countries' social and economic conditions are much better than ours and their experience in democracy are much matured than ours. We did not have any democracy from 1947 till 1971. We had only three and half year's democratic government after the independence in 1971. Then the country experienced the worst nightmare in history— not only the father of the nation but also his entire family (except two daughters) including a minor boy of four years old, were brutally killed. The country again fell into the hands of the guns and generals, who established a reign of terror through martial laws, and it continued till 1990. After innumerable sacrifices and through a tremendous mass uprising the military demagogue was ousted from power and the country again came to its usual course of

parliamentary democracy. But the system could not work properly due to the apathy of the government then in power to hold free and fair election. In the Sixth Parliamentary election, the biggest political party which led the liberation struggle did not participate and the Parliament could not survive for more than two months. After a huge agitation, the government was compelled to amend the constitution. The Constitution (Thirteenth Amendment) Act, 1996 incorporating a system of 'Non-Party Care-Taker Government' for holding free and fair election was passed, but it did not take long time to discover that this system had some incurable inherent weaknesses. Again, the country went through another saga of military backed care taker government in the garb of Emergency for two years. It was also due to the lack of forsightness of the politicians in power and their apathy to institutionalizing democracy.

By the Thirteenth Amendment, articles 58B, 58C, 58D, 58E were inserted and articles 61, 99, 123, 147, 152 were amended. Form 1A was also inserted in the

Third Schedule of the constitution. Under the amended provision, a Non-party Caretaker Government shall wield the Executive power of the Republic, but it shall discharge its functions as an interim government and shall carry on the routine functions of the government without any power of making any policy decision during the period from the date on which the Chief Adviser of such government entered upon office after Parliament was dissolved or stands dissolved by reason of expiration of its term till the date on which a new Prime Minister entered upon his office after the constitution of the Parliament. The mechanism for choosing Caretaker Government had been provided in article 58C. There was controversy over choosing of the Chief Advisor of the government. The country had to experience an attempted coup d'état by the Chief of Army Staff which had resulted in his removal during one interim government period.

Ultimately this constitutional amendment was challenged in the High Court Division. The matter came before this court and by majority, this court in

Abdul Mannan Khan V. Bangladesh, 64 DLR (AD) 169 declared the amendment *ultra vires* the constitution. In the majority opinion, this court was of the view that two parliamentary elections may be held under the Caretaker System subject to the condition that the selection of the Chief Advisor should not be made from amongst the last retired Chief Justice or the retired Judges of the Appellate Division, in accordance with clauses (3) and (4) of article 58C. This court gave the above direction keeping in mind that by keeping this system there was likelihood of politicization in the selection of the Chief Justice and alternatively the Election Commission should be made more empowered and institutionalized so that the parliamentary elections can always be held fairly. This court noticed that in every national election, the political party which lost the election questioned the impartiality of the election and the opposition party did not co-operate in the Parliament. Ultimately in the 10th Parliamentary

election, one of the big political parties did not participate.

This court was of the view that the government shall strengthen the Election Commission with all powers for holding a free and fair Parliamentary election and that there will be automatic filling up of the vacancies of the Election Commission without the intervention of the government. None of the succeeding governments took any step in this regard. Even the opposition political party has not also raised this point either in the Parliament or in any forum with the net result that the Election Commission has not been institutionalized as yet.

Unless the National Parliamentary Election is held impartially and independently free from any interference, the democracy cannot flourish. In the absence of credible election, a credible Parliament cannot be established. As a result, our election process and the Parliament remain in infancy. The people cannot repose trust upon these two institutions and if these institutions are not

institutionalized to gain public confidence and respect, no credible election can be held. In the absence of a free and fair election the Parliament cannot be constituted with wise politicians and this may impede institutionalization of the Parliament itself. If the Parliament is not matured enough, it would be a suicidal attempt to give the Parliament the power of removal of Judges of the higher judiciary. The judiciary should not be made answerable to the Parliament. More so, the political parties should be cautious in selecting their candidates for the national elections. As noticed above, even in matured democracy, where election mechanism has been institutionalized and the parliamentarians are elected in free and fair elections, they also could not properly transact the business of removal of Judges of the highest court impartially.

It is expected in a country run by constitutional democracy that the following indispensable constituents would exist: (a) purity of

election, (b) probity in governance, (c) sanctity of individual dignity, (d) sacrosanctity of rule of law, (e) independence of judiciary, (f) efficiency and acceptability of bureaucracy, (g) credibility of institutions like judiciary, bureaucracy, Election Commission, Parliament, (h) integrity and respectability of those who run those institutions.

After the delivery of the judgment by the High Court Division, the Supreme Court noticed from both print and electronic media that the members of Parliament made discussions in the floor criticizing the judgment and the Judges questioning their propriety in declaring the amendment *ultra vires* the constitution by using unparliamentarian languages. This proves that our Parliamentary democracy is immature and to attain its maturity, there is necessity of practising Parliamentary democracy continuously for at least 4/5 terms. In this connection, as example of development, Mr. M.I. Farooqui has drawn our attention towards two recent cases of India and Pakistan and submits that the

members of Parliament in both the countries did not react with anything and accepted the verdicts of the Supreme Courts even though decisions were sensational.

The Pakistan Supreme Court case relates to the corruption of the sitting Prime Minister Mian Muhammad Nawaz Sharif, his brother Mian Muhammad Shahbaz Sharif, the Chief Minister of Punjab and other members of their family. In the said case, the operative part of the judgment is as under:

"By a majority of 3 to 2 (Asif Saeed Khan Khosa and Gulzar Ahmed, JJ) dissenting, who have given separate declarations and directions, we hold that the questions how did Gulf Steel Mill come into being; what led to its sale; what happened to its liabilities; where did its sale proceeds end up; how did they reach Jeddah, Qatar and the U.K.; whether respondents No.7 and 8 in view of their tender ages had the means in the early nineties to possess and purchase the flats; whether sudden appearance of the letters of Hamad Bin Jassim Bin Jaber Al-Thani is a

myth or a reality; how bearer shares crystallized into the flats; who, in fact, is the real and beneficial owner of M/S Nielsen Enterprises Limited and Nescoll Limited, how did Hill Metal Establishment come into existence; where did the money for Flagship Investment Limited and other companies set up/taken over by respondent No.8 come from, and where did the Working Capital for such companies come from and where do the huge sums running into millions gifted by respondent No.7 to respondent No.1 drop in from, which go to the heart of the matter and need to be answered. Therefore, a thorough investigation in this behalf is required.

2. In normal circumstances, such exercise could be conducted by the NAB but when its Chairman appears to be indifferent and even unwilling to perform his part, we are constrained to look elsewhere and therefore, constitute a joint Investigation Team (JIT) comprising the following members:

i. a senior Officer of the Federal Investigation Agency (FIA), not below the rank of Additional Director General who shall head the team having firsthand experience of investigation of white collar crime and related matters:

ii. a representative of the National Accountability Bureau (NAB);

iii. a nominee of the Security & Exchange Commission of Pakistan (SECP) familiar with the issues of money laundering and white collar crimes;

iv. a nominee of the State Bank of Pakistan (SBP);

v. a seasoned Officer of Inter Services Intelligence (ISI) nominated by its Director General; and

vi. a seasoned Officer of Military Intelligence (MI) nominated by its Director General.

3. The Heads of the aforesaid departments/institutions shall recommend the names of their nominees for the JIT within seven days from today which shall be placed before us in chambers for nomination and approval. The JIT shall investigate the case and collect evidence, if any, showing that respondent No.I or any of his dependents or benamdars owns, possesses or has acquired assets or any interest therein disproportionate to his known means of income. Respondents No.1, 7 and 8 are directed to appear and associate themselves with the JIT as and when required. The JIT may also examine the evidence and material, if any, already available with the FIA and NAB relating to or having any nexus with the possession or acquisition of the aforesaid flats or any other assets or pecuniary resources and their origin. The JIT shall submit its periodical reports every two weeks before the said Bench

within a period of sixty days from the date of its constitution. The Bench thereupon may pass appropriate orders in exercise of its powers under Articles 184(3), 187(2) and 190 of the Constitution including an order for filing a reference against respondent No.1 and any other person having nexus with the crime if justified on the basis of the material thus brought on the record before it.

4. It is further held that upon receipt of the reports, periodic or final of the JIT, as the case may be, the matter of disqualification of respondent No.1 shall be considered. If found necessary for passing an appropriate order in this behalf, respondent No.1 or any other person may be summoned and examined.

5. We would request the Hon'ble Chief Justice to constitute a Special Bench to ensure implementation of this judgment so that the investigation into the allegations may not be left in a blind alley".

(Constitution Petition No.29 of 2016, Imran Ahmed Khan Niazi V. Mian Muhammad Nawaz Sharif).

In the Indian case, the question was the constitutional validity of the Constitution (Ninety-ninth Amendment) Act, 2014 and also that of the National Judicial Appointments Commission Act, 2014. The court declared the amendment ultra vires the independence of judiciary. The opinion of the Supreme Court of India is as under:

1. The prayer for reference to a larger Bench, and for reconsideration of the Second and the Third Judges cases, is rejected.
2. The Constitution (Ninety-ninth Amendment) Act, 2014 is declared unconstitutional and void.
3. The National Judicial Appointments Commission Act, 2014, is declared unconstitutional and void.
4. The system of appointment of Judges to the Supreme Court, and Chief Justices and Judges to the High Courts; and transfer of Chief

Justices and Judges of High Courts from one High Court, to another, as existing prior to the Constitution (Ninety-ninth Amendment) Act, 2014 (called the ”Collegium System”), is declared to be operative.

5. To consider introduction of appropriate measures, if any, for an improved working of the ”Collegium System”, list on 3-11-2015.

(Supreme Court Advocates-on-Record V. Union of India, (2016) 5 SCC 1.)

Clause (3) of article 65 of our constitution made provision for fifty reserved seats for women in the Parliament, who are not directly elected by the people. The Constitution (Fifteenth Amendment) Act, 2011 inserted a new provision as clause (3A) to article 65, which provided that for the remaining period of the Parliament in existence at the time of the commencement of the Fifteenth Amendment, “Parliament shall consist of three hundred members elected by direct election provided for in clause (2) and fifty women members provided for in clause (3).”

While making provision for fifty reserved women members of Parliament is a remarkable step forward to promote women participation in our law making process, but it has focused the idea that our democracy is not mature enough that we still need to promote participation of women in the Parliament by making special provisions for them so that they can come to the Parliament without the need to go to the public. These fifty women members get elected by the rest three hundred members of Parliament based on the proportional representation of the parties who are directly elected by the public. Reserved women members of Parliament, who are not directly elected by the public, would also take part in the Judges' impeachment process, which is not acceptable in a mature democracy. It is also incompatible with the spirit of the preamble and article 7(1) of the constitution. Moreover, there have been women Prime Ministers and leaders of the opposition in this country since 1991, which signifies that women members of Parliament can be directly elected by the

people just like the male members of Parliament. We hope that arrangements may be made reserving fifty constituencies to contest in the election, which would ensure women representation in the Parliament through direct election.

If we look this fact from another angle, it will be nakedly clear that our Parliamentary democracy cannot transact its business in the manner it ought to have performed. This court in Civil Review Petition Nos.17-18 of 2011 provisionally condoned the laws promulgated by the martial law authority for a limited period till 31st December, 2012 'for enabling the Parliament to make necessary amendment to the constitution and also enacting laws promulgated during the aforesaid period.' The Parliament in violation of the direction and/or without comprehending the impact of the direction promulgated Act 06 of 2013 as under:

"১৯৭৫ সালের ১৫ আগস্ট হইতে ১৯৭৯ সালের ৯ এপ্রিল তারিখ পর্যন্ড় সময়ের মধ্যে জারীকৃত কতিপয় অধ্যাদেশ কার্যকর কার্যকর করিবার লক্ষ্যে প্রণীত আইন।

যেহেতু সংবিধান (পঞ্চদশ সংশোধন) আইন, ২০১১ (২০১১ সনের ১৪ নং আইন) দ্বারা ১৯৭৫ সালের ১৫ আগস্ট হইতে ১৯৭৯ সালের ৯ এপ্রিল তারিখ পর্যন্ড় সময়ের মধ্যে জারীকৃত অধ্যাদেশ সমূহ

অনুমোদন ও সমর্থন (ratification and confirmation) সংক্রান্ড় গণপ্রজাতন্ত্রী বাংলাদেশের সংবিধানের চর্তুথ তফসিলের ৩ক ও ১৮ অনুচ্ছেদ বিলুপ্ত হওয়ায় উক্ত অধ্যাদেশসমূহ কার্যকারিতা হারাইয়াছে; এবং

যেহেতু সিভিল পিটিশন ফর লীভ টু আপীল নং ১০৪৪-১০৪৫/২০০৯ এ সুপ্রীমকোর্টের আপীল বিভাগ কর্তৃক প্রদত্ত রায়ে সংবিধান (পঞ্চম সংশোধন) আইন, ১৯৭৯ (১৯৭৯ সনের ১নং আইন) বাতিল ঘোষিত হওয়ায় উক্ত সময়ের মধ্যে জারীকৃত উক্ত উক্ত অধ্যাদেশসমূহ কার্যকারিতা হারাইয়াছে; এবং

সেহেতু এতদদ্বারা নিম্নরূপ আইন করা হইলঃ

১। **সংক্ষিপ্ত শিরোনাম ও প্রবর্তন** - (১) এই আইন ১৯৭৫ সালের ১৫ আগস্ট হইতে ১৯৭৯ সালের ৯ এপ্রিল তারিখ পর্যন্ড় সময়ের মধ্যে জারীকৃত কতিপয় অধ্যাদেশ কার্যকরকরণ (বিশেষ বিধান) আইন, ২০১৩ নামে অভিহিত হইবে।

(২) ইহা অবিলম্বে কার্যকর হইবে।

৪। **কতিপয় অধ্যাদেশের কার্যকারিতা প্রদান**। - ১৯৭৫ সালের ১৫ আগস্ট হইতে ১৯৭৯ সালের ৯ এপ্রিল তারিখ পর্যন্ড় (উভয় দিনসহ) সময়ের মধ্যে জারীকৃত -

(ক) তফসিলভুক্ত অধ্যাদেশসমূহ, এবং

(খ) অন্যান্য অধ্যাদেশসমূহ দ্বারা প্রচলিত কোন আইন, আদেশ বা অধ্যাদেশ সংশোধন করা হইয়া থাকিলে উক্ত সংশোধনী অধ্যাদেশসমূহ (amending Ordinances),

এমনভাবে কার্যকর থাকিবে যেন উহা এই আইনের উদ্দেশ্য পূরণকল্পে, জাতীয় সংসদ কর্তৃক প্রণীত কোন আইন ঃ

তবে শর্ত থাকে যে, এই ধারার অধীন ১৯৭৫ সালের ১৫ আগস্ট হইতে ১৯৭৯ সালের ৯ এপ্রিল তারিখ পর্যন্ড় সময়ের মধ্যে জারীকৃত কতিপয় অধ্যাদেশ কার্যকরণ করা হইলেও যতটুকু উহাদের বিষয়বস্তুর (contents) সহিত সংশিণ্টষ্ট শুধুমাত্র ততটুকু গ্রহণ করা হইয়াছে মর্মে গণ্য হইবে এবং উক্ত সময়কালে অবৈধ ও অসাংবিধানিকভাবে রাষ্ট্রক্ষমতায় আসীন সামরিক শাসন আমলের কৃত কর্মের অনুমোদন ও সমর্থন (confirmation and ratification) করা হইয়াছে বলিয়া কোনক্রমেই বিবেচিত হইবে না।

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The above provision shows that the Parliament instead of promulgating laws confirmed and ratified

85 laws. Again the Parliament by Act 07 of 2013 ratified and confirmed the laws promulgated during the period between 24th March, 1982 and 11th November, 1986 by the Martial Law authority. The Act is as under:

"১৯৮২ সালের ২৪ মার্চ হইতে ১৯৮৬ সালের ১১ নভেম্বর তারিখ পর্যন্ড় সময়ের মধ্যে জারীকৃত কতিপয় অধ্যাদেশ কার্যকর করিবার লক্ষে প্রণীত আইন

যেহেতু সংবিধান (পঞ্চদশ সংশোধন) আইন, ২০১১ (২০১১ সনের ১৪ নং আইন) দ্বারা ১৯৮২ সালের ২৪ মার্চ হইতে ১৯৮৬ সালের ১১ নভেম্বর তারিখ পর্যন্ড় সময়ের মধ্যে জারীকৃত অধ্যাদেশসমূহ অনুমোদন ও সমর্থন (ratification and confirmation) সংক্রান্ড় গণপ্রজাতন্ত্রী বাংলাদেশের সংবিধানের চতুর্থ তফসিলের ১৯ অনুচ্ছেদ বিলুপ্ত হওয়ায় উক্ত অধ্যাদেশসমূহ কার্যকারিতা হারাইয়াছে; এবং

যেহেতু সিভিল আপীল নং ৪৮/২০১১ এ সুপ্রীমকোর্টের আপীল বিভাগ কর্তৃক প্রদত্ত রায়ে সংবিধান (সপ্তম সংশোধন) আইন, ১৯৮৬ (১৯৮৬ সনের ১নং আইন) এর ধারা ৩ এবং বাংলাদেশের সংবিধানের চতুর্থ তফসিলে ১৯ অনুচ্ছেদ বাতিল ঘোষিত হওয়ায় উক্ত সময়ের মধ্যে জারীকৃত উক্ত অধ্যাদেশসমূহ কার্যকারিতা হারাইয়াছে; এবং

যেহেতু উক্ত অধ্যাদেশসমূহ ও উহাদের অধীনে প্রণীত বিধি, প্রবিধান বা আদেশবলে কৃত কাজ-কর্ম, গৃহীত ব্যবস্থা বা কার্যধারাসমূহ, অথবা প্রণীত, কৃত, গৃহীত বা সূচীত বলিয়া বিবেচিত কাজ-কর্ম, ব্যবস্থা বা কার্যধারাসমূহ আইনের শাসন, জনগণের অর্জিত অধিকার সংরক্ষণ এবং প্রজাতন্ত্রের কর্মের ধারাবাহিকতা বহাল ও অক্ষুন্ন রাখিবার নিমিত্ত, জনস্বার্থে, উহাদের কার্যকারিতা প্রদান আবশ্যক; এবং

যেহেতু উক্ত সময়ে জারীকৃত কতিপয় সংশোধনী অধ্যাদেশ (amending Ordinances) দ্বারা প্রচলিত আইন সংশোধন করা হইয়াছে বিধায় আইনের শাসন, জনগণের অর্জিত অধিকার সংরক্ষণ এবং প্রজাতন্ত্রের কর্মের ধারাবাহিকতা বহাল ও অক্ষুন্ন রাখিবার নিমিত্ত, জনস্বার্থে, উহাদের কার্যকর রাখা আবশ্যক; এবং

যেহেতু সংবিধানের ৯৩(২) অনুচ্ছেদের নির্দেশনা পূরণকল্পে, নবম জাতীয় সংসদের ১৬তম অধিবেশনের ২৭ জানুয়ারি ২০১৩ তারিখে অনুষ্ঠিত প্রথম বৈঠকে ২০১৩ সালের ২নং অধ্যাদেশ উপস্থাপিত হইয়াছে এবং উহার পরবর্তী ৩০ দিন অতিবাহিত হইলে অধ্যাদেশটির কার্যকরতা লোপ পাইবে; এবং

যেহেতু দীর্ঘসময় পূর্বে জারীকৃত অধ্যাদেশসমূহ যাচাই-বাছাইপূর্বক বাংলায় নূতনভাবে আইন প্রণয়ন করা সময় সাপেক্ষ; এবং

সেহেতু এতদ্দ্বারা নিম্নরূপ আইন করা হইল :-

১। **সংক্ষিপ্ত শিরোনাম ও প্রবর্তন**। - (১) এই আইন ১৯৮২ সালের ২৪ মার্চ হইতে ১৯৮৬ সালের ১১ নভেম্বর তারিখ পর্যন্ড় সময়ের মধ্যে জারীকৃত কতিপয় অধ্যাদেশ কার্যকরকরণ (বিশেষ বিধান) আইন, ২০১৩ নামে অভিহিত হইবে।

(২) ইহা অবিলম্বে কার্যকর হইবে।

৪। **কতিপয় অধ্যাদেশের কার্যকারিতা প্রদান**। - ১৯৮২ সালের ২৪ মার্চ হইতে ১৯৮৬ সালের ১১ নভেম্বর তারিখ পর্যন্ড় (উভয় দিনসহ) সময়ের মধ্যে জারীকৃত –

(ক) তফসিলভুক্ত অধ্যাদেশসমূহ, এবং

(খ) অন্যান্য অধ্যাদেশসমূহ দ্বারা প্রচলিত কোন আইন, আদেশ বা অধ্যাদেশ সংশোধন করা হইয়া থাকিলে উক্ত সংশোধনী অধ্যাদেশসমূহ (amending Ordinances),

এমনভাবে কার্যকর থাকিবে যেন উহা এই আইনের উদ্দেশ্য পূরণকল্পে, জাতীয় সংসদ কর্তৃক প্রণীত কোন আইন ঃ

তবে শর্ত থাকে যে, এই ধারার অধীন ১৯৮২ সালের ২৪ মার্চ হইতে ১৯৮৬ সালের ১১ নভেম্বর তারিখ পর্যন্ড় সময়ের মধ্যে জারীকৃত কতিপয় অধ্যাদেশ কার্যকরকরণ করা হইলেও যতটুকু উহাদের বিষয়বস্তুর (contents) সহিত সংশিণ্টষ্ট শুধুমাত্র ততটুকু গ্রহণ করা হইয়াছে মর্মে গণ্য হইবে এবং উক্ত সময়কালে অবৈধ ও অসাংবিধানিকভাবে রাষ্ট্রক্ষমতায় আসীন সামরিক শাসন আমলের কৃতকর্মের অনুমোদন ও সমর্থন (confirmation and ratification) করা হইয়াছে বলিয়া কোনক্রমেই বিবেচিত হইবে না।

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In Civil Appeal No.48 of 2011 this court directed the Parliament to promulgate the laws which

were declared void during that period. In the said Act 81 laws were ratified although this court directed to promulgate fresh law because of the fact that the martial law regime had no right or authority to promulgate those laws because he was a usurper. Most of the laws are very important and some of them were promulgated affecting the fundamental rights. As for example, the Acquisition and Requisition of Immovable Property Ordinance, 1982. It is an irony that the Parliament is totally unable to transact its basic functions but it wants to wise-pull one of the most successful organs of the State, that is, the Supreme Court of Bangladesh.

The word 'ratification' implies confirmation or adoption of an act that has already been performed. This word carries synonymous meaning as used in respect of ratification of American Constitutional Amendment by different States or ratification of treaties, international laws. Under the American Constitution there are two procedures for ratifying the proposed amendment, which requires three-fourths

of the States' (presently 38 of 50) approval: a) consent of the State legislatures, or b) consent of State ratifying conventions. The ratification method is chosen by Congress for each amendment.

In contract law, the confirmation of a previous act done by the party himself or by another is called ratification of a voidable act. Ratifications are either express or implied. The former are made in express and direct terms of assent; the latter are such as the law presumes from the acts of the principal. By ratifying a contract, a man adopts the agency, altogether, as well what is detrimental as that which is for his benefit. As a general rule, the principal has the right to elect whether he will adopt the unauthorized act or not. But having once ratified the act, upon a full knowledge of all the material circumstances, the ratification cannot be revoked or recalled, and the principal becomes bound as if he had originally authorized the act.

The ratification of a lawful contract has a retrospective effect, and binds the principal from

its date, and not only from the time of the ratification, for the ratification is equivalent to an original authority, according to the maxim "*omnis ratihabitio retro trahitur et mandato aequiparatur*" meaning every consent given to what has already been done, has a retrospective effect and equals a command. This concept is generally used in contract law regime between principal and agent.

In respect of international treaty, 'ratification' defines the international act whereby a State indicates its consent to be bound to a treaty if the parties intended to show their consent by such an act. In the case of bilateral treaties, ratification is usually accomplished by exchanging the requisite instruments, while in the case of multilateral treaties the usual procedure is for the depositary to collect the ratifications of all States, keeping all parties informed of the situation. The institution of ratification grants States the necessary time-frame to seek the required approval for the treaty on the domestic level and to

enact the necessary legislation to give domestic effect to that treaty. [Arts.2 (1) (b), 14 (1) and 16, Vienna Convention on the Law of Treaties 1969]

According to Chapter II and III of PART V of the constitution of Bangladesh, law may be promulgated in three ways as ordained in articles 80, 93, and 65 (1) (subordinate legislation through delegated power). The Supreme Court in its landmark judgment on Fifth and Seventh Amendments cases declared that the laws must be made by the competent Parliament abolishing the laws made by and during the illegal usurper martial law regime, but the government without legislating new laws promulgated two enabling Ordinances in the first place and then regularized those Ordinances as Acts of Parliament namely Acts 6 and 7 of 2013 (both of these Acts are enabling Acts too). The short titles of these two Acts are respectively, 'Act effectuating (special provisions) a few Ordinances promulgated from and between 15 August 1975 to 9 April 1979' and 'Act effectuating

(special provisions) a few Ordinances promulgated from and between 24 March 1982 to 11 November 1986'.

Confirmation and/or ratification is not any recognized mode of making laws in Bangladesh. In the constitution none of these words even used in the remotest sense of making laws. According to article 152 of our constitution, '"law" means any Act, Ordinance, order, rule, regulation, bye-law, notification or other legal instrument, and any custom or usage, having the force of law in Bangladesh;'. But on the contrary, through Acts 6 and 7 of 2013, the Parliament mere ratified a bunch of laws made by the military usurpers and declared void by this Court. This Court feels embarrassed when the matters are being heard basing upon these laws.

Before assuming the powers the members of Parliament should have considered as to whether they are capable of dealing with such responsibility. In this connection I would like to reproduce some valuable words of a scholar of this subcontinent. At

the time of adopting the constitution of India, Dr. Rajendra Prasad in the Constituent Assembly said:

> "Whatever the constitution may or may not provide, the welfare of the country will depend upon the way in which the country is administered. That will depend upon the men who administer it. If the people who are elected, are capable and men of character and integrity, they would be able to make the best even of a defective constitution. If they are lacking in these, the constitution cannot help the country. After all, a constitution like a machine is a lifeless thing. It acquires life because of the men who control it and operate it, and India needs today nothing more than a set of honest men who will have the interest of the country before them.
>
> It requires men of strong character, men of vision, men who will not sacrifice the interests of the country, at large for the

> sake of smaller groups and areas and who will rise over the prejudices which are born of these differences. We can only hope that the country will throw up such men in abundance." (Constituent Assembly Debates, Vol-XI)

These statements focused on the quality of a person who would represent the people to build a welfare State by promulgating laws. He must have integrity and be a man of character. Even laws may be defective but if a parliamentarian possesses all the qualities that are required to have with him, the foundation of democracy may be shaped phase by phase. This was the fervent hope of the millions who fought for the establishment of a country where there will be democracy and rule of law. This faith has to be restored failing which the independence will be meaningless. "There is no automatic guarantee of success by the mere existence of democratic institutions. The success of democracy is not merely a matter of having the most perfect institutional

structure that we can think of. It depends inescapably on our actual behaviour patterns and the working of political and social interactions. There is no chance of resting the matter in the 'safe' hands of purely institutional virtuosity. The working of democratic institutions, like all other institutions, depends on the activities of human agents in utilizing opportunities for reasonable realisation....' (Amartya Sen – The Idea of Justice). This is what we call 'institutional virtuosity' by itself is not enough without 'individual virtuosity' and we have to strive for that if we really want to build the Bangabandhu's dream of 'Sonar Bangla'.

After independence, those unholy alliances of power-mongers twice reduced this country to a banana Republic, where people are seen as commodity which can be bluffed and compromised at any unworthy cost to legalize their illegitimate exercise of power. They did not empower the people, rather they abused their position and introduced different bluffing tools (sometimes gono vote, sometimes rigged election

and sometimes no election at all!) as means to prolong their power game. Thus as an institution, the notion of 'politics' has been completely destroyed. Dirty political practices of those undemocratic regimes even to a great extent infected the civil politics. Politics is no longer free, it is now highly commercial and money is in the driving seat which controls the course of action and its destination. Now power, not merit, tends to control all public institutions of the country. Irony of the history is that with the unflinching determination and indomitable spirit, we were able to free a country from the clutches of a military superpower but we have been measurably defeated by ourselves in that very free country.

Even after forty-six years of independence, we have not been able to institutionalize any public institutions. There are no checks and balances, there is no watchdog mechanism at work, thus the people in the position are being indulged into abuse of power and showing audacity of freehand exercise of power.

The state power, which is another dimension of political power, is becoming a monopoly of a few now-a-days and this suicidal tendency of concentration of power is increasing. The greed for power is a like plague, once set in motion it will try to devour everything. Needless to say, this WAS NOT at all the aims and vision of our liberation struggle. Our Forefathers fought to establish a democratic State, not to produce any power-monster.

The human rights are at stake, corruption is rampant, Parliament is dysfunctional, crores of people are deprived of basic health care, mismanagement in the administration is acute, with the pace of the developed technology, the crimes dimension is changing rapidly, the life and security of the citizens are becoming utterly unsecured, the law enforcing agencies are unable to tackle the situation and the combined result of all this is a crippled society, a society where good man does not dream of good things at all; but the bad man is all the more restless to grab a few more of bounty. In

such a situation, the Executive becomes arrogant and uncontrolled and the bureaucracy will never opt for efficiency.

Even in this endless challenge, the judiciary is the only relatively independent organ of the State which is striving to keep its nose above the water though sinking. But judiciary too, cannot survive long in this situation. Yet, no law has been formulated for selection and appointment of Judges in the higher judiciary. There is no scope for imparting training to the Judges of the higher judiciary. It is the high time for formulating laws for the selection of the Judges and their training so that they can be equipped to face the challenges of 21st century. Instead of strengthening the judiciary, the Executive is now trying to cripple it and if it happens, there could be disastrous consequences. Even in matured democracy, bureaucracy and judiciary like India, there is strong criticism against Parliamentarians, Parliament, and bureaucracy and to some allowable extent against the Judges of the High Courts and

lower courts. In comparison to the standard of democracy, bureaucracy, freedom of press and rule of law they have been able to establish, we cannot even think to be a match with them in any manner. In this connection, I fully endorse the views expressed by a renowned jurist of this sub-continent Justice V. R. Krishna Iyer, in his book 'Legally Yours' as under:

> 'Elections are indispensible if democracy is to survive. Elections as instruments become purposeful if only there is a management study of the Houses. What we see today in the Houses is howling not deciding because the members are not inspired by sense of management but only of grabbing power. Power without efficient objectives ceases to be serving a democratic rule of law. The Legislature becomes a paralyzed instrument without rules regulating the governance of the House. It often happens that members are at cross purposes and without a sense of harmony.

Efficient administration of the Houses ceases to be a reality when the Executive and the Legislature malfunction. The judiciary is supposed to settle disputes and see that the Constitution functions through correct interpretation and enforcement of the provisions of the Constitution. But when the judiciary is not properly trained and produced added confusion by the Ipse Dixit of the ignorant Judges in their arrogance and arbitrary rule, the Judiciary and as such the democratic system as a whole also fails. Thus we find that the management of the Executive, of the Legislature, of the Judiciary is important if these three instruments of the State are to produce an orderly administration. In short, the paramount purpose of good democracy makes it obligatory to have management of each branch of administration with intellectual clarity and scientific methodology but alas,

management itself requires refinement. Absent that, today if society is to enjoy good Governance have the cosmos not to end up in chaos, high priority must be imparted to the study of management in the field of politics, public business and administration of the laws. The Executive becomes arbitrary, arrogant and authoritarian, absent the Legislature which is the people's voice to make the Executive democratic. The Legislature when geared to majority power ceases to be scientific, sensitive and didactic and can be fit only if there is an independent Judiciary truly learned and insightfully aware of the purpose of the Constitution. Thus, the Judiciary is all important in a democracy. The management of the Judiciary including the selection of judges and functioning methods is of key importance. Regrettably there is no law regulating the functionalism of the

> Judiciary itself. This failure leads to judicial conflicts, poor selection and sometimes ghastly performance and if the Judiciary fails, the Constitution collapses and the other two branches become menaces.' (emphasis supplied)

Learned Attorney General argues that judiciary being an organ of the State, it is not fair for the Judges to administer justice on their own, which is contrary to the rule of law. Learned Attorney General adds that the accountability of the Judges should be left with the representatives of the people. The people of USA, Canada and India did not deter from making the Judges accountable to the representatives of the people. The Judges even feel proud that they are accountable to no other person but to the representatives of the people. He further adds that if some prospective candidate for the post of a Judge feels himself 'too big, too great, too superior to the representatives of the people, they are not welcome to the judiciary - they may even quit.' Mr.

Ajmalul Hossain echoed him and submitted that if the provision of the Judges removal mechanism is left with the judiciary, there will be likelihood of eroding public perception towards the judiciary.

Mr. M. Amirul Islam has pointed out remarks of the historian Lord Acton. He said 'All power tends to corrupt. Absolute power corrupts absolutely'. Now, there remains a question as to who should control the exercise of power? Lord Denning said 'someone must be trusted. Let it be the Judges'. The Attorney General made very unkind remarks towards the Judges and if he or the government does not repose trust upon the Judges, I would say, he is wrong and he should advise his client that if it is the perception of the government that the Judges are not independent and fair, then there would be none in the country to repose trust upon. More so, if we agree with his argument then most of the constitutions of the globe seem to have adopted the wrong method in this regard! In addition to that, Mr. Ajmalul Hossain has also made an unkind and derogatory remark towards the

Judges of the higher judiciary. In his written argument, he mentioned that "since the judiciary has an interest in this case, it should be extremely careful in deciding the case".

We are astounded and surprised by reading this remark. If a senior counsel like him has this perception towards the judiciary we feel sorry for him. The Judges and the judiciary have no interest in any cause while they administer justice. If the Judges have any interest in any matter, it is proper to delete articles 7(2), 26, 94(4), 102 and 116A from the constitution but keeping these provisions in the constitution, he should not harbour any doubt about the impartiality of the Judges in the administration of justice. Clause (4) of article 94 says, subject to the provisions of the constitution, the Chief Justice and other Judges shall be independent in the exercise of their judicial functions and article 116A says, subject to the provisions of the constitution, all persons employed in the judicial service and all Magistrates shall be independent in exercise of their

judicial functions. The concept of accountability of a Judge individually and the judiciary as a whole should be understood in this context. Almost eighty percent of the litigations pending in the courts are either against the State or State is seeking justice from this judiciary.

A careful look into the very scheme of the constitution will reveal that the judiciary is an independent organ of the State, which has no interest in any litigation pending before it. Rather, the political government has interest in many disputes and the Parliament is composed of the representatives of a political party, who have the majority of the members to form the government under the constitution. The constitution itself guarantees independence and impartiality of the Judges. In this connection Mr. A.J. Mohammad Ali has referred to a case of Canadian Federal Court, which is very significant to meet the questions raised by Mr. Ajmalul Hossain and the learned Attorney General. In

Justice Paul Cosgrove V. Attorney General, Ontario, 2005 FC 1454, it was observed:

> "*The Canadian Judicial Council Inquiries and Investigations* by-laws and Complaints procedures represent a carefully calibrated effort to reconcile the need for judicial accountability, with the preservation of the independence of the judiciary. This process includes an 'institutional filter' in the form of the judicial prescreening process, which maintains an appropriate relationship between the judiciary and outside influences. Complaints are considered internally, and are only referred for an inquiry where the CJC itself determines that the complaint is sufficiently serious and sufficiently meritorious as to potentially warrant the removal of the judge".

This observation of the highest court negates the submission of the learned Attorney General that the Canadian jurisdiction did not deter from making

their Judges accountable to the representatives of the people.

While judicial independence forms an important guarantee, it also has the potential to act as a shield behind which Judges have the opportunity to conceal possible unethical behaviour. For this reason, Judges conduct themselves according to ethical guidelines. In order to provide Judges with rules of conduct and ethics, several countries have approved Codes of ethics to regulate judicial behaviour. In some cases, Judges have drafted these Codes and in other cases, governments have formulated Rules. In the international sphere, the Bangalore Principles of Judicial Conduct contain a set of values that should determine judicial behaviour. These values, which are reflected in most Codes of Conduct, are; independence, impartiality, integrity, propriety, equality, competence and diligence. Grounds for removal based on a Judge’s conduct will normally be based on these principles.

It is worth distinguishing between judicial accountability for the discharge of professional functions, for which there are clear rules of conduct, and accountability for ordinary crimes Judges may commit in their private capacity, for which the applicable rules are the same as for other individuals. A Judge cannot be called to account for his judicial adjudication and there is no question of such accountability. Non-accountability of a Judge cannot be abused by him by being negligent. The principle of non-accountability is that the occasion for it would never arise at that level. The Chief Justice and Judges are constitutional functionaries. They hold constitutional office and not a post as in civil services. They are not servants of anybody and have no master whatsoever. There is no master and servant relationship at all between them and any body else, least of all the other branches or government. Under the constitution, the higher judiciary is entirely separated from the Executive and Legislature and is absolutely independent. The accountability,

its nature and extent of the superior judiciary are only to be found within the confines of and as envisaged by the constitution and the laws. By the very nature of the office held, powers exercised and duties discharged under the constitution and the laws, they are answerable to none except their conscience.

Accountability and independence of the judiciary are closely interlinked. Judges are constrained by existing laws, procedures and practices. They do not act as they please; otherwise Justice would be sacrificed at the alter of another, namely, independence. Judges are therefore not free to act perversely or for ulterior motives. Inevitably, they find themselves under control of either a judicial or an administrative nature. Constitution of Zambia states that 'the Judges shall be independent, impartial and subject only to this Constitution and the law and shall conduct themselves in accordance with a Code of Conduct'.

Accountability of the judiciary may be to the law and the constitution and to the public. Judicial criticisms by the public and the press are a recognition that the independence of Judges is not absolute, but is subject to certain limitations. It is for this reason that throughout history Judges have been criticized, sometimes savagely and severely, by the Members of Parliament, government officials, the press and the public for decisions they have made in particular cases. The justification for such criticism seems to be anchored in the fact that as long as courts continue to serve as the stage for contentious battles over emotionally charged issues of corruption, crime and high profile cases, Judges are criticized and attacked for decisions they make. In the modern environment, the concept of accountability, permeates public life.

In a democracy based on the rule of law, it is now the expectation of every citizen that all aspects of the government ought to be highly accountable. As a matter of fact, it should be remembered that the

judiciary has historically been one of the most accountable organs of the State. The concept of judicial accountability can broadly be said to refer to the notion that Judges or those who sit in judgment over others need to account for their judicious and injudicious conduct. The emerging right to democratic governance has come with a call for accountability of all public institutions.

The legislature is composed of members who represent an electorate. They are accountable to this electorate. The executive branch also has, at the end of the day, to account to those who put them in office. In their day to day functions, Judges wield tremendous pressure. They are to review the decisions of both legislature and executive branch of the government. It is again, a concept of democratic governance to guarantee judicial independence, which requires that the judiciary must, in the performance of its function, be free from any interference, be it political, parliamentary, administrative, executive or otherwise. This principle of non-interference

permeates to all who sit on the Bench. The judiciary is a sacrosanct and inviolable sanctuary of its occupants. It goes without saying that Judges being human do make mistakes, some of which could be unintentional but with devastating effects on individuals, but those mistakes may be rectified through several layers of appeal and review.

Now-a-days judicial accountability, therefore, even in the absence of specific provisions in a constitution, is accepted as the reverse side of judicial independence and not as interference or a limitation. As long as Judges are charged with the responsibility of protecting human rights and freedoms of the citizenry, they are stewards to the public for their judicial performance. The Founding Fathers of most constitutions seem to have taken special precautions to isolate the judiciary from the Executive and the Legislative influence. They did not wish the Judges to be subject to the executive dominance. They must also have been afraid that there might be times when the Executive and the Legislature

might respond to political and social convulsions and act hastily and oppressively. But as repositories of public power, all the three branches of the State hold that power in trust for the people and for the accomplishment of their constitutionally assigned tasks.

In a democracy, the Legislature is accountable to the people through regular and periodic elections. The Executive is accountable to the Legislature and ultimately to the electorate. And, in both cases, the courts in the exercise of their powers of constitutional and judicial review may invalidate laws passed by the Legislature and overturn decisions made by the Executive if after judicious scrutiny it is found that the law passed or the decision made are not in accordance with the constitution or with the law.

On the other hand, Judges are neither subject to periodic elections nor subject to censure. They serve till they reach retiring age. They may be removed only for proved misbehaviour or incapacity or gross

misconduct. No other authority hovers over their shoulders to see whether they are performing their functions properly. Consequently, this has led to a perception that Judges, particularly those who serve in the superior courts, are irresponsible and undemocratic, especially when they invalidate laws passed by representatives or overturn decisions of elected governments.

Judges, as public servants, are accountable to the people as to how they exercise their powers, albeit not in the same way as other branches of government. However, the concept of accountability is said to be a facet of the concept of democracy. This means that any individual, authority or institution that exercises the power of governance of any kind, exercises it for and on behalf of the governed and, therefore, should be accountable to them for its exercise. Certainly, the Judges are accountable but the question is, accountable to whom? And how far does the Judiciary measure up to this standard of accountability? Thomas Jefferson once said: "Man is

not to be trusted for life, if secured against all liability to account'. The question that should not be overlooked when we deliberate on judicial accountability is this: who Judges the Judges?

Judicial accountability is manifested in several ways. In most countries, the business of all courts is, except in extraordinary circumstances, conducted in public. In terms of practice and procedure, Judges resolve disputes under the obligation to publish full reasons for their decisions. Thus, the public hearing and the reasoning underlining judicial decisions are forms of accountability. Another form of judicial accountability is that each decision, other than those of the ultimate court of appellate is subject to being appealed. The criticisms of the appeal courts may be published without limitation. Academics, legal academics, lawyers and researchers are free to criticize judicial reasoning. One commentator once said, "if you have Judges with high character, knowledge, and commitment to the rule of law, that in itself is a measure of accountability".

Possibly the answer lies here if the State wants the Judges should be accountable measures should be taken and law should be framed for elevation of Judges in the higher court with high character, qualification, knowledge, commitment and professional experience.

As a general rule, Judges can only be removed for serious misconduct, disciplinary or criminal offence or incapacity that renders them unable to discharge their functions. This should only occur after the conduct of a fair procedure. Judges cannot be removed or punished for *bona fide* errors or for disagreeing with a particular interpretation of the law. Furthermore, Judges enjoy personal immunity from civil suits for monetary damages arising from their rulings. Judges conduct themselves according to ethical standards and are held accountable if they fail to do so. International law clearly establishes that Judges can only be removed for serious misconduct or incapacity. Disciplinary proceedings must be conducted by an independent and impartial body and in full respect for procedural guarantees.

In the Bangalore Principles of Judicial Conduct 2002, the first principle is that 'impartiality is essential to the proper discharge of the judicial office. It applies not only to the decision itself but also to the process by which the decision is made." The second principle is that 'integrity is essential to the discharge of the judicial office'. The fourth principle is that 'ensuring equality of treatment to all before the courts is essential to the due performance of judicial office'. And the fifth principle is that 'competence and diligence are prerequisites to the due performance of judicial office'. In a paper under the heading Judiciary of England and Wales, a question was posed for what should individual Judges and Judiciary as an institution be accountable? In answering the question the following principles were cited ……..

a) The nature and form of accountability depends on the responsibilities and conduct of the individual or the group.

b) The vital importance of the independence of individual Judges and the judiciary as a body, now recognised by section 3 of the CRA, follows from the judiciary's core responsibility as the branch of the State responsible for providing the fair and impartial resolution of disputes between citizens and between citizens and the State in accordance with the prevailing rules of statutory and common law.

c) Neither individual Judges nor the judiciary as a body should be subject to forms of accountability prejudicing that core responsibility.

d) Within the resources provided, and subject to the areas for which there is shared responsibility with the Lord Chancellor, the responsibility of the Lord Chief Justice for deployment of individual judges, the allocation of work within the courts, and the well-being, training and guidance of serving

(full and part-time) judges, mean that the judiciary is responsible for:-

i. An effective judicial system, including the correction of errors;

ii. Training Judges in the light of changes in law and practice; and

iii. Identifying and dealing with pastoral, equality, and health and safety issues concerning serving judges.

The Lord Chancellor and the Lord Chief Justice share responsibility for the provision of a complaints and disciplinary system to identify and deal with issues of competence, misconduct, and personal integrity.

e) Within a common law system the judiciary is responsible for the interpretation of statutes and the development of the non-statutory principles embodied in case-law. This is done by the system of precedent and incremental

development of the principles of law, in particular by appellate courts.

There is no gainsaying that in the courtroom, a Judge is both an account-receiver and an account-giver. The court is a forum of legal accountability, where Judges hold disputants, including public actors, to account for legal wrongs. As an account-giver, the Judge provides detailed reasons to the litigants and the public at large and the appellate courts to whom through a written judgment for their decision to resolve legal dispute one way rather than another. Their reasoned decision is assessed according to the relevant legal standards, with shortcomings liable to render the decision amenable to appeal. It is stated:

(a) This follows that one cannot properly be made accountable for that for which one is not responsible. Accordingly, for example, notwithstanding the extent of judicial representation on the Judicial Appointments Commission, it is the Commission and not the judiciary which is responsible

for and therefore accountable for appointments and it is the Lord Chancellor who is responsible for and therefore accountable for providing resources for the courts and the judiciary. For this reason, issues of accountability concerning the appointment process and the resourcing of the courts are not discussed.

(b) Judicial independence is not an absolute concept and there are many formulations of it. There is, however, general agreement that the minimum requirements are that the judiciary is impartial, that its decisions are accepted, that it is free from improper influence, and that it has jurisdiction, directly or by way of review, over all issues of a justifiable nature so that it is capable of rendering justice on all issues of substantial legal and constitutional importance.

(c) The executive, legislative and judicial branches of the State should show appropriate respect for the different positions occupied by the other branches. The need for appropriate respect for the different positions occupied by others also applies

to respect for and by the media. The branches of the State should respect the importance in a democratic society of vigorous scrutiny by the media, and the media should recognize the positions of and restrictions on the branches of the state, including the judiciary. The limits of what it is proper for Judges to say to Parliamentary Committees, Ministers, the media, or in lectures, follow from the need to safeguard the core constitutional responsibility of the judiciary. The corollary should be that government ministers, Members of Parliament, and the media should also respect the need to safeguard and to avoid prejudicing or corroding this core responsibility. That should limit what it is appropriate to say to or about Judges and individual decisions.

(d) The structure of the system including the appellate process and the process for making complaints about the conducts of Judges is determined by statute and regulation and, in the case of complaints and discipline, by the Concordat. The

appropriate forms of accountability are thus in part identified by those instruments. To furnish information about court process, delays, workloads, training, appeals, complaints, lack of integrity and misconduct and equality issues to Parliament and the public is an appropriate way of explaining, justifying and opening these areas to public examination and scrutiny. It can also identity the boundary between the respective responsibilities of the judiciary (for the business of the courts) and of the Lord Chancellor (for resourcing the courts) and HM Courts Service (HMCS) (for providing court buildings and court staff). To voluntarily offer what is a form of "explanatory" accountability for the matters which are the responsibility of the judiciary set out in "d" is not inconsistent with the requirements of judicial independence.

(e) One of the justifications for two levels of appeal (to the Court of Appeal and then to the House of Lords) is the particular responsibility of the judiciary in a common law system for developing the

law. (Robin Cooke, Empowerment and Accountability the Quest for Administrative Justice (1992) 18 Commonwealth Law Bulletin 1326).

As complementary to the preceding discussions, two forms of accountability can be considered for clearer understanding of the issues involving accountability, such as:

- Internal accountability to more senior Judges or courts by way of (a) the system of appeals against judicial decisions, and (b) procedures for dealing with complaints about the conduct of judges,
- External accountability to the public by way of amenability to scrutiny in particular by the media, but more widely by civil society,

Needless to say that these various forms of accountability overlap. For instance, the appeal and complaints processes provide both internal accountability and accountability to the public, and the giving of evidence to legislative committees

provides direct accountability to Parliament and indirect accountability to the public. (Ibid)

There are clear links between the features of individual accountability and the question of institutional accountability. It is important to distinguish the accountability of the judiciary as an institution from that of the courts as an institution and that of HMCS (Her Majesty's Court Service) in UK or Canada. This is because of the responsibility of the Lord Chancellor (to some extent equivalent to law Minister in Bangladesh) for the resourcing of the courts. For example, if a lack of resources means there are insufficient courts, court staff or Judges and the result of this is delay, it is the Lord Chancellor and not the judiciary who is responsible and accountable.

The responsibility of the judiciary for the deployment of Judges, training, pastoral issues, part of the complaints and disciplinary system, and the provision of an effective judicial system within the resources provided mean that it is legitimate for

there to be some form of accountability in respect of these matters. In respect of those matters on which the judiciary shares responsibility with the Lord Chancellor, it is legitimate for there to be a measure of "explanatory" accountability by the judiciary. (Ibid)

Individual Judges are subject to a strong system of internal accountability in respect of legal errors and personal conduct, but outside the judiciary these are often not understood in terms of accountability. Individual Judges are accountable to the public in the sense that in general their decisions are made in public and are discussed, often critically, in the media and by interest groups and sections of the public affected by them. The judiciary is similarly institutionally accountable in respect of first instance and appellate decisions.

Neither individual Judges nor the judiciary is, nor should they be, accountable to the Executive branch of the State because that is inimical to the judicial independence which is a necessary

requirement for the discharge by Judges of their core responsibility to resolve disputes fairly and impartially. The Lord Chancellor's role in the consideration of complaints and disciplinary proceedings against Judges is not inconsistent with this. The requirement that the Lord Chancellor and the Lord Chief Justice have to agree before a Judge is removed or disciplined in some other way ensures that the independence of an individual Judge is not improperly infringed, either by the executive, or internally by another member of the judiciary. (Ibid)

Learned Attorney General submitted that the removal of Judges of the higher judiciary is not based on political decision of the party in power. The separation of power contained in the constitution should be perceived. If the Executive commences any act in violation of law, the court has power to declare it void. Similarly, if the Parliament promulgates any law or amend the constitution the court has power to test the constitutionality of the that law or amendment through 'judicial review'. On

the other hand, by reason of Supreme Judicial Council the judiciary's accountability has been kept with the judiciary which is inconsistent with the principles of separation of power. He further submits that if the judiciary retains the disciplinary mechanism of the higher judiciary with them it would be contrary to the principle of Rule of law and furthermore, it would also be inconsistent with balance of power and violative of article 7 of the constitution.

The latter part of the submission is devoid of substance. There is no gainsaying that an independent and impartial judiciary is a precondition of rule of law. Durga Das Basu in his 'Limited Government and Judicial Review, 1972' commented '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 whatsoever.'

In this connection, I would like to quote the observation of Abraham Lincoln in his First Inaugural Address:

> "I do not forget the position assumed by some, that constitutional questions are to be decided by the Supreme Court; nor do I deny that such decisions must be binding in any case, upon the parties to a suit, as to the object of that suit.... And while it is obviously possible that such decision may be erroneous in any given case, still the evil effect following it, being limited to that particular case, with the chance that it may be over-ruled, and never become a precedent for other cases, can better be borne than could the evils of a different practice."

(Abraham Lincoln in his First Inaugural Address (1861). RP Basler, The Collected Works of Abraham Lincoln, Vol IV New Brunswick NJ, Tutgers University Press, 1953 268.)

The learned Attorney General has made a hotch-potch in his submission. He is rather confused regarding the doctrine of separation of power under the scheme of a written constitution and unwritten

constitution. His submission in this regard is heavily influenced and more befitting with the scheme and spirit of the British unwritten constitution. Regarding unwritten constitution, Professor A.V. Dicey (1835-1922) gave a classic definition of Parliamentary sovereignty in his 'Introduction to the Study of the Law of the Constitution' as under:

> "The principle of Parliamentary Sovereignty means neither more nor less than this, namely, that Parliament... has, under the English constitution, the right to make any law whatever; and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament." (What is Parliamentary Sovereignty? by Carl Garnder).

Thus, it is abundantly clear that the British Parliament can make any law whatsoever and that no one can override or set aside a law passed by the Parliament. All of this is in contrast to legislatures whose power is legally constrained,

usually by a written constitution. In the United States, for instance, free speech is famously protected by the First Amendment to the constitution, which says Congress shall make no law.... abridging the freedom of speech, or of the press....

Those first five words show us that Congress is not sovereign like British Parliament. The U.S. constitution is a higher law, limiting its legislative competence of the Congress. It follows that American Judges review the constitutionality of Congress's laws, and set them aside if they are in breach – something Dicey's second principle tells us can't happen in English judicial framework.

Parliamentary sovereignty may be contrasted with separation of powers, which limits the legislature's scope often to general law-making, and judicial review, where laws passed by the legislature may be declared invalid by the Supreme Court in certain circumstances.

In recent years some Judges and scholars in Britain have questioned the traditional view that

Parliament is sovereign. Various constitutional changes in the United Kingdom have influenced the renewed debate about Parliamentary sovereignty:

> "The devolution of power to devolved legislatures in Scotland (Scottish Parliament), Wales (Wales Assembly) and Northern Ireland (Northern Ireland Assembly): All three bodies can pass primary legislation within the areas that have been devolved to them, but their powers nevertheless all stem from the UK Parliament and can be withdrawn unilaterally. The Northern Ireland Assembly, in particular, has been suspended multiple times due to political deadlocks." (Ibid) (Peter Gerangelos)

Under Federal System, neither the States nor the Federal Parliament in Australia have true parliamentary sovereignty. The Commonwealth Parliament is created by the constitution, and only has enumerated powers. Each State's legislative power

is inherent, but restrained by the Federal Constitution, State Constitution, and commonwealth powers.

In this context, parliamentary supremacy has two meanings: one is that Parliament can make and unmake any law; another meaning is that as long as Parliament has the power to make laws regarding a subject matter, the exercise of that power cannot be challenged or reviewed by judiciary. The second meaning is more consistent with the Federal system and the practice of judicial review, as judiciary cannot review on the merits of the parliament (legislature)'s exercise of power. (Ibid)

In this connection Griffith, CJ. spoke about the power which every sovereign must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take

action. (Huddarl, Paker & Co Pty Ltd V. Moorhead (1909) 8 CLR 330 at 357). In that case Kitto,J. observed that a judicial power involves, as a general rule, a decision settling for the future, as between defined persons or classes of persons, a question as to the existence of a right or obligation, so that an exercise of the power creates a new charter by reference to which that question is in future to be decided as between those persons or classes of persons. (Ibid)

In the case of *People's Union for Civil liberties v. Union of India (2003) 4 SCC 399, (Para 34),* the Supreme Court held that 'the legislature has no power to review the decision and set it at naught except by removing the effect which is the cause pointed out by the decision rendered by the court. If this is permitted, it would sound the death knell of the rule of law...the legislature also cannot declare any decision of a court of law to be void or of no effect,'..... 'the legislature cannot 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 cannot trench on the judicial power vested in the courts.' In *Cauvery Water Disputes Tribunal (1993) Suppl (1) SCC 96(2), and in Municipal Corn. Of City of Ahmedabad v. New Shrook Spg. and Wvg Co. Ltd. (1970), 2 SCC 280,* the Indian Supreme Court also held similar views as in *civil liberties.*

It is contended by the learned Attorney General that by the Sixteenth Amendment, the Supreme Court undermined the authority of the Parliament by keeping the Supreme Judicial Council in the constitution in its judgment and hence, it has thereby destroyed the basic structure of the Constitution.

In Anwar Hussain Chowdhury, V. Bangladesh, 1989 BLD (spl)1, this court held that the independence of judiciary is one of the basic pillars of the constitution which cannot be demolished, whittled down, curtailed or diminished in any manner whatsoever and the constitution does not give the Parliament nor the Executive authority to curtail or

diminish the independence of the judiciary by recourse to amendment to the constitution. Learned Amici in the context of the above views in Anwar Hussain submit that the tenure of the Judges is very much part of the integrity of the judiciary and pivotal to uphold and maintain the independence of judiciary; that the removal of the Judges must be by a proper process for the sake of fairness, legal certainty and transparency and avoidance of arbitrariness; that the process of voting in Parliament is a political process and hence article 96(2) is against the fundamental principles of rule of law; that the impugned amendment will make the Judges susceptible to a capricious political process of voting in Parliament which may pass resolution for removal of a Judge on one hand, or may not do so in case of another and if that being so, a Judge may be left at the mercy of the Parliament in any case.

In *Benazir Bhutto v. Federation of Pakistan PLD 1988 SC 416,* the Supreme Court of Pakistan expressed that 'the Parliament in our Constitution does not

enjoy the supreme status like the British Parliament….In our Constitution, the legislative authority of the Parliament is governed and limited by the provisions of the Constitution.' In *Al-Jehad Trust v. Federation of Pakistan PLD 1996 SC 324,* the Supreme Court of Pakistan also expressed that 'the success of the system of governance can be guaranteed and achieved only when these pillars (the Executive, the Parliament and the Judiciary) of the state exercise their power and authority within their limits.' In the present context, particularly the weakness of the Parliamentary and democratic institutions it cannot be said to be exaggerated that the Sixteenth Amendment has transgressed the constitutional limit of Parliament.

In India, Parliamentary sovereignty is subject to the constitution of India, which includes judicial review. In effect, this means that while the Parliament has rights to amend the constitution, the modifications are subject to be valid under the

framework of the constitution itself. For example, any amendments which pertain to the federal nature of the constitution must be ratified by a majority of State Legislatures also and the Parliament alone cannot enact the change on its own. Further, all amendments to the constitution are also open to Judicial Review. Thus, in spite of parliamentary privilege to amend the constitution, the constitution itself remains supreme.

In India there is no entrenched constitutional protection of the decisional independence of the courts, although provision is made for the protection of judicial independence by securing tenure and remuneration (articles 124-125). Although provision is made for the establishment of a Supreme Court, with its powers and jurisdictions defined in Chapter IV, there is no provision which vests the judicial power of the Union in the Supreme Court, as there is in the Australian and United States constitutions. Accordingly, legislation cannot be invalidated on the grounds that it constitutes an invalid interference

with, or usurpation of, the judicial power in breach of a legally-entrenched separation of powers. (H.M. Seervai, Constitutional Law of India, Vol.1). However, the Supreme Court does have the power, in the manner of the United States Supreme Court and the High Court of Australia, to invalidate legislation where it is otherwise beyond the competence of the legislature.

In the Parliamentary System of democracy an important characteristic is the predominance of the Cabinet which virtually monopolizes the business of Parliament. So long as the party in power commands the majority support in Parliament, the Cabinet is in full control of Parliament and it is the Cabinet that decides what shall be discussed in Parliament, when it shall be discussed, how long the discussion shall take place and what the decision shall be. Practically all the Bills that ultimately pass through Parliament are sponsored by the Ministers who are under the constant pressure of organised groups and interests seeking redress through legislation.

A member of Parliament who is not a Minister may sponsor a Bill. (Rules 72 of the Rules of Procedure). But the private member's Bill has little chance of being passed without the government's support. The power of the private members in extremely limited and not much scope is left for their individual enterprise and initiative. Most of the parliamentary time is consumed by the government's business and only one day in a week is reserved as private member's day. The problem before a modern government is one of time and there are always a number of government Bills waiting in the line for passage by Parliament. Consequently, the private member's Bill is more often sidetracked to accommodate the government's business.

There is a misconception about the Parliamentary sovereignty or legislative privilege in a written constitution. The law on the subject has been clearly enunciated by a Full Bench of the Supreme Court of India in Special Reference No.1 of 1964 (AIR 1965 SC 745) laying down amongst others that the court has

jurisdiction to deal with the petition of a citizen committed for contempt by a Legislature, and to quash the committal where the legislature has exceeded its privilege, even if the warrant is unspeaking or general. An unspeaking warrant cannot silence the constitution.

Only the people are sovereign and only the constitution is supreme. All other institutions are merely the instruments or agencies to fulfill the greatest purposes enunciated in the constitution. Our constitution envisages not only a democracy of men but a democracy of institutions. The attributes of sovereign authority or unlimited power do not attach to any office or any institution. To claim sovereignty for the Legislature is directly contrary to the law laid down by the Supreme Court of India and this court has approved the view. Democracy can survive only if basic norms of public decency are maintained both within and outside the legislature. (Nani A. Palkhivala, We the Nation).

Mr. Manzill Morshid along with all learned Amici Curies except Mr. Ajmalul Hossain submit in unison that the impugned removal mechanism introduced by the Sixteenth Amendment being highly politicized will be even more prominent in the current political context of Bangladesh especially due to the effect of article 70 of the constitution. Article 70 reads as under:

> "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".

This article provides for vacation of seat of a member of Parliament amongst other reasons that if he votes in Parliament against the party which nominated him. The object of this article is no doubt discernible that it is to ensure stability and

continuity of government and also to ensure discipline among the members of the political parties so that corruption and instability due to political horse trading can be removed from national politics. If the members of Parliament are suspected to indulge in horse trading if no such provision is contained in the constitution, how they may be reposed with the responsibility of the onerous task of removal of Judges of the higher judiciary. The spirit is that members elected to the Parliament should continue to maintain their allegiance to the party by which they have been nominated (Secretary, Parliament V. Khondker Delwar Hossain, 1999 BLD(AD)276).

Prior to the Fifteenth Amendment, the expression, 'voted against that party' was given an extended meaning by an explanation which stipulated that if a member of Parliament being present in Parliament refrains from voting or abstains himself from any sitting of Parliament ignoring the direction of the party nominating him for election, he shall be deemed to have voted against that party. Clause (2)

provided the manner of determining the leader of a party in case of dispute and directed that the direction of the leader would be the direction of the party for the purpose of article 70. Violation of any direction of the party will not necessarily lead to vacation of the seat. In order to attract article 70, the direction must be one relating to voting in Parliament on an issue. Violation of direction of a party to refrain from attending the sitting of Parliament will not attract the mischief of article 70 as the constitution contemplates the duty of the members of Parliament to attend the sittings of Parliament and provides for vacation of seat for absence from Parliament for a specified number of sitting days. (Constitutional Law of Bangladesh, Mahmudul Islam, 3rd Edn.)

The Indian Supreme Court held that a member of Legislature who was elected as an independent candidate may support the government from outside, but if he joins any political party he has his seat vacated. (Jagjit Singh V. Haryana, (2006) 11 SCC 1).

To avoid such a situation, clause (3) of article 70 provided that if person after being elected as member of Parliament as an independent candidate joins any political party, he shall be deemed to have been nominated by that party. The Fifteenth Amendment substituted article 70 by excluding the explanation in clause (1) and deleting clauses (2) and (3). As a result, the expression "vote against that party" cannot be given the extended meaning and article 70 providing for some sort of forfeiture clause is required to be strictly construed and a member of Parliament cannot be said to have vacated his seat unless his case falls within the literal meaning of the substituted article 70. In view of such provision it is questionable as to what extent the members of Parliament can be impartial and free from partisan political directives at the time of exercising power of removal of Judges.

Mr. Hassan Ariff in this connection rightly argued that this article places a member of Parliament within the clan and bounds of the

political party to which he belongs and under which banner he was elected. He further submitted that there has been a chequered story of article 70 in keeping it in the constitution. In the Twelfth Amendment this article was substituted as under:

> "70(1) A person elected as a Member of Parliament at an election of which he was nominated as a candidate by a political party shall vacate his seat if he resigns from that party or votes in Parliament against that party.
>
> Explanation.- If a Member of Parliament
>
> (a) Being present in Parliament abstains from voting. or
>
> (b) Absence himself from any sitting of Parliament,
>
> ignoring the direction of the party which nominate him at the election as a candidate not to do so, he shall be deemed to have voted against that party."

In the said amendment clause (2) of article 70 reads thus:

> "If, at any time, any question as to the leadership of the Parliamentary party of a political party arises, the Speaker shall, within seven days of being informed of it in writing by a person claiming the leadership of the majority of the members of that party in Parliament, convene a meeting of all members of Parliament of that party in accordance with the rules of procedure of Parliament and determine its Parliamentary leadership by the votes of the majority through division and if, in the matter of voting in Parliament, any member does not comply with the direction of the leadership so determined, he shall be deemed to have voted against that party under clause (1) and shall vacate his seat in the Parliament."

Clause (3) provides "if a person, after being elected a member of Parliament as an independent candidate, joins any political party, he shall, for the purpose of this article, be deemed to have been elected as a nominee of that party."

The present article 70 has been substituted by the Constitution Fifteenth Amendment as quoted earlier. The majority of the members of Parliament come from political parties. The political party which gains majority as members of Parliament form the Cabinet headed by the Prime Minister. Article 55(2) gives the Executive power of the Republic to be exercised by the Prime Minister in accordance with the constitution. Article 55(4) says that all executive actions of the government shall be expressed to be taken in the name of the President and clause (6) of article 55 provides that the President shall make Rules for the allocation and transaction of the business of the government.

Under article 48 clause (3), the President in exercise of all his functions, save only that of

appointing of the Prime Minister and Chief Justice, shall act in accordance with the advice of the Prime Minister. From the above, Mr. Ariff and Mr. Rokonuddin Mahmud submit that this provision boils down that a political party through the process of election secures majority of the seats in the Parliament i.e. members of Parliament under one banner of a political party becomes majority members. The leader of said political party who commands the support of the majority of the members of Parliament form the Cabinet which runs the government. The theoretical separation of power is completely diluted here, because the members who are in the majority of the Parliament legislate and the Cabinet which is formed from among them discharge the function of the Executive part of the government. Therefore, legislation and administration fall in the hands of the same group of members of Parliament. In that view of the matter, article 70 in any format ensure adherence of members of Parliament belonging to a party to abide by the party instruction.

Learned Attorney General argues that the High Court Division has given a wrong interpretation to article 70, but he has not explained as to which part of the findings in respect of article 70 is based on wrong interpretation. The High Court Division observed that by reason of article 70, it has imposed a tight rein on the members of Parliament that they cannot go against their Party line or position on any issue in the Parliament; that they have no freedom to question their party's stance in the Parliament, even if it is incorrect and flawed; that they cannot vote against their party's decision; that they are, indeed, hostages in the hands of their party high command; that 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. We find no infirmity in the views taken by the High Court Division on construction of article 70; and that in view of article 70, the members of Parliament must toe the

party line in case of removal of any Judges of the Supreme Court. Consequently, the Judges will be left at the mercy of the party high command. We find nothing wrong in taking the above view.

However, in the majority judgment of the High Court Division, it was observed that:

> "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 ……. 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 debate 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 misbehavior or incapacity"

The above observations by the High Court Division regarding the members of Parliament are totally uncalled for and we do not endorse this view at all. The court or the Judges should not make such derogatory remarks against the members of Parliament. There should be mutual respect and harmony between the court and the Parliament. Similarly the Parliament should not make any comment or remark or aspersion against any findings of the Supreme Court in any proceeding which is barred by article 78(2) of the constitution and rules 270 & 271 of the Rules of Procedure of Parliament. More so, in a unitary form

of government there cannot be any separation of power in absolute sense of the word and therefore, the Parliament and the Judiciary are required to work in a harmonious way. Accordingly, those remarks in the judgment of the High Court division are expunged.

We are of the view that in presence of article 70, it is difficult for a member of Parliament to form an opinion independently ignoring the directions given by the party high command of the political party in power. That being the position, it cannot be said to be exaggerated that the members of the political party which gains majority in the Parliament cannot remain independent when the question of removal of a Judge would arise because the removal proceeding will be taken in the Parliament by the political party in power and under such scenario, it will be questionable as to what extent the members of Parliament would act impartially free from partisan political pressure at the time of exercising the power of removal. In this connection, I have already mentioned the Sri Lankan

and Indian example about the removal of the Chief Justice and a Judge of the Supreme Court. No one can guarantee that keeping article 70 in the constitution, a Judge would not be removed in the manner the Sri Lankan Chief Justice had been removed.

It is admitted from the Bar that the independence of judiciary is a basic structure of the constitution. Now the question is whether by the Sixteenth Amendment through which Judges removal mechanism has been given with the Parliament, the independence of judiciary has been curtailed or impaired. Mr. Murad Reza, learned Additional Attorney General submits that for keeping the independence of judiciary it is necessary to separate the independence of individuals who function as Judges and the independence of the institution of the judiciary as a whole. He adds that judicial independence was sought to be balanced against accountability of Judges and the judiciary through several provisions that vested power in Parliament or the President either in terms of appointment or

removal or salaries which are equally curtailed in the overall scheme pertaining to judicial functioning. Such provisions are made to ensure checks and balances in the operation of the judiciary and its constitutional function.

Randy E. Barnett in his book 'The structure of Liberty' has clearly explained the essence of checks and balances under the American system as under:

> "For James Madison and the other framers of the United States Constitution, judicial review was not the principal remedy for the ills of balloting or enforcement abuse more generally. Madison and his colleagues were more concerned that government be structured in such a way as to balance interests against each other so none would come to dominate. These balancing structures have come to be referred to as federalism and separation of powers.
>
> The essence of this strategy is to create an oligopoly or a "shared" monopoly

> of power. This scheme preserves a monopoly of power but purports to divide this power among a number of groups, each having limited jurisdiction over the others. So, for example, there might be a division of powers between groups of people known as "state officials" and others called "federal officials". Or there might be a separation of powers between some people called "legislators" and others called "Judges" or "executives." The object of such schemes is to create checks and balances.

Mr. Ajmalul Hossain submits that the Sixteenth Amendment has not in any way affected the basic structure of the constitution since the structure relating to security of tenure, which is considered as one of the conditions of the judicial independence has not been affected. He, however, admitted that independence of judiciary and the fundamental rights are basic structures of the constitution. Since there is no dispute from the Bar that independence of

judiciary is a basic structure of the constitution, I need not explore this point although all the learned counsel made elaborate submissions on the issue and referred to various decisions.

Essential to the rule of law in any country is an independent judiciary-the Judges not under the thumb of other branches of the government and therefore equipped with the armour of impartially. The experience gathered from the developed countries including USA confirms that judicial independence is vulnerable to assault; it can be shattered if the society which it serves does not take care to assure its preservation. It is the sole responsibility of the apex Court of the country to protect the independence of judiciary and this responsibility is not abducted by any other branches of the State; rather it is the constitution, the supreme law of the nation, which gave this great burden on the shoulder of the Judiciary.

Under the U.S. constitution, Federal Judges hold their offices essentially for life, with no

compulsory retirement age, and their salaries may not be diminished by Congress. Through those protections, the Founders sought to advance the judiciary's independence from Congress and the President, and thus to safeguard Judge's ability to decide cases impartially. In over 220 years since ratification of the USA constitution, the Representatives have impeached only 13 Federal Judges; in only seven instances did impeachment result in a Senate Conviction, and those Judges were removed not for wrongly interpreting law, but for unquestionably illegal behaviour, such as, extortion, perjury, and waging war against USA (My own words-Ruth Bader Ginsburg-p.218-219)

In Masder Hossain, 52 DLR(AD) 82, this court held that security of tenure which includes security against interference by the Executive or other appointing authority is an essential feature of the independence of judiciary. Therefore, the responsibility reposed upon the Supreme Judicial Council to protect the Judges of higher Judiciary

except on the ground of misconduct, incapacity and proved misbehaviour without interference by the Executive is an essential element of the foundation of the independence of judiciary. Sahabuddin, J. in Anwar Hossain case observed that "Independence of the Judiciary, a basic structure of the Constitution, is also likely to be jeopardised or affected by some of the other provisions of 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 independence of Judges."

In this connection B.H. Chowdhury, J. opined that Judges cannot be removed except in accordance with the provisions of article 96, that is, the Supreme Judicial Council. Clause (5) says 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 misconduct, the President shall, by order remove the Judge from office. This is a unique feature because the Judge is tried by his own peer, 'thus there is secured a freedom from political control." The above opinion is clear that the provisions of Supreme Judicial Council Mechanism for removal of Judges are essential for safeguarding the independence of judiciary. This Provision relates to self regulation introduced by the Fifth Amendment and ratified, approved by this Court in Fifth Amendment case and same has been retained by the Fifteenth Amendment is a unique provision for safeguarding the Judges in the administration of justice independently and impartially without interference from any corner.

Dr. Kamal Hossain in this connection submits that this Sixteenth Amendment was intended to alter the basic structure of the constitution. He submits that the experience of the last 42 years in Bangladesh and other countries where impeachment by Parliament have been the mode of removal of Judges,

concerns have been raised that the impeachment procedure is inappropriate if independence of the judiciary is to be safeguarded. The politicization in the judiciary is now injected, and partisanship has rendered the process inappropriate.

In all cases where the Parliaments have exercised its power of impeachment, it must be able to enjoy the confidence as an impartial and neutral body and not affected by political partisanship. The long experience of the last 42 years in Bangladesh and in particular the way the Parliament has evolved in Bangladesh leaves little doubt that such impartiality and neutrality can be ensured. As an illustration, in India where impeachment was attempted in Indian Parliament in Ramaswami case in 1990, the whole process was undermined by various forms of politicized manipulation (Impeachment of Judges: Tremors in Indian Judiciary by T. N. Shalla).

By reason of article 70 of our constitution and its impact on members of Parliament leads to the irresistible conclusion that this new mechanism

cannot be expected to function independently and neutrally if a Judge attracts displeasure from the political party in power, he may be subjected to removal by the Parliament. There can be little argument that the function of judicial review by Judges involve dealing with views in respect of which political parties in the government and opposition could have opposing views with which the Judges may not reflect or agree in their judgment. Without a political tradition in which members of Parliament could clearly demonstrate that they can act neutrally and impartially if they are given the power of removal and will not be affected by the party's views under article 70, the purported process of impeachment introduced by Sixteenth Amendment would clearly undermine the independence of judiciary and will definitely alter the basic structure of the constitution.

In this connection Mr. Rokanuddin Mahmood submits that for impeachment and removal of the President there is detailed provision in articles 52

and 53 of the constitution, but for removal of Judges under article 96(2) details have been left with the Parliament. Power of removal of Judges under article 96(2) is a constitutional mandate but the procedure and investigation process will be governed under an ordinary law as under article 96(3) in which using 'may' for passing such ordinary law implies that it is not mandatory. He adds that even if such ordinary law is passed, it will be subject to frequent changes even repeal in the interest of party-in-power allowing a constitutional provision to facilitate exercise of abusive power. He further adds that even if a fair procedure is followed, obligation cannot be imposed on the members by an ordinary law while exercising constitutional power under article 96(2). Moreover, he argues, exercise of power of removal of Judges under article 96(2) is not subject to compliance of article 96(3) nor any law passed under it and hence a resolution under article 96(2) can be passed without following any recommendation emanated from it. That is to say, it can be said that any

outcome of investigation can be thrown away by voting of the Parliament. The submissions of Mr. Mahmood merit consideration and therefore, I hold the view that if this removal mechanism remains, the independence of judiciary will be jeopardized, curtailed and whittled down.

If articles 7, 22, 94(4), 102 and 112 are read together it becomes clear that the Supreme Court is independent, separate and is the guardian of the constitution and it is an organ of the State. It is not merely a court and if this position is taken to be true, the Parliamentary removal mechanism introduced by the Sixteenth Amendment would be an embargo upon the Judges to uphold the supremacy of the constitution as well as it will create imbalance between the organs of the State and thereby jeopardize the independence of judiciary.

Separation of the Executive and the Legislative branches from the Judiciary is equally important and essential, subject, of course, to the constitutional guarantees, the other provisions and the entire

scheme of the constitution. Rigging their respective boundaries under any guise, like court legislating or functioning as the Executive which would be *coram non judice* and void, would be eroding the rule of law and paving the way for despotism. Courts have not only to themselves strictly adhere to the boundaries and set an example but stand, when matters come under their purview, as sentinels and forbid or strike down transgression by other branches of their boundaries. Forces of freedom, liberty and the rule of law channeled through the three branches of government would be strong or weak in proportion to the effective control ever to be maintained against transgression of their mutual boundaries.

Independence of the Judiciary is a basic feature of the justice system under the constitution. A Judge is enjoined by his oath and the every nature of his office and duties to function without fear or favour, affection or ill-will and uphold the constitution and the laws. The Chief Justice or other Judges of the

Supreme Court are constitutional functionaries and as such they hold an office and not a post.

The constitution itself delineates and demarcates the difference and contains in separate compartments different provisions, some of which relating to Judges of the Superior Judiciary as constitutional functionaries holding an office and the other to the various services holding posts borne on cadres governed by separate rules. There are various provisions in the constitution which establish and protect the independence of the Judiciary as a basic feature in its sweep and as an inherent element of the Rule of Law. With all that, I think the bedrock of independence lies in the personalities who handle in the inter-relation with the changing concepts of rights and liberties, and in a sense, the continuing life itself for the time being.

Certainly Judges are not above the law. But what is the law has to be reviewed and laid down, which has a great bearing on the independence of the

Superior Judiciary. That apart, in the matter of discharge of judicial duties and functions, independence is a *sine qua non* and an integral part of justice and its dispensation. That applies to the entire judiciary, top to bottom. The Supreme Court is a Court of Record and has as such vested in them the power to punish for contempt of such courts. The Contempt of Courts Act takes care of the Subordinate Courts as well. Independence in this context is a subtle and delicate matter but is of great importance and substance. Independence is not an assertion of right but an inherent virtue necessarily embedded in the process and rendition or dispensation of Justice.

As Coke would have it, in theory the King might be the fountain of justice but in practice, he has no right to interfere with or pollute justice and its dispensation. That is the essence of independence to extract which, took centuries of struggle and sacrifice.

Independence rests not merely on law and its protection but equally and surely and also more, on

the Judge himself. Self restraint, decorum, circumspection, balance, conscience, dignity, objectivity, aloofness are among the preservatives of the independence of a Judge. He holds a high office and immense power of the laws as a Judge, not as an individual, and has therefore, a duty to uphold it in ways which would help hold its place in public interest, not in the least swayed by anything from what justice dictates.

In the case of *TFH Van Rooyen v. the State (case No. 21 of 2001),* Mr. Chaskalson, CJ, the Constitutional Court of South Africa discusses the principles of judicial independence. The court finds that the core of the judicial independence is the complete freedom of individual judicial officers to hear and decide the cases with no outside interference. The court gives emphasis on acting independently and impartially by individual judicial officers in dealing with the cases at institutional level; there must be structures to protect courts and judicial officers against external interference.

These safeguards must include security of tenure and basic degree of financial security. That in the instant case, the impugned amendment would affect the security to tenure of judges-one of the basic conditions of judicial independence as expounded in *van Rooyen,* though it sheds light on the lower judiciary of that country. (http://www.constitutionalcourt.org.za/uhtbin/hyperion-image/S-CCT98-08)

In *Walter Valente v. The Queen, 1985 SCR 673,* the Canadian Supreme Court held that, 'Judicial independence is a 'foundational principle' of the constitution…Security of tenure, financial security and administrative independence are the three 'core characteristics' of judicial independence.' These views are in conformity with the views taken by this court and this court cannot overlook the established norms to be followed around the globe regarding the independence of judiciary. The Parliament has totally ignored the security of tenure—one of the basic

conditions of judicial independence as expounded in *Valente* and other courts of higher echelon of this sub-continent.

Mr. M. Amirul Islam argues that while drafting our constitution the Framers gave enough thoughts to make three pillars, the Executive, the Legislature and the Judiciary strong and to clothe them with the necessary prestige and authority so as to ensure democracy, human dignity, rule of law and freedom. He adds that the working of democratic government in the countries of the world three pillars identified are not mutually exclusive in their functions and theory; rather they are complementary to one another, though they have certain clearly defined functions in their respective fields, and in respect of independence of the judiciary, he has referred to the European Commission for Democracy Through Law (Venice Commission) 2008; the Commonwealth Latimer House Principles and United Nations formulated basic Principles of Independence of Judiciary in 1985.

In the European Commission regarding independence of judiciary it is stated "The independence of the judiciary has both an objective component, as an indispensable quality of the judiciary as such and a subjective component as the right of an individual to have his/her rights and freedoms determined by an independent Judge. Without independent Judges there can be no correct and lawful implementation of rights and freedoms. Consequently, the independence of the judiciary is not an end in itself. It is not a personal privilege of the Judges but justified by the need to enable Judges to fulfill their role of guardians of the rights and freedoms of the people. It also provides for an impartial umpire in the shape of an independent judiciary to resolve the inevitable disputes over the boundaries of constitutional power which may arise in the working of the government.'

The United Nations principles were adopted by the Seventh United Nations Congress on the Prevention of Crimes and the Treatment of Offenders held at

Milan and endorsed by the General Assembly Resolution Nos.40/32 and 40/146. The basic principles of the independence of judiciary are as follows:-

> "1. The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.
>
> 2. The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interference, direct or indirect, from any quarter or for any reason.
>
> 3. The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide

whether an issue submitted for its decision is within its competence as defined by law.

4. There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law.

5. Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.

6. The principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial

proceedings are conducted fairly and that the rights of the parties are respected.

7. It is the duty of each member state to provide adequate resources to enable the judiciary to properly perform its functions".

In the Commonwealth Latimer House Principles, it is stated "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.

To secure these aims:

"(a) Judicial appointment should be made on the basis of clearly defined criteria and by a publicly declared process. The process should ensure:

equality of opportunity for all who are eligible for judicial office; appointment on merit; and

that appropriate consideration is given to the need for the progressive attainment of gender equality and the removal of other historic factors of discrimination;

(b) Arrangements for appropriate security of tenure and protection of levels of remuneration must be in place;

(c) Adequate resources should be provided for the judicial system to operate effectively without any undue constrains which may hamper the independence sought;

(d) Interaction, if any, between the executive and the judiciary should not compromise judicial independence.

Judges should be subject to suspension or removal only for reasons of incapacity or

misbehaviour that clearly renders them unfit to discharge their duties..."

Article 1 of the *Universal Charter of the Judge formulated by International Association of Judges* has clearly mentioned that Judges shall in all their work ensure the rights of everyone to a fair trial. They shall promote the right of individuals to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law, in the determination of their civil rights and obligations or of any criminal charge against them. 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.

Article 11 of the said Charter provides that the administration of the judiciary and disciplinary action towards Judges must be organized in such a way, that it does not compromise the Judges genuine independence, and that attention is only paid to

considerations both objective and relevant. Where this is not ensured in other ways that are rooted in established and proven tradition, judicial administration and disciplinary action should be carried out by independent bodies, that include substantial judicial representation. Disciplinary action against a Judge can only be taken when provided for by pre-existing law and in compliance with predetermined rules of procedure.

Article 98 of the constitution of the Republic of Singapore has depicted the procedure of removal of a Judge. Clause (3) provides that if the Prime Minister, or the Chief Justice after consulting the Prime Minister, represents to the President that a person holding office as a Judge of the Supreme Court or a Judicial Commissioner, a Senior Judge or an International Judge of the Supreme Court ought to be removed on the ground of misbehaviour or of inability, from infirmity of body or mind or any other cause, to properly discharge the functions of his office, the President shall appoint a tribunal in

accordance with clause (4) of article 98 and shall refer that representation to it; and may on the recommendation of the tribunal remove the person from office.

Clause (4) of the article 98 provides that the tribunal shall consist of not less than 5 persons who hold or have held office as a Judge of the Supreme Court, or, if it appears to the President expedient to make such an appointment, persons who hold or have held equivalent office in any part of the Commonwealth, and the tribunal shall be presided over by the member first in the following order, namely, the Chief Justice according to their precedence among themselves and other members according to the order of their appointment to an office qualifying them for membership (the older coming before the younger of 2 members with appointments of the same date).

At the 6th Conference of Chief Justices held in Beijing in August 1997, 20 Chief Justices first adopted a joint Statement of Principles of the

Independence of the Judiciary shortly referred to as Beijing Statement. This Statement was further refined during the 7th Conference of Chief Justices, held in Manila in August 1997. It has now been signed by 32 Chief Justices throughout the Asia Pacific region.

Article 23 of the Beijing Statement states that it is recognized that, by reason of differences in history and culture, the procedures adopted for the removal of Judges may differ in different societies. Removal by parliamentary procedures 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 7 of the Beijing Statement provides that Judges shall uphold the integrity and independence of the judiciary by avoiding impropriety and the appearance of impropriety in all their activities. Article 10 of the Beijing Statement states that the

objectives and functions of the judiciary include the following:

a) To ensure that all persons are able to live securely under the rule of law;
b) To promote, within the proper limits of the judicial function, the observance and the attainment of human rights; and
c) To administer the law impartially among person and between persons and the State.

As per article 84 of the Constitution of the Republic of Namibia, on the recommendation of the Judicial Service Commission consisting of the Chief Justice, a Judge appointed by the President, Attorney-General and two members of legal profession nominated in accordance with the provisions of an Act of Parliament by the professional organization of organization representing the interests of the legal profession in Namibia, President of Namibia may remove a Judge from his office.

As per article 129 of the constitution of Bulgaria, Judges, prosecutors and investigating Magistrates shall be appointed, promoted, demoted, transferred and removed from office by the Supreme Judicial Council and the Chairman of the Supreme Court of Cassation, the Chairman of the Supreme Administrative Court and the Prosecutor General shall be appointed and removed by the President of the Republic upon a proposal from the Supreme Judicial Council consisting of 25 members.

International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors provides that security of tenure for Judges constitutes an essential guarantee to maintain judicial independence. Decisions on promotion of Judges must be based on the same objective criteria as appointment and must be the outcome of transparent and fair proceedings.

It is worth highlighting that the Council of Europe's recommendation on the independence of the judiciary

lays down clear guidelines on the grounds that can lead to the removal of a Judge:

> "Appointed judges may not be permanently removed from office without valid reasons until mandatory retirement. Such reasons, which should be defined in precise terms by the law, could apply in countries where the judge is elected for a certain period, or may relate to incapacity to perform judicial functions, commission of criminal offences or serious infringements of disciplinary rules."

Furthermore, the Council has established clear requirements on removal proceedings, in particular the creation of a special body subject to judicial control and the enjoyment by judges of all procedural guarantees:

> "Where measures on discipline need to be taken, states should consider setting up, by law, a special competent body which has as its task to apply any disciplinary sanctions and measures, where they are not dealt with by a court, and

> whose decisions shall be controlled by a superior judicial organ, or which is a superior judicial organ itself. The law should provide for appropriate procedures to ensure that judges in question are given at least all the due process requirements of the European Convention on Human Rights, for instance that the case should be heard within a reasonable time and that they should have a right to answer any charges."

Judges must conduct themselves according to ethical standards and will be held accountable if they fail to do so. International law clearly establishes that Judges can only be removed for serious misconduct or incapacity. Disciplinary proceedings must be conducted by an independent and impartial body and in full respect for procedural guarantees.

Article 209 of the Pakistan's constitution deals with Supreme Judicial Council consisting of the Chief Justice of Pakistan; the two next most senior Judges

of the Supreme Court; and the two most senior Chief Justices of High Courts and on the basis of the recommendation of the Supreme Judicial Council, President removes Judges of the High Court and Supreme Court. In view of article 144 of the said constitution, President may remove a Judge on the report of Judicial complaints Commission on the grounds of a mental or physical disability that makes the Judge incapable of performing judicial functions; incompetence; gross misconduct; or bankruptcy.

Removal of Judges from office should be an event rarely to take place if their entry in the judiciary is properly made after detailed scrutiny as required for getting the selection done with best quality of head, heart & courage with judicial discipline and conviction for rule of law and equal justice with the backbone that never to yield to any power or favour, however tempting or convenient it may seem and in strict adherence to the rule of law, being an integral part of the Independence of Judiciary. For ensuring rule of law through a rigorous judicial

selection process and high standards of ethical conduct can help avoid the need for the use of removal mechanism. These are basics to be borne in mind but the Executive ignores the criteria in the selection process which is seen all the times. 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 penalize or intimidate Judges. The challenge is to strike the correct balance between these concerns. It is to be ensured that the removal process cannot be used to penalize or intimidate Judges. Removal from office is a very serious form of judicial accountability.

Describing the duties of a Judge, in the case of Union of India v. Sankalchand [AIR 1977 SC 2328], K. Iyer J, with the approval of another great Judge

i.e., Lord Denning M.R., which is as follows: "Law does not stand still. It moves continually. Once this is recognized, then the task of the Judge is put on a higher plane. He must consciously seek to mould the law so as to serve the needs of the time. He must not be a mere mechanic, a mere working mason, laying brick on brick without thought to the overall design. He must be an architect-thinking of the structure as a whole building for society a system of law which is strong, durable and just. It is on his work that civilized society itself depends."

The degree or level of misconduct is to be considered sufficient to warrant the removal of a Judge. It has to be serious misconduct. Removal Process and disciplinary proceedings should be confined to instances of professional misconduct that are gross and inexcusable and that also bring the judiciary into disrepute. This position is also reflected in the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, 2005 and the IBA Minimum Standards of Judicial

Independence. Judge facing removal must have the right to be fully informed of the charges, to be represented at a hearing, to make a full defense and to be judged by an independent and impartial tribunal. [Latimer House Guidelines]

The High Court Division upon analysis of different authorities and the submissions of the learned Amici came to the conclusion that there are two dimensions of the judicial independence; one is individual and the other is institutional. The individual dimension relates to the independence of a particular Judge. The institutional relates to the independence of the court. Both the dimensions depend upon some objective standards that protect the judiciary's role. The judiciary must 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. It further observed that the three core characteristics

of judicial independence are security of tenure, financial security and administrative independence which have emerged from the various decisions as considered by it and the Sixteenth Amendment has affected the security of tenure of the Judges of the Supreme Court of Bangladesh, a core characteristic of judicial independence. I find no reason to discard the above findings, which are core and basics to maintain the independence of the judiciary.

Mr. Attorney General submits that judicial independence is guaranteed under articles 94(4) and 116A, but if the Supreme Court declares that the constitution is supreme, there is no doubt about it. According to him, it cannot be subordinate or subservient to Martial Law Proclamation. He goes on submitting that the concept of independence of judiciary is being abused by the High Court Division not in the interest of public but for keeping the Judges above accountability which is against rule of law, public interest and independence of judiciary itself.

Mr. Fida M. Kamal pointed out that article 96 of the constitution was amended at first by the Fourth Amendment, whereby Parliament entrusted the power upon the President without determining any procedure. Thereafter, by the Tenth Amendment Order 1977, sub-articles (2) to (7) of article 96 were inserted. This Division in the Fifth Amendment Case condoned the same. The Ninth Parliament after deliberating over the matter, for more than one year, with eminent jurists and different classes of people, enacted the Fifteenth Amendment incorporating new article 7B and Chapter I of Part VI, which includes article 96, consciously keeping the provision of Supreme Judicial Council intact and undisturbed. Referring to articles 88(b) and 89(1) of the constitution, Mr. Kamal submits that the remuneration of the Judges of the Supreme Court is payable from the Consolidated Fund and the expenditures charged upon the Fund can only be discussed in the Parliament but cannot be voted on. Such restriction upholds the independence of the judiciary in the way that even the Parliament cannot

vote on their remuneration. Therefore, the Sixteenth Amendment is in conflict with the aforesaid articles 88(b) and 89(I), as also article 94(4) of the constitution. Again referring to article 147(2), he submits that the remuneration, privileges and other terms and conditions of service of a person holding or acting in any office to which that article applies, shall not be varied to the disadvantage of any such person during his term of office.

Refuting the submissions of the learned Attorney General that the Parliament is going back to the original wording of article 96 by way of 'restoring the said provision in its original language,' Mr. Kamal, pointing to the statement of objects & reasons (at page 591 of the Paper Book) for making the Sixteenth Amendment that article 142 does not provide to "restore" or any such word by way of amendment. Further, article 7B is a clear bar to destroy the basic structure of the constitution.

Mr. Kamal concluded by submitting that the Sixteenth Amendment Act seeks to replace the

constitutionally entrenched provision of the Supreme Judicial Council, (as newly inserted afresh by the 9th Parliament), by ordinary statute law. Such procedural provisions will be subject to change at any time by the Parliament by a simple majority, thereby seeking to effectively controlling the Judiciary and keeping Judges at the mercy of each and every Parliament, which will certainly destabilize the system ensuring separation and independence of judiciary and the rule of law. Lastly, Mr. Kamal submits that having regard to article 70 of the constitution, Members of Parliament, belonging to a particular political party, are constitutionally duty bound to act in support of the party decision. The Sixteenth Amendment Act is not only ultra vires the constitution, but the same is intended to be used as a political weapon to control the judiciary.

I fail to understand why the learned Attorney General is hostile towards particular provision regarding the Supreme Judicial Council mechanism introduced by the martial law proclamation. There is

no doubt that article 94(4) guarantees the independence of higher judiciary but such independence will remain in the constitution if the political Executive is bent upon to remove a Judge because he decides a case against the government as has been done in Sri Lanka. This court does not approve martial law and term the authority as 'usurper' but for this reason a provision which upholds the independence of judiciary cannot be equated with all ills. True, a usurper made the above constitutional amendment. This amendment was far better than that existed after the Fourth Amendment. Besides, as observed above, a provision of constitution or the constitution as a whole is valuable if it is suited to the circumstances, desires, and aspirations of the people and it contains security against disorder.

As observed above, a constitution is a 'living tree' that grows and adapts to contemporary circumstances, trends, and beliefs and whose current and continued authority rest on the justice or on

factors like the consent, commitment, or sovereignty of the people – one, not the framers or the people – then, then one will be far less likely to find such appeals conclusive, or even particularly relevant. (Canadian Law in Edwords). 'A constitution is not a finished product handed down in a form fixed until such time as its amending formula is invoked successfully or a revolution occurs. Rather, it is the blueprint for a work in progress requiring continual revisiting and reworking ask our theories about the limits it establishes are refined and improved. It is, in short, a tree that is very much alive." (A common Law Theory of Judicial Review – W.J.Waluchow). It can be changed any time if it augments the need of the people or for the independence of judiciary.

In this connection, I have pointed out that the Muslim Family Laws Ordinance was also promulgated by martial law and it is still in force and also some other provisions are operative till now. It should not be oblivious that the constitution as drafted and

as it exists today, has placed the Judges of this court in the driving seat of governance, maintaining rule of law and safeguarding the constitution. Maintaining public acceptance requires a constitution that works well for the people today. To quote Benjamine N. Cardozo - 'Constitutions are more likely to enunciate general principles, which must be worked out and applied thereafter to particular conditions. What concerns us now, however, is not the size of the gaps. It is rather the principle that shall determine how they are to be filled, whether their size be great or small. The method of sociology in filling the gaps puts, its emphasis on the national welfare.'

The court can help achieve this objective in two ways. First, the court should reject approaches to interpreting the constitution that consider the document's scope and application as fixed at the moment of framing. Rather, the court should regard the constitution as containing unwavering values that must be applied flexibly to ever changing circumstances. In this regard Stephen Breyer, a

sitting Judge of the U.S. Supreme Court in his book 'Making Our Democracy Work' stated at page 75 that "the court must consider not just how Eighteenth-century Americans used a particular phrase but also how the values underlying that phrase apply today to circumstances perhaps then inconceivable". When the court interprets the constitution, it should take account of the roles of other governmental institutions and the relationships among them. The constitution must work in both senses, that is, the court must interpret the law in ways that help that document works well for the citizens and public must accept the court's decisions as legitimate.

The constitution divides power between different organs and prescribes limits on the powers of Parliament, Executive and the Judiciary. It also provides for an impartial umpire in the shape of an independent judiciary to resolve the inevitable disputes over the boundaries of constitutional power which may arise in the working of the government. It is admitted by both the parties that in Masder

Hossain's case, this court observed that 'the independence of judiciary, as affirmed and declared 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'. An independent, impartial, competent and ethical judiciary is essential to the rule of law. It is necessary for the fair and impartial resolution of disputes, just and predictable application of the law, and for holding governments and private interests to account. In order to ensure the judiciary as be so fit well equipped and competent to perform these task, often in situations of considerable pressure requires a sound institutional structure to support the courage and integrity of individual Judges and appropriate measures should be taken towards the selection and appointment process of the Judges impartially.

If the removal mechanism is left with the Executive or the Legislature, it is difficult to

accept the contention of the learned Attorney General that the independence of judiciary will be protected. There will be threat to the judicial independence, and therefore, it is to be ensured that the removal process cannot be used as an instrument to penalize or intimidate Judges. Removal from office is a very serious form of judicial accountability. Judicial accountability can be ensured by Judges providing reasons for their decisions.

Mr. M. Amirul Islam quoted a statement of Marshall, CJ. made in 1829 in a Convention in Virginia that "the argument of the gentleman, he said, goes to prove not only that there is no such thing as judicial independence, but that there ought to be no such thing:- that it is unwise and improvident to make the tenure of the judge's office to continue during good behavior. I have grown old in the opinion that there is nothing more dear to Virginia, or ought to be more dear to her statesmen, and that the best interests of our country are secured by it. Advert, sir, to the duties of a judge.

He has to pass between the government, and the man whom that government is prosecuting, - between the most powerful individual in the community, and the poorest and most unpopular, It is of the last importance, that in the performance of these duties, he should observe the utmost fairness. Need I press the necessity of this? Does not every man feel that this own personal security, and the security of his property, depends upon that fairness. The judicial department comes home in its effects to every man's fire side;- it passes on his property, his reputation, his life, his all. Is it not to the last degree important, that he should be rendered perfectly and completely independent, with nothing to control him but God and his conscience. I acknowledge that in my judgment, the whole good which may grow out this convention, be it what it may, will never compensate for the evil of changing the judicial tenure of office. I have always thought from my earliest youth till now, that the greatest scourge an angry heaven ever inflicted upon ungrateful and

sinning people, was an ignorant, a corrupt, or a dependent judiciary."

Independence of judiciary greatly depends upon the tenure of the office held by the Judges. In order to ensure total freedom, from any overt or covert pressure or interference in the process of adjudicating causes brought before the Judges, they are to be ensured tenure. In S.P. Gupta V. President of India, AIR 1982 SC 149, Gupta, J. observed "The independence of the judiciary depends to great extent on the security of tenure of the Judges. If the Judge's tenure is uncertain or precarious, it will be difficult for him to perform the duties of his office without fear or favour".

There is no doubt that by the Sixteenth Amendment the procedure which was enacted in the original constitution has been restored, but the Parliament failed to consider that the political party which introduced the system realised later on that the system was not suitable and changed the mechanism within three years of its introduction.

Secondly, it fails to consider that in restoring the original position whether the basic structure of the constitution has been changed. It is assumed that the Parliament in its wisdom has restored the original provision but there is nothing to show that the judicial review is not available against such legislative amendment if such amendment will impair the independence of judiciary or if the court finds that such obsolete procedure introduced about 42 years ago will not be suitable in the present context. On repeated queries he failed to refer any authority in support of his contention. True, the Parliamentary removal mechanism was provided in the original constitution but the Parliament did not formulate any law to implement the mechanism. Therefore, apparently this provision has not been implemented till this day and the people and the judiciary are not aware of the benefit of the provision. But the precedents of India, Sri Lanka, Malaysia and United States of America are unhappy ones. On the other hand, the Supreme Judicial Council

mechanism introduced by the Fifth Amendment is proved as fruitful one and by using this mechanism, the independence of judiciary has been secured. There is no doubt about it.

The independence of the judiciary is the foundation stone of the constitution and as contemplated by article 22, it is one of the fundamental principles of State policy. The significance of an independent judiciary, free from the interference of other two organs of the government as embodied in article 22 has been emphasized in articles 94(4), 116A and 147 of the constitution. There has been a historic struggle by the people of this country for independence of judiciary, to uphold the supremacy of the constitution and to protect the citizens from violation of their fundamental rights and from exercise of arbitrary power. In Anwar Hossain (supra) this court observed that "Democracy, Republican Government, Unitary State, Separation of Powers, Independence of the Judiciary, Fundamental Rights are

basic structures of the Constitution" (emphasis supplied). Therefore, the constitutional principle of independence of judiciary precludes any kind of partisan exercise of power by the Parliament in relation to the judiciary, in particular, the power of the Parliament to remove the Judges of the Supreme Court.

The substance of the argument of the learned Attorney General is that the independence of judiciary will be secured and protected if the removal mechanism of the higher judiciary is kept with the Parliament. Learned Attorney General has tried to establish a new philosophy which is totally foreign to the international arena. The judiciary has been assigned the onerous task of safeguarding the fundamental rights of the citizens and of upholding the rule of law. The courts are entrusted with the duty to uphold the constitution and the laws. This Court often faces conflict with the State when it tries to enforce its orders by exacting obedience from recalcitrant and indifferent State agencies.

Therefore, the need for an independent and impartial judiciary, manned by persons of sterling quality and character, undoubting courage and determination and resolute impartiality and independence who would dispense justice without fear or favour, ill will or affection, is the cardinal creed of our constitution and a solemn assurance of every Judge to the people of this great country. There can be no two opinions at the bar that an independent and impartial judiciary is the most essential characteristic of a free society"(Supreme Court Advocates-on-Record B. Union of India, (1993) 4 SCC 441).

This observation supports the views taken in Masder Hossain and Anwar Hossain. In N. Kannadasan V. Ajoy Khose, (2009) 7 SCC 1, the Supreme Court of India observed that "It is the Majesty of the institution that has to be maintained and preserved in the larger interest of the rule of law by which we are governed. It is the obligation of each organ of the State to support this important institution. Judiciary holds a central stage in promoting and

strengthening democracy, human rights and the rule of law. People's faith is the very foundation of any judiciary. Injustice anywhere is a threat to justice everywhere, and therefore, people's faith in the judiciary cannot be afforded to be eroded."

The people of this country pledged in the preamble that it shall be a fundamental aim of the State to realise through a democratic process a socialist society in which the rule of law will be secured to all citizens. In this connection Mr. Abdul Wadud Bhuiyan, has drawn our attention to some observations made in Kannadasm (supra) and other cases. It was observed that the duty of the judiciary to adjudicate upon the disputes that arise between individuals, individuals and State and in the scheme of things, the apex court has been assigned the duty of being a final arbiter including on the question of interpretation of the constitution and the laws. The Court has always played a pivotal role in securing the rule of law, equality and justice, and maintaining the supremacy of the constitution which

is an embodiment of the will of the people. One of the essential conditions of the independence of judiciary is security tenure of the Judges and if it is left with the Executive there will create anarchy in the administration of justice. As there is no rigid separation of powers in our constitution as in USA, but there is a broad demarcation and the reason behind this separation is that the concentration of powers in one organ may upset the balance between the three organs of the State. It is to be noted that the power of amendment of the constitution cannot be equated with such power of framing constitution by the Constituent Assembly because the amending power has to be measured within the constitution.

Learned Attorney General has argued that the superior Judges removal mechanism being a policy decision of the government, it is not subjected to judicial review and that the High Court Division has traveled beyond its jurisdiction in declaring the amendment ultra vires the constitution. He adds that the Judges being unelected took the role of

Legislature in deciding the policy decision. Normally the Courts do not interfere with any policy decision of the government, but there are certain situations in which the courts are left with no option other than to interfere in such policy matters.

As observed above, our constitution is based on the basic principle of separation of powers, there are some overlapping in the running of the government particularly in a unitary form of government. Each organ of the State has the power to act in its own sphere of activity reposed by the constitution. The judiciary being a sensible organ of the State is to apply laws, interpret laws and the constitution, and decides disputes between individuals, and between the individuals and the State, and finally deliver justice. The State is being run by its Executive branch and the Executive acts in its own sphere of activity. But it is one of the biggest litigants. Therefore, in making policies and executing them comes within the sphere of the Executive. But in executing the policies, there are situations where

the court is required to interfere in exceptional cases, like the present one. If the policy decision is one of violation of fundamental rights or interference with the independence of judiciary or in violation of any provisions of the constitution, the courts will not hesitate to interfere and intervene in the matter. Similarly, if the policy decision violates the Act of Parliament or the Rules made thereunder, the courts will not remain as silent spectator – it will certainly interfere with such acts.

In this connection V.R. Krishna Lyer, J. in Col. A.S. Sangwan V. Union of India, 1980 Supp SCC 559 explained the position in charming language as under:

> "But one imperative of the Constitution implicit in Article 14 is that if it does change its policy, it must do so fairly and should not give the impression that it is acting by any ulterior criteria or arbitrarily. This object is achieved if the new policy assuming government wants to

> frame a new policy, is made in the same way in which the 1964 policy was made and not only made but made known. After all, what is done in secret is often suspected of being capricious or mala fide. So, we make it clear that while the Central Government is beyond the forbiddance of the court from making or changing its policy is regard to the Directorate of Military Farms or in the choice or promotion of Brigadiers, it has to act fairly as every administrative act must be done."

The Supreme Court is normally not inclined with the nitty-gritty of the government policy or to substitute one by the other, but it will not be correct to contend that the court shall lay its judicial hands off, when it comes to its notice that by a constitution device the Executive wants to intrude into the affairs of the judiciary jeopardising its independence. Such intrusion is subject to judicial review. There are instances - the

policies made by the government have been struck down by the courts on grounds being unconstitutional, being against law, being arbitrary or malafide.

Constitutionalism presumes that the constitution can override the decision-making process. Our constitutional democracy is pillared on the principle that the elected representatives have the right to take decisions on the polity (Eugene V. Rostow: The Democratic Character of the Judicial Review, (1952) 66 Harv LR 193). Our constitution by declaring this country as a 'democratic Republic', in its reach engraves the supremacy of the constitution over the Legislature and guarantees that the human rights are protected not only by self-restraint of the majority, but also by constitutional control over the majority (article 7B). Right to judicial recourse has itself been realised as the fundamental force for peddling the structure of each and every law because the role to be played by each organ of the State can be adjudged on the doorsteps of our constitution.

The mandate of our constitution stands at the pinnacle of the pyramid, under which everything done by the State to diverge from its reach can be tested by this court. As the ultimate guardian of the rights of the people of this land this court has found itself at the helm of affairs, in dealing with State machinery (In P.N. Bhagwati and C.J. Dias, The Judiciary in India: A Hunger and Thirst for Justice, 5 NUJS L REV 171(2012)). Judicial review, when undertaken in consonance with the constitution, brings realisation to the hopes and aspirations of millions. Under the mandate of the constitution this court cannot sit to harmonise the functions of the different organs of the State. Its role gets restricted in providing access to those who bring to light the darkness springing out State actions. This darkness can only be tested under the parasol of our constitution. A policy decision taken by the government is not liable to interference, unless the court is satisfied that the rule making authority has acted arbitrarily or in violation of the fundamental

right guaranteed under articles 27, 29, 31 and 32. In Bromley London Borough Council V. greater London Council, (1983) 1 AC 768, the House of Lords quashed the GLC cheap fares policy as being based on a misreading of the statutory provisions.

Learned Attorney General fell in an error in submitting that this amendment is the policy decision of the government or in the alternative, his submission that the High Court Division has usurped the functions of the Parliament. This submission is devoid of substance. It is not a policy decision of the government, for a policy decision cannot take a democratic government forty two years back system. More so, the political environment and the Parliament prevailed in 1972 cannot be equated with the present context. The policy decision relates to future economic matters, field of trade and commerce, finance, communications, telecommunications, health, infrastructural projects, public accountability in all governmental enterprises etc. and government to government relationship. Assuming that it is so, it

is patently a farce, inasmuch as, the policy makers, if there be any, took an unworkable devastating system for implementation with a view to creating chaos, confusion, indiscipline and interference in the higher judiciary, which is working as the most acceptable organ of the State in comparison with other two organs.

The Supreme Court is still respected internally and globally for its professionalism and unbiased rullings on human rights, environment, protection of women and children, military rule, fatwah, corruption and crimes against humanity. The press and human right activists are hailing its role vigorously. People from all walks of life repose faith upon it all the time and feel that it is their ultimate sentinel against any oppression by the Executive. The people express hope that the Supreme Court would serve as a laboratory for political, economical, democratical change in the country as a whole. Under such situation any change in its supervisory power is given to the Executive, the people’s hope and

aspiration would be trampled. It is observed by Burrough, J. in Richardson V. Mellish, (1824) 2 Bing 229 (252), public policy is an 'unruly horse and dangerous to ride and, as observed by Cave, J. in Re Mirami, (1891) 1 QB 594 (595), it is a branch of the law, however, which certainly should not be extended, as Judges are more to be trusted as interpreters of the law that as expounders of what is called public policy.'

Learned Attorney General is totally confused in his submission, inasmuch as, on the one hand he has submitted that due to hurry and haste, the Sixteenth Amendment provision has not been incorporated in the Fifteenth Amendment, but on the other hand, he submits that the Law Minister being a technocrat this amendment has not been brought in the Fifteenth Amendment, and in the same breath, he submits that it is the domain of the Parliament to make such amendment because the people being the owners of the Republic that includes all institutions including the judiciary, and the natural consequence is that the

judiciary is also answerable and accountable to the people. He has totally ignored that if this amendment is implemented the independence of judiciary will be seriously hampered under the present political structure. As observed above, previously to the insertion of article 7B, there was no implied limitation on the constituent power of amendment of the constitution under article 142 of the constitution, save and except the basic structures. Even assuming that article 7B is absent in the constitution, the amending power under article 142 has to keep the constitution in repair as and when it becomes necessary and thereby protect and preserve the basic structure of the constitution. In such process if any amendment destroys the basic feature of the constitution, the amendment will be unconstitutional. The Supreme Court being the guardian of the constitution any interpretation of the relevant provision of the constitution by this court prevails as a law, there is no doubt about it. The interpretation placed on the constitution by this

court thus becomes part of the constitution. This interpretation gets inbuilt in the provisions interpreted.

This does not mean that the articles which are capable of amendment cannot be amended under article 142 and if this court declares any article ultra vires, such decision will not amount to violation of the basic structure of the constitution and it will amount to usurpation of judicial power. However, if the change is made touching upon the basic structure of the constitution, this court has full power to declare it ultra vires. It has done earlier and will not hesitate to do so presently and in future. The constitution is not static but dynamic. Law has to change - there is no doubt about it. If it requires the amendment to the constitution according to the needs of time and the society, the change must be made, but for the welfare of the people – not for destroying the substratum of the judiciary. It is an ongoing process of judicial and constituent power, both contributing to change of law with the final say

in the judiciary to pronounce on the validity of such change of law effected by the constituent power by examining whether such amendment violates the basic structure of the constitution.

Whenever a constitutional matter comes before this court, the meaning of the provisions of the constitution comes for interpretation. Though there is no implied limitation on the power of Parliament to amend the constitution but by insertion of article 7B, the power is circumscribed by limitations. An amendment will be invalid if it interferes with or undermine the basic structure. Therefore, the validity of amendment of a constitution is not to be decided on the touchstone of article 26, but only on the basis of violation of the basic features of the Constitution (M. Nagaraj V. Union of India, (2006) 8 SCC 212), Kesabananda (supra), Bangladesh V. Idrisur Rahman, 15 BLC (AD) 49, Anowar Hossain Chowdhury (supra). In Indira Nehru Gandhi v. Raj Narain, AIR 1975 SC 2299, the Indian Supreme Court was specific

enough to proclaim that amendment to any of the basic structures of the constitution is void.

The duty of the judiciary is to adjudicate upon the disputes that arise between individuals, between individual and the State. In this scheme of things, this court has been assigned the duty of being the final arbiter, including on the question of interpretation of the constitution and the laws. The maintenance of the supremacy of the constitution as the embodiment of the will of the people, upholding the rule of law and safeguarding the fundamental rights of the citizens is the onerous task assigned to the judiciary under the constitution. This court has always played the pivotal role in securing the rule of law, equality and justice and maintaining the supremacy of the constitution by its verdicts and interpretations given in disputes between the individuals and the State.

The Rule of Law is a basic feature of the constitution and the precondition of the rule of law

is an independent judiciary which will administer justice according to law. One of the essential conditions of the independence of judiciary is security of tenure as noted earlier. In Kesavanarda Bharati (supra), it was observed that there is ample evidence in the constitution itself to indicate that it creates a system of checks and balances by reason of which powers are so distributed that none of the three organs it setup can become so predominant as to disable the others from exercising and discharging powers and functions entrusted to them. Though the constitution does not lay down the principle of separation of powers in all its rigidity as in the case of the United States constitution, yet it envisages such a separation to a great degree. Our constitution also provided the similar provision.

Any particular form of constitutional government cannot be regarded as the only true embodiment of the rule of law. A written constitution as the supreme law of the land appears as the legally clearest and most satisfactory embodiment of democratic legal

principles. It is found indispensable in a constitution as a safeguard of State and minority rights; this would also apply to a more closely knit international community; but the unchecked legal supremacy of British Parliament has not led to dictatorship, while some written constitutions have quickly crumbled before political revolutions. The embodiment of judicially protected individual rights in the American constitution has not prevented restrictions on freedom of thought, Speech and association more severe than in contemporary Britain which has no such constitutional guarantees. Again, the American constitution regulated the relations between Executive, Legislature and Judiciary differently from the British. It gives to a law court a supervisory function which cannot help having deep political implications, and it isolates Legislative and Executive from each other, instead of the British method of constituting government as an executive committee of the majority in Parliament. (Legal

Theory, W. Fried Mann, Univbersal Law Publishing Co. Pvt. Ltd.)

Modern democracies also differ widely in the organization of the administration of justice. In Continental democracies, a ministry of justice is in administrative control of the entire judicial machinery, and also the central agency for the drafting of legislation. In Britain, these functions are divided between the Lord Chancellor's secretariat, the parliamentary draftsman and ad hoc law revision committees. In 1965 the process of law revision was given institutional continuity through the creation of Law Commissions for England and Scotland. In the United States, the Attorney - General's Department exercises some of the functions of a ministry of justice. Together with numbers congressional committees and ad hoc commissions. Each of these national institutions has certain merits and deficiencies and may be in need of reform, but they are all compatible with democratic ideas.

The other pillar of the rule of law, cardinal to all democratic thought, is the principle of equal individual responsibility. In Bentham's terminology, everybody counts for one. This does not exclude legal differences arising from the exercise of functions officials are, as such, nowhere in the same legal position as individuals. It does exclude, for example, the retrospective punishment of actions. It does exclude the exemption of individuals or classes from legal responsibility and, on the other hand, punishment or persecution of individuals by virtue of their membership of a specific race, religion or other group characteristics. (Ibid)

The democratic conception of the rule of law balances individual rights with individual legal responsibility. This accounts for such rules as the responsibility for damage done by official acts to private citizens, or the principle of criminal liability based on individual wrongdoing by a person responsible for his action. The relation between individual right and individual duty is in constant

development between, and its forms vary from system to system. (Ibid)

In Minerva Mill Ltd. V. Union of India, (1980) 3 SCC 625, it was observed 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 …. the concentration of powers in any one organ may, to quote the words of Chandrachud' in Indira Gandhi's case, 1975 Supp SCC 1, 'by upsetting that fine balance between three organs, destroy the fundamental premises of a democratic government to which we are pledged'.

In the Fifth Amendment case, this Court observed that the Supreme Judicial Council mechanism is a provision that reinforces the independence of judiciary. The supreme Judicial Council is not only a part of the independence of judiciary, but it ensures the independence of judiciary. In the constitution there was no definition of basic structure nor thus article 7B identify the articles that contain

provisions relating to the basic structures of the constitution. The Judges removal mechanism by the Supreme Judicial Council has already been interpreted by this Court. Therefore, when one reads article 7B and comes to the expression "the provisions of Articles relating to the basic structures of the Constitution ….shall not be amendable …", it becomes inescapable that article 7B prohibits amendment of article 96 embodying the provisions of the Supreme Judicial Council. More so, by the Fifteenth Amendment this Supreme Judicial Council mechanism has been retained and by this amendment, article 7B embodying the doctrine of 'basic structures' of the constitution as an express provision, also retained article 96 embodying the Supreme Judicial Council.

Mr. Rokanuddin Mahmood submits that when the Fifteenth Amendment incorporates the doctrine of 'basic structure' in the constitution as an express provision, and prohibits any amendment to it, and leave articles 94(4) and 96 embodying independence of judiciary and Supreme Judicial Council intact, the

logical consequence is that these two articles are integral part of the basic structures of the constitution as upheld by this court in the Eighth, Fifth and Thirteenth Amendment cases. I fully agree with the submissions of Mr. Mahmood. The constitution as stood after the Fifteenth Amendment and may, at the most, trace back to the date of Eight Amendment judgment, when the basic structure theory became part of the constitutional law and jurisprudence by judicial pronouncement. Article 7B specifies certain articles which are unamendable. In addition, article 7B also bars amending of the articles that relate to the basic structures of the constitution. The articles which have been specifically barred from amendment are not necessarily articles that relate to the basic structures of the constitution.

This court has already identified the independence of judiciary as envisaged in article 94(4) as the basic structure of the constitution and has also identified article 96 embodying the Supreme Judicial Council as reinforcing and safeguarding such

independence of judiciary by its pronouncements. Therefore, there is no scope in our constitution to render one organ of the State subservient to the other, or one organ to control the other. The only exception is that in order to have a democratically elected government to govern the country, which would remain accountable to the people through their elected representatives, the Executive organ of the State is appointed from amongst the members of the Parliament, who command the majority. This accountability is in compliance with the letter and spirit of article 7 of the constitution.

Article 7 ensures the supremacy of the constitution. It may be reiterated that the Supreme Court is not only an independent organ of the State, but it also acts as the guardian of the constitution. It is the Supreme Court that ensures that any law that which is inconsistent with the constitution will be declared void in exercise of the judicial review by reference to articles 7(2) and 26.

Mr. Rokanuddin Mahmood submits that the Parliamentary removal mechanism of the Judges of the higher judiciary will be compromised with the independence of Judges and judiciary, inasmuch as, (a) there is a risk that the power of removal of a judge may be exercised on a political motivation. (b) any decision rendered on an important or sensitive issue, touching upon public interest and the affairs of the State by a Judge may irk the Parliament, causing it to move against such a Judge for removing him from the office. (c) the prospect of being removed by the Parliament may weigh heavy in the minds of Judges in exercising their judicial functions independently. (d) power of removal of a Judge by the Parliament cuts both ways: first, the risk of Parliament exercising the power being politically motivated, and the other the Judge discharging his duties under a constant pressure of worrying about the risk of incurring the wrath of the Parliament of his decision. (e) there is also the possibility of instances where a particular Judge's

removal on grounds of incapacity and misconduct is truly warranted by the existing facts and circumstances, but the Parliament may not be willing to remove him on political consideration, and may shield the particular Judge, who is truly liable to be removed. (the case of Ramashswami of the Supreme Court of India). (f) the power and the threat of removal of a Judge will compromise the position of the Supreme Court to act as the guardian of the constitution or acting independently.

There cannot be any doubt about adverse impact if Parliament removal mechanism is introduced. More so, the day-to-day overlooking the administration of justice by the Chief Justice will also be hampered in the absence of Supreme Judicial Council mechanism and in that case nobody can give guarantee that the incident like the one of justice Karnan would not happen in our Court also. If the Judges are not accountable in any manner to the head of the institution, the administration of justice is bound to collapse. Therefore, there is no doubt to hold

the view that this amendment is ultra vires the constitution and the High Court Division has rightly interfered with the amendment. I find no reason to decide otherwise.

Article 116 was also amended by the Constitution Fourth Amendment and by this amendment the word 'President' was substituted for the words 'Supreme Court'. By this amendment the control including posting, promotion, leave and discipline of persons employed in the judicial service are to be exercised by the President. Though there was a provision for consultation in exercising this power practically this consultation is meaningless, if the Executive does not cooperate with the Supreme Court. More so, this amendment is in direct conflict with article 109, which provides that the High Court Division shall have superintendence and control over all courts and tribunals subordinate to it. If the High Court Division has superintendence and control over the lower judiciary, how it shall control the officers performing judicial works if the Executive

controls the posting, promotion and discipline, disciplinary action is not clear to me.

Learned Attorney General submits that this substitution of the word 'President' has been made in the context of the country then prevailing under the presidential form of government which was introduced by the Fourth Amendment. This explanation is ex-facie not tenable, inasmuch as, there is no nexus between the form of government-it relates to the independence of judiciary. The subordinate judiciary has been brought most closely into contact with the people. It is thus no less important, perhaps indeed even more important that its independence should be placed beyond question. To establish the rule of law the subordinate judiciary must also be independent and impartial. Shocking situation now the judiciary is facing that till now nothing has been done to give effect to article 22 despite the direction given in Masder Hossain.

Learned Attorney General fails to comprehend that even before the Fourth Amendment, the

superintendence and control of all courts and tribunals were under the High Court Division and this provision ensures the independence of judiciary, but by this substitution of the word 'President' for the words 'Supreme Court' in article 116, the independence of the lower judiciary has been totally impaired, curtailed and whittled down. This amendment, therefore, violates the basic structure of the constitution and therefore this substitution of the word 'President' is *ultra vires* the constitution.

The scheme of the constitution itself shows that the lower judiciary is totally independent and that its control shall be with the High Court Division. The change of the system of the government will not make any difference. There were twelve amendments in the constitution after the Fourth Amendment. None of the governments took any step in this regard despite the observations by this court in Fifth, Eighth and Thirteen Amendment cases. Keeping the control and disciplinary mechanism of the officers of the lower

judiciary with the Executive, judiciary cannot be independent and this provision is not only inconsistent with article 109, it is also inconsistent with article 116A, which has also been substituted by the constitution Fourth Amendment. Under this provision, it is said that all persons employed in the judicial service and all Magistrates shall be independent in exercise of their judicial functions. There cannot be any independence in the judiciary if the disciplinary mechanism including the power of appointment, posting and promotion of the officers of the lower and higher judiciary are kept in the hands of the Executive, inasmuch as, there is no mechanism under the scheme of the constitution as to how the Executive shall control the power of posting, promotion and discipline of persons employed in the judicial service and the higher judiciary.

Mr. A.J. Mohammad Ali argues that if original articles 115(1) and 116 are read together it will imply that self regulation is a basic feature of the constitution as it was framed in 1972 and that by

this amendment the independence of judiciary has been interfered with. He further argues that by the Fourth Amendment articles 95, 96, 98, 102, 109, 115 and 116 were amended. These amendments, curtailed the independence of judiciary. The independence of judiciary being admittedly a basic structure of the constitution, this amendment is also ultra vires the constitution. In the Fifth Amendment case, this court observed that by 'partial restoration of the independence of judiciary (Article 95 and 116) as made by the Second Proclamation (Seventh Amendment) Order, 1976',the independence of judiciary was curtailed.

Mr. Mohammad Ali argues that part VI of the constitution relating to the judiciary is a composite part and a piecemeal restoration of some original articles while retaining other amended articles would lead to chaos in the operation of a complex organ of the State, that is, the judiciary. We find substance in the submission of Mr. Mohammad Ali. This court in Fifth Amendment case clearly observed that these

amendments of articles 95, 96, 98, 102, 109, 115 and 116 curtailed the independence of judiciary.

Learned Attorney General, however, argues that the amendment to article 116 is totally different and it relates to the lower judiciary and the Sixteenth Amendment relates to the higher judiciary, and therefore, article 116 is not an issue in this case. The submission of the learned Attorney General has no force at all. The question is whether under the present provisions of the constitution, the independence of judiciary is curtailed or not. Judiciary includes both the lower judiciary and the higher judiciary. The scheme of the constitution says that the judiciary is completely independent, but if the lower judiciary is controlled by the Executive, how there will be independence of judiciary and how the High Court Division shall control the lower judiciary. The net result is by the constitution contrivance, the Executive is now trying to take control of the entire judiciary which device is unconstitutional and ultra vires.

In Masder Hossain, this court after exploration of various provisions of the constitution and authorities of different regions summed up its opinion that the judicial service is a service of the Republic within the meaning of article 152(1) of the constitution, but it is functionally and structurally a distinct and separate service from the civil executive and administrative services of the Republic with which the judicial service cannot be placed on par on any account and that it cannot be amalgamated, abolished, replaced, mixed up and tied together with the civil executive and administrative services. In the guideline Nos.5 and 7 this court made the following directions:

> "(5) It is directed that under Article 133 law or rules or executive orders having the force of Rules relating to posting promotion, grant of leave, discipline (except suspension and removal), pay, allowances, pension (as a matter of right not favour) and other terms and conditions

of service, consistent with Articles 116 and 116A as interpreted by us, be enacted or framed or made separately for the judicial service and magistrates exercising judicial functions keeping in view the constitutional status of the said service."

"(7) It is declared that in exercising control and discipline of persons employed in the judicial service and magistrates exercising judicial functions under Article 116 the views and opinion of the supreme court shall have primacy over those of the Executive."

This court fails to comprehend the reason behind the promulgation of the impugned amendment abruptly without removing the inconsistency in other provisions of the constitution. Keeping articles 116 and 116A intact and substituting article 96, the judiciary is totally crippled now. This has caused embarrassment on the part of the Chief Justice in the administration of justice in higher and lower

judiciary to the knowledge of the Executive. There is practically no disciplinary Rules in respect of the entire judiciary which is suicidal to the country as a whole. When this fact is drawn to the notice of the learned Attorney General, he has replied that the appointing authority can take necessary action in case of necessity. In his written argument learned Attorney General stated that the Learned Judge who wrote the judgment of the High Court Division made some wild allegations against the majority members of Parliament of having 'criminal records' and if the allegation is not true "the President of Bangladesh should do something about the concerned learned Judge of the Supreme Court as his appointing authority." The Court was not prepared to hear such comment from the Chief Law Officer of the country. This argument reflects the intention of the Executive for hearing brought the change in disciplinary mechanism of the Judges of the higher judiciary.

Thus the Sixteenth Amendment is a colourable legislation. Where the power of the Parliament is

limited by the constitution or the Parliament is prohibited from passing certain laws, the Parliament sometimes makes a law, which in form appears to be within the limits prescribed by the constitution, but which is 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 cannot be done directly cannot 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 cannot 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. (Shahriar Rashid Khan V. Bangladesh, 1998 BLD(AD)155). The entire question is one of competence of the Legislature to enact a law. A law will be colourable legislation if it is one which in substance is beyond the competence of the Legislature.

A mala fide exercise of discretionary power is bad as it amounts to abuse of discretion. (Punjab V. Gurdial Singh, AIR 1980 SC 319). It is often said that malafide or bad faith vitiates everything and a mala fide act is a nullity. (Abdul Rob V. Abdul Hamid, 17 DLR(SC)515). What is mala fides? "Mala fides or bad faith" means dishonest intention or corrupt motive in the exercise of powers or a deliberately malicious or fraudulent purpose, on the part of the decision maker. Mala fides includes those cases where the motive force behind an action is personal animosity, spite, vengeance, personal

gratification or benefit to the concerned authority or its friends or relatives. (Halsbury's Laws of India, Vol-1, P.319 and CS Rowjee V. A.P., AIR 1964 SC 962).

An independent ground of attack, malafides (Malice in fact) should be distinguished from mala fides (malice in law). According to Megaw LJ, it always involves a grave charge and it must not be treated as a synonym for an honest mistake. (District Council V. Kelly, (1978) 1 All ER 152). There is malice in law where "it is an act done wrongfully and willfully without reasonable or probable cause and not necessarily an act done from ill feeling and spite. It is a deliberate act in disregard of the rights of others'. (A.P. V. Goverdhanlal Pitti, (2003) 4 SCC 739). Colourable exercise of power is equated with malice in law (Wadhwa V. Bihar, AIR 1979 SC 659) and in such a case, it is not necessary to establish that the respondent was actuated by a bad motive. (Venkataraman V. India, AIR 1979 SC 49).

In Dr. Nurul Islam V. Bangladesh (33 DLR(AD)201, before the emergence of Bangladesh, the East Pakistan Government wanted to make the post of Director of the Institute of Post Graduate, Medicine, a non-practicing post and offered the post to Dr. Nurul Islam, but the latter declined the offer. In 1972, Dr. Nurul Islam was appointed as Director and Professor of the Institute. The right to continue as Professor of Medicine carried with it the right to private practice. In 1978, the government issued a notification relieving Dr. Nurul Islam of his duties and designation of Professor of Medicine and the said notification also made the post of Director a non-practicing post. Dr. Nurul Islam challenged the notification and the notification was declared without lawful authority by the High Court Division. The government thereafter in 1980, compulsorily retired him under the Public Servants (Retirement) Act, 1974. Dr. Nurul Islam challenged the order of retirement. Though from the facts malice in fact can be suspected, because of the difficulty of proving

it, Dr. Nurul Islam urged malice in law stating that the order was passed to circumvent the earlier decision of the High Court Division in his favour. This court found the allegation to be correct and held the order of compulsory retirement vitiated by malice in law.

Next question is whether the writ petition is premature one or not. It is the argument of both the learned Attorney General and the learned Additional Attorney General that in view of the provisions in section 2(3) of the Constitution (Sixteenth Amendment) Act that the Parliament by law may regulate the procedure in relation to clause (2) and for investigation and proof of the misbehaviour or incapacity of a Judge, in the absence of promulgation of law, the writ petition is premature one. This submission is devoid of substance, firstly, the writ petitioners have challenged the vires of an Act of Parliament, that is to say, an amendment to the constitution which has been effective by Gazette Notification dated 22nd September, 2014 and secondly,

this amendment has become a part of the constitution and the same cannot be judged by the touchstone of an ordinary legislation.

Learned Attorney General argued that even if this amendment is declared ultra vires the constitution, if the Parliament does not restore the earlier provision of the Judges removal mechanism by the Supreme Judicial Council, a deadlock would be created in the removal process of the higher judiciary. Secondly, he submits that the earlier provision of Supreme Judicial Council mechanism for removal of Judges was non-functional in the absence of the prescribed Code of Conduct.

This Judges removal mechanism was made by substituting the old provision. In section 2 of the Act it is said, 'In the Constitution, in article 96, for clauses (2), (3), (4), (5), (6), (7) and (8), the following clauses (2) (3), and (4) shall be substituted.' As per law if a substituted provision is declared void or repealed, the former provision shall be effective immediately. This court in Ful

Chand Das V. Mohammad Hamad, 34 DLR (AD) 361 held that when a provision of law repealed by a statutory provision which is declared ultra vires the constitution, the former provision is automatically revived on such declaration. If the amended statute is wholly void, the statute sought to be amended is not affected but remains in force. Where the law was amended but subsequently the amendment was repealed, the amendment has to be completely ignored and the provisions of the law as they stood prior to amendment are to be taken into consideration. (Mir Laik Ali V. Standard Vacuum Oil Co., 16 DLR (SC) 287. In Ram Dayal V. Shankar Lal, AIR 1951, Hyd 140(FB), it was held that when an Act passed repeals another in whole or in part and substitutes some provision in lieu of the provision repealed, the repealed enactment remains in force until the substituted provision comes into operation.

On the above question, the decisions of the American jurisdiction are clear. The Supreme Court of Indiana has said that if a statute is

unconstitutional it is no law, and cannot be used to give appellee a right of action against appellant. (Bed ford Quarries V. Bough, (1907) 168 Ind. 671, 80 N.E.539). In passing upon an amendment to a statue which was held to be unconstitutional, in Carr V. State, (1819) 127 Ind. 204, 26 N.E. 778 it was observed:

> 'An act which violates the constitution has no power and can, of course, neither build up or tear down. It can neither create new rights nor destroy existing ones. *It is an empty legislative declaration without force or validity*.'

In view of the above, it is held in Indiana that a repealing Act which is unconstitutional can have no effect upon the statute sought to be repealed and the previous statute remains the law as though the legislature had not made any attempt to change it. (Igoe V. State (1860) 14 Ind 289). That an unconstitutional statute is to be considered as

though it had never been enacted by the legislature is also the view of a number of other courts.

In Chicago, Indianapolis V. Hackett, (1912) 227 U.S. 559, it was held "That act was therefore as inoperative as if it had never been passed, for an unconstitutional act is not a law, and can neither confer a right or immunity nor operate to supersede any existing valid law". In another case it was held that "an unconstitutional statute 'is of no more force or validity than a piece of blank paper," while the Minnesota court (Minn. Sugar Co. V. Iverson, (1903) 91 Minn. 30) has expressed the same idea by stating that it "is simply a statute in form, is not a law, and under every circumstance or condition lacks the force of law".

So, the American courts are in agreement as to the effect of unconstitutionality. Thus there has been no particular conflict amongst the court as to the effect of unconstitutionality. The overwhelming view is that the statute is absolutely void and never had any legal existence and that consequently any

acts done in reliance on such an unconstitutional statute are not protected in any way. In Norton V. Shelby County, (1886) 118 U.S. 425, 6 S.Ct. 1121, it was held "An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed".

An unconstitutional enactment is sometimes void, and sometimes not; and this will depend upon whether, according to the theory of the government, any tribunal or court is empowered to judge of violations of the constitution, and to keep the legislature within the limits of a delegated authority by annulling whatever acts exceed it. According to the theory of British constitutional law the Parliament possesses and wields supreme power, and if therefore its enactments conflict the constitution, they are nevertheless valid, and must operate as modifications or amendments of it. But in America, the legislature acts under a delegated authority, limited by the

constitution itself, and the judiciary is empowered to declare what the law is, an unconstitutional enactment must fall when it is subjected to the ordeal of the court. Such an enactment is in strictness no law, because it establishes no rule; it is merely a futile attempt to establish a law. (Luther v. Borden, 7 How.1; Mississipi v. Johnson, 4 Wall, 475). Similar principle is applicable to our country as well.

Another reason sometimes advanced in the cases is that the Executive and Legislative departments of the government are circumscribed by constitutional limitations and that one of the reasons for such limitations is to protect the rights of the individual against such excesses of authority as are involved in these cases. It has been seen throughout the history that the power held by the executive branch has been exercised tyrannically and this notion of tyrannical abuse of power is not wholly eradicated from the mind of the people even in this modern century. We find no reason to depart from the

views expressed by different courts of United States. In India also in a case it was observed, a statute void for unconstitutionality cannot be vitalized by a subsequent amendment of the constitution removing the constitutional objection and must be reenacted (Saghir Ahmed V. UP, AIR 1954 SC 728).

Besides the above, in the beginning of the judgment I have quoted an observation of Justice Vivian Bose which reflects the onerous responsibility reposed upon this court by the Founding Fathers and ultimately by the constitution. This is a constitutional power of making final 'say' in the interest of justice without any restriction. The constituent power of amendment of the constitution under article 142 has been given upon the Parliament but the said power is circumscribed by limitations. It is for this court to exercise its power to do complete justice or to prevent injustice arising from the exigencies of the cause or matter before it. (Khandker Zillur Bari V. State, 17 BLT (AD) 28, Shahana Hossain V. Asaduzzaman, 47 DLR (AD) 155, B.C.

Chaturvedi V. India (1995) 6 SCC 749, Ashok Kumar Gupta V. State of U.P. (1997) 5 SCC 201.)

This conferment of power is under special circumstances and for special reasons having the concept of justice being predominant factor behind the inclusion of such a provision in the constitution (Karnataka V. Andhra Pradesh (2000) 9 SCC 572, Nilabati Behera V. Orissa AIR 1993 S.C. 1960.) This power can be exercised in a matter or cause which is pending in appeal when the court finds that no remedy is available to a party to the litigation though gross injustice has been done to him for no fault of his own. (Raziul Hasan V. Badiuzzaman, 1996 BLD (AD) 253; Abdul Malek V. Abdus Sobhan, 61 DLR (AD) 124.) This power is not circumscribed by any limiting words. This is an extra ordinary power conferred by the constitution and no attempt has been made to define or describe 'complete justice'. Any such attempt would defeat the very purpose of the conferment of such power. (Bangladesh V. Shamirunnessa, 2005 BLD (AD) 225.)

Sometimes it may be justice according to law; sometimes it may be justice according to fairness, equity and good conscience; sometimes it may be pure commonsense; sometimes it may be the inference of an ordinary reasonable man and so on. (National Board of Revenue V. Nasrin Banu, 48 DLR (AD) 171, Naziruddin V. Hamida Banu, 45 DLR (AD) 38.) It is well settled that the cardinal principle of interpretation of statute is that courts must be held to possess power to execute their own order. It is also well settled that a tribunal which has been conferred with power to adjudicate a dispute and pass necessary order has also the power to implement its order (State of Karnataka V. Vishwabharathi House Building co-op society, (2003) 2 SCC 412.)

This is why the Supreme Court of Pakistan in Asma Jilai (supra) in exercise of this power by accepting the principle propounded by the Supreme Constitutional Court of Cyprus enlarged the principle by terming it as 'doctrine of necessity', condoned some martial law promulgated acts, deeds, things etc.

and recognised as laws of the country. In that case also Pakistan Supreme Court considered the cases of American jurisdiction. This court accepted the said doctrine in the Constitution Fifth Amendment case and approved the Judges removal mechanism by the Supreme Judicial Council provided in the constitution observing that this provision is more transparent procedure than that of the earlier ones and also for safeguarding independence of judiciary. By judicial pronouncement this court approved the substituted provision of article 96 and thus, the Parliament has no power to amend the same. In N.S. Bindra's Interpretation of Statutes, Tenth Edition, at page 1058 it is stated 'A change in law can affect the decision of a court only to the extent that the decision becomes contrary to law, but where the change in law does not touch the question already decided by the competent court, the judicial decision is not affected by such amendment.' This court reaffirms the views taken by this court in the Constitution Fifth Amendment case.

The effecting of judgment, one must relate the particular facts to the abstract concept in question, usually expressed as a broad term. A judgment is the action of mentally apprehending the relation between two objects of thought. (Oxford English Dictionary, Second Edn.) Whately said, 'Judgment is the comparing together in the mind two of the notions or ideas which are the objects of apprehension. (Elements of Logic, Second Edn.). Judgment – forming has also been described as 'a matter of weighing the cumulative effects of one group of severally inconclusive items against the cumulative effects of another group of severally inconclusive items.' (AJTD Wisdom, philosophy and psycho analysis (1953) Basil Blackwell P.157). The various concepts may conflict, when weighing and balancing of the concepts becomes necessary. (R Cross, Precedent in English Law, Third Edn.) A court may need to form a judgment as to whether a statutory right or duty should not be enforced because its performance might have deleterious consequences such as the commission or

rewarding crime. (R. Registrar General, ex P Smith (1991) 2 All ER 88).

It is not correct that there is no prescribed Code of Conduct to be observed by the Judges. The Judges are guided by the Code of Conduct and that is why Mr. Syed Shahidur Rahman, an Additional Judge of the High Court Division has been removed as per recommendation of the Supreme Judicial Council (Md. Idrisur Rahman V. Government of Bangladesh, 13 ADC 220). This Court has formulated forty instructions, to be followed by the Judges and held that the learned Judge has violated the Code of Conduct and thereby 'he has committed gross misconduct.' I have observed earlier that there should be accountability of the Judges. In dealing with the issue, I have observed that the accountability involves procedures for dealing with complaints about the conduct of the Judges; that individual Judges are subject to a strong system of internal accountability in respect of legal errors and personal conduct; that Judges individually are accountable to the public in the

sense that in general their decisions are in public and are discussed, often critically, in the media and by interest group that Judges can be removed for serious misconduct, disciplinary or criminal offence or incapacity that renders them unable to discharge their functions.

With a view to avoiding any misgiving and confusion, we reformulate the Code of Conduct in exercise of powers under article 96 as under:

Code of Conduct

(1) A Judge should participate in establishing, maintaining, and enforcing high standards of conduct, and should personally observe those standards so that the integrity and independence of the judiciary is preserved.

(2) A Judge should respect and comply with the constitution and law, and should act at all times in a manner that promotes public confidence in the judiciary.

(3) A Judge should not allow family, social, or other relationships to influence judicial conduct or judgment. A Judge should not lend the prestige of the judicial office to

advance the private interests of others; nor convey or permit others to convey the impression that they are in a special position to influence the Judge.

(4) A Judge should be faithful to and maintain professional competence in the law, and should not be swayed by partisan interests, public clamor, or fear of criticism.

(5) A Judge should be patient, dignified, respectful, and courteous to litigants, lawyers, and others with whom the Judge deals in an official capacity, and should require similar conduct of those officers to the Judge’s control, including lawyers to the extent consistent with their role in adversarial system.

(6) A Judge should dispose of promptly the business of the court including avoiding inordinate delay in delivering judgments/orders. In no case a judgment shall be signed later than six months of the date of delivery of judgment.

(7) A Judge should avoid public comment on the merit of a pending or impending Court case.

(8) A Judge shall disqualify himself/herself in a proceeding in which the Judge's impartiality might reasonably be questioned.

(9) A Judge shall disqualify himself/herself to hear a matter/cause where he served as lawyer in the matter in controversy, or with whom the Judge previously practiced during such association as a lawyer concerning the matter, or the Judge or such lawyer has been a material witness.

(10) A Judge shall not hear any matter if he/her knows or if he/she is aware or if it is brought into his/her notice that, individually or as a fiduciary, the Judge or the Judge's spouse or children have a financial interest in the subject matter in controversy or is a party to the proceeding, or any other interest that could be affected substantially.

(11) A Judge requires a degree of detachment and objectivity in judicial dispensation and he is duty bound by the oath of office.

(12) A Judge should practise a degree of aloofness consistent with the dignity of his office.

(13) A Judge should not engage directly or indirectly in trade or business, either by himself or in association with any other person.

(14) A Judge must at all times be conscious that he is under the public gaze and there should be no act or omission by him which is unbecoming of his office and the public esteem in which that office is held.

(15) A Judge should not engage in any political activities, whatsoever in the country and abroad.

(16) A Judge shall disclose his assets and liabilities, if asked for, by the Chief Justice.

(17) Justice must not only be done but it must also be seen to be done. The behaviour and conduct of a member of the higher judiciary must reaffirm the people's faith in the impartiality of the judiciary. Accordingly, any act of a Judge, whether in official or personal capacity, which erodes the credibility of this perception has to be avoided.

(18) Close association with individual members of the Bar, particularly those who practice in the same court, shall be eschewed.

(19) A Judge should not permit any member of his immediate family, such as spouse, son, daughter, son-in-law or daughter-in-law or any other close relative, if a member of the Bar, to appear before him or even be associated in any manner with a cause to be dealt with by him.

(20) No member of his family, who is a member of the Bar, shall be permitted to use the residence in which the Judge actually resides or other facilities for professional work.

(21) A Judge shall not enter into public debate or express his views in public on political matters or on matters that are pending or are likely to arise for judicial determination.

(22) A Judge is expected to let his judgments speak for themselves. He shall not give interview to the media.

(23) A Judge shall disqualify himself or herself from participating in any proceedings in which the Judge is unable to decide the

matter impartially or in which it may appear to a prudent man that the Judge is unable to decide the matter impartially. Such proceedings include, but are not limited to, instances where the Judge has actual bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceedings.

(24) A Judge shall ensure that his or her conduct is above reproach in the view of a reasonable observer.

(25) The behavior and conduct of a Judge must reaffirm the people's faith in the integrity of the judiciary.

(26) A Judge shall avoid impropriety and the appearance of impropriety in all of the Judge's activities.

(27) As a subject of constant public scrutiny, a Judge must accept personal restrictions that might be viewed as burdensome by the ordinary citizens and should do so freely and willingly.

(28) A Judge shall, in his/her personal relationship with individual members of the legal profession who practice regularly in the Judge's court, avoid situations which

might reasonably give rise to the suspicion or appearance of favoritism or partiality.

(29) A Judge shall not participate in the determination of a case in which any member of the Judge’s family represents a litigant or is associated in any manner with the case.

(30) A Judge shall not allow the use of the Judge’s residence by a member of the legal profession to receive clients or other members of the legal profession.

(31) A Judge shall not allow his/her family to maintain social or other relationship improperly to influence any judicial matter pending in his/her court.

(32) A Judge shall not use or lend the prestige of the judicial office to advance the private interests of the Judge, a member of the Judge’s family or of anyone else, nor shall a Judge convey or permit others to convey the impression that anyone is in a special position improperly to influence the Judge in the performance of judicial duties.

(33) A Judge shall not practice law or maintain law chamber while he is holding judicial office.

(34) A Judge and members of the Judge's family, shall neither ask for, nor accept, any gift, bequest, loan or favor in relation to anything done or to be done or omitted to be done by the Judge in connection with the performance of judicial duties.

(35) A Judge shall maintain order and decorum in all proceedings before the court and be patient, dignified and courteous in relation to litigants, witnesses, lawyers and others with whom the Judge deals in an official capacity. The Judge shall require similar conduct from legal representatives, court staff and others subject to the Judge's influence, direction or control.

(36) A Judge shall not engage in conduct incompatible with the diligent discharge of judicial duties.

(37) A Judge shall sit in and rise from the court in time without fail and in case the Chief Justice notices that a Judge does not utilize the time allocated for judicial works, the Chief Justice shall intimate the Judge by writing to maintain the court's time and despite such notice if the Judge does not rectify, such conduct be treated as

misconduct and he/she will be dealt with in accordance with law.

(38) (a) If a complaint is received by the Chief Justice from anybody or any other sources that the conduct of a Judge is unbecoming of a Judge, that is to say, the Judge is unable to perform his/her judicial works due to incapacity or misbehaviour, the Chief Justice shall hold an inquiry into such activities with other next two senior most Judges of the Appellate Division and if the Chief Justice or any one of the other Judges declines to hold a preliminary inquiry or if the allegation is against any one of them, the Judge who is next in seniority to them shall act as such member and if upon such inquiry it found that there is prima-facie substance in the allegation the Chief Justice shall recommend to the president.

(b) A complaint against a Judge shall be processed expeditiously and fairly and the Judge shall have the opportunity to comment on the complaint by writing at the initial stage. The examination of the complaint at its initial stage shall be kept

confidential, unless otherwise requested by the Judge.

(d) All disciplinary action shall be based on established standards of judicial conduct.

(39) The above Code of Conduct and the ethical values to be followed by a Judge, failing which, it shall be considered as gross misconduct.

The decisions of the apex court of the country are final not because they are infallible, but because the decisions are infallible as they are constitutionally final. By the impugned amendment, the removal mechanism of the Judges of higher judiciary by the Supreme Judicial Council has been substituted by the Parliamentary removal mechanism. Since this amendment in ultra vires the constitution, the provision prevailing before substitution is restored. The appeal is accordingly dismissed.

I record my appreciation and gratitude for the wonderful, great and valuable assistance offered to the court by the very able and erudite submissions by the learned Amici during the hearing of the appeal. It is on record that the eminent counsel who appeared

on both sides, discharged their responsibilities to the court did not spare themselves and brought their vast learning.

I conclude my opinion with the words of Manu who says, 'destruction of law and justice brings about the destruction of society; the protection of law and justice should not be destroyed.'

C.J.

Md. Abdul Wahhab Miah, J: This civil appeal has arisen from a certificate given by the High Court Division in Writ Petition No.9989 of 2014 under article 103(2)(a) of the Constitution of the People's Republic of Bangladesh (hereinafter referred to as the Constitution). The appeal has been dismissed with an unanimous decision with observations and expunging some of the observations of the majority and my Lord, the learned Chief Justice, was supposed to speak for the Court, for which I took it for guaranteed that I would not be required to write any separate judgment, but when, besides the proposed judgment of the

learned Chief Justice, other three separate judgments written by my four brethren, Syed Mahmud Hossain, Muhammad Imman Ali, Hasan Foez Siddique and Mirza Hossain Haider, JJ, came to me and I went through those judgments; I felt rather allured to give my own reasoning agreeing with the unanimous decision that the appeal be dismissed with observations and expunction. But I would be as brief as possible.

The core question to be decided in this appeal is whether the Constitution (Sixteenth Amendment) Act, 2014 (hereinafter referred to as Sixteenth Amendment) to the Constitution by way of substitution of sub-articles (2)(3)(4) as it stood in the Constitution on 4th November, 1974, that is, the day the Constitution was adopted, enacted and given to the people of Bangladesh with sub-articles (2)(3)(4) as it stood after Fifteenth Amendment to the Constitution (hereinafter referred to as Fifteenth Amendment) is *ultra vires* the Constitution or not (Fifteenth Amendment was passed on 30.06.2011). The High Court Division answered the question in the

affirmative and I fully endorse the view of the High Court Division.

The whole argument advanced by the learned Attorney General and the learned Additional Attorney General before the High Court Division, as it appears from the impugned judgment and order as well as before this Division, is that Sixteenth Amendment is *intra vires* the Constitution as by the amendment sub-articles (2) (3) (4) as it stood on 4th November, 1972 were just restored, in other words, revived and that by Sixteenth Amendment, the independence of judiciary, a basic structure of the Constitution, has, in no way, been impaired or destroyed. Whereas, the argument of Mr. Manzil Morshed, learned Advocate for the writ-petitioners before the High Court Division as well as before this Court, is that Sixteenth Amendment is *ultra vires* the Constitution, as it has impaired the independence of judiciary, a basic structure of the Constitution. Of course, there are other arguments on behalf of the writ-respondent-appellants as well as by the writ-petitioners, but

those are complemental and supplemental to those two main arguments and shall be referred to in course of discussion as and when necessary on the core question. As already stated in the proposed judgment of the learned Chief Justice, 10 amici curiae were appointed by this Court to give their valuable opinion on the question as formulated at the very beginning of this judgment. Of the 10 amici, 9(nine) (except Mr. Ajmalul Hossain) have given their valuable opinion that Sixteenth Amendment is *ultra vires* the Constitution as it has impaired the independence of judiciary, a basic structure of the Constitution, whereas Mr. Ajmalal Hossain has opined that it is *intra vires* the Constitution. However, I would not note the opinion of the learned Amici Curiae who opined that Sixteenth Amendment is *ultra vires* the Constitution as their opinions have been exhaustively noted in the judgment of the learned Chief Justice.

I would not embark upon so much on the question whether the independence of judiciary is a basic

structure of the Constitution or not, as this has been dealt with elaborately in the proposed judgment prepared by the learned Chief Justice and my other brethren. I would just say about the same as would be required in the context of discussion whether Sixteenth Amendment has impaired the same. It is to be noted that the learned Attorney General and the learned Additional Attorney General have not also disputed that the independence of judiciary is a basic structure of the Constitution. But I must embark upon to say how the independence of judiciary as engrained in the Constitution has been impaired by Sixteenth Amendment?

Before discussing the question, I feel constrained to deal with a point raised by Mr. Ajmalul Hossain under the bold head "A CAUTION" " . . . *can the Judiciary be a Judge in his own case" applying the rule against bias or "nemo iudex in causa sua. Since the Judiciary has an interest in this case, it should be extremely careful in deciding this case."* At the time of hearing, Mr. Ajmalul

Hossain read his entire written argument and put much emphasis on the quoted portion of his written submission. In submitting so, Mr. Ajmalul Hossain has, in fact, tried to dissociate us from hearing the appeal. In making the submission quoted, Mr. Ajmalul Hossain totally failed to comprehend the constitutional scheme that the Supreme Court is the guardian of the Constitution and forget article 44 of the Constitution and also failed to comprehend the true purport and meaning of the provisions of article 102 thereof which vested the High Court Division with the power of judicial review and jurisdiction upon this Division *"to hear and determine appeals from judgments, decrees, orders or sentence of the High Court Division"* by article 103 of the Constitution. Sub-article (2) of article 103 has specifically provided that an appeal to this Division from a judgment, decree, order or sentence of the High Court Division shall lie as of right where the High Court Division (a) certifies that the case involves a substantial question of law as to the interpretation

of the Constitution; or (b) . . . ; (c) . . . and in such other cases as may be provided for by act of Parliament. As stated in the beginning, the appeal has arisen out of a certificate given by the High Court Division under article 103(2)(a) of the Constitution. And since the High Court Division gave the certificate that the case involves a substantial question of law as to the interpretation of the Constitution, except this Division, no other authority, the executive and the legislature have the mandate to hear the same. As for myself, I failed to understand the purport to put forward such an opinion in the form of 'CAUTION' by Mr. Ajmalul Hossain. The Judges of the Supreme Court (including this Division) do never have and can never have any personal interest in a particular matter including the instant one; they hear and dispose of a matter in accordance with law and in case, constitutionality of an act or an amendment to the Constitution is challenged in a writ petition, it is decided in accordance with the constitutional scheme of separation of power and that

such amendment to the Constitution does not impair or destroy the fundamental or the basic structures of the Constitution.

So far as the jurisdiction of the High Court Division is concerned, it is provided in article 101 of the Constitution which reads as under:

> "**101.** The High Court Division shall have such original, appellate and other jurisdictions and powers as are conferred on it by this Constitution or any other law."

And the power of judicial review having been given to the High Court Division under article 102 of the Constitution and the constitutionality of Sixteenth Amendment having been challenged in the writ petition giving rise to this appeal on the ground that it impaired the independence of judiciary, a basic structure of the Constitution, except the High Court Division, who else would examine the same. It does not require any new expounding that the Supreme Court is the guardian of the Constitution and it safeguards the fundamental rights of our citizens and uphold the rule of law, another basic feature of the

Constitution and the independence of judiciary is a must in establishing the rule of law. If, in fact, Sixteenth Amendment impaired the independence of judiciary, it would affect the rule of law and then whole fabric of the Constitution shall be destroyed and if that be so, it is the people of Bangladesh who shall eventually suffer, because if the Judges cannot work independently according to their oath of office due to Sixteenth Amendment, the fair justice would be a far cry. And since the Constitution has given the onerous task of judicial review upon the High Court Division to see the *vires* of an amendment made to the Constitution, it could not play the role of onlookers or, in other words, shut its eyes, on the plea that the constitutionality of the Act very much concerned the Judges of the Supreme Court. When the writ-petitioners, nine in number, who are all Advocates of the Supreme Court except one, filed the writ petition before the High Court Division complaining that Sixteenth Amendment offended one of the basic structures of the Constitution, independence of

judiciary; it had a constitutional obligation to entertain the writ petition and then to examine and decide the question in the light of the constitutional provisions and the constitutional jurisprudence and in entertaining the writ petition and deciding the question, the High Court Division simply discharged the said constitutional duty/obligation. Rather, had the High Court Division not entertained the writ petition and decided the question on the plea that the impugned amendment related to the judiciary or the Judges, the concerned Judges would have been guilty of violating their oath of office. The examination of the constitutionality of an amendment to the Constitution touching the judiciary is not something new. In the case of Anwar Hossain Chowdhury-Vs-Bangladesh and others (Special Issue) 1989 BLD, 1=41DLR(AD)165, commonly known as Eighth Amendment case (hereinafter shall be referred to as Eighth Amendment case), the constitutionality of Eighth Amendment to the Constitution was challenged and this Division hearing the appeal

having arisen from the order of the High Court Division by way of special leave declared the same *ultra vires*.

Mr. Ajmalul Hossain in his written submission has also made an endeavour to remind us about the very oath of office, we have to *"preserve, protect and defend the Constitution and the laws of Bangladesh"* and to *"do right to all manner of people according to law, without fear or favour, affection or ill-will."* In the context, I am obliged to say that we, the Judges, need no caution and reminder of our oath by anybody, as we are always conscious about our oath of office to *"preserve, protect, and defendant the constitution and the laws of Bangladesh"* and to *"do right to all manner of people according to law, without fear or favour, affection or ill-will."* We, the 7(seven) Judges, having heard this appeal, are the senior Judges and were elevated to this Division after having performed the duties for a considerable period as the Judges of the High Court Division and we all are aware and conscious

about our oath of office. One should know that the moment a Judge takes oath of his office, it becomes a part of his life and he remembers the same in dispensing justice and he is trained as like when he sits in the Bench with a Senior Judge.

Be that as it may, since the appeal in question has arisen out of a certificate given by the High Court Division under article 103(2)(a) of the Constitution that the case involves a substantial question of law as to the interpretation of the Constitution, we are oath bound to hear the same under article 103(1) of the Constitution. Therefore, the caution sounded by Mr. Ajmalul Hossain is of no avail and cannot be given countenance to and is rejected outright.

Is Parliament supreme as claimed by a section of people and also argued by the learned Attorney General and the learned Additional Attorney General? It may be true that Parliament is supreme to some extent in case of British Parliament where there is no written constitution and a Swiss political

theorist, Jean Louis De Lolme, wrote in his 1771 book on the English Constitution *"Parliament can do everything but make a woman a man and a man woman."* So far as our Constitution is concerned, it is a written one. And the people of this country adopted, enacted and gave themselves the Constitution on 4th November, 1972. In the Constitution, the powers of the three organs of the State: the Executive, the Legislature and the Judiciary, have been clearly spelt out and none has been given superiority or supremacy over the other. In other words, it can be said that the Constitution is the engine and it has three separate compartments where the three organs board. In the proposed judgment to be delivered by the learned Chief Justice and my other brethren, the subject has been dealt with elaborately. I need not deal upon the question so much, as it would be repetition and in the process, the judgment would become a lengthy one. I only say that it is the Constitution and the people of Bangladesh who are supreme, but the Judiciary enjoys a unique position

in the Constitution as its guardian having the power of judicial review under__article 102 of the Constitution which the other two organs have not. But that does not mean that the Judiciary shall transgress into the domain of the Executive and the Legislature so long they are within their domain as demarcated by the Constitution; the power of judicial review is also circumscribed by the limitation that it shall not declare a law *ultra vires* if the same does not impair any of the basic structures of the Constitution or is not enacted inconsistent with any of the provisions of the Constitution or the preamble, all parts of Part I, all articles in 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 (Sub-article (2) of article 7, sub-article (2) of article 26 and article 7B of the Constitution), (article 7B was inserted by Fifteenth Amendment)). At the risk of repetition, I would like to add further that it is only the Supreme

Court which can examine and see whether the amendment made to the Constitution has been within the legislative power of Parliament without impairing or offending any of the basic structures of the Constitution or not in violation of the above provisions of the Constitution. In the context, I would like to say further that this power of judicial review to the High Court Division was given in article 102 of the Constitution by the constituent Assembly under the leadership of the father of the Nation, BangaBandu Sheikh Mujibar Rahman and at no point of time, this power was ever taken away by bringing any amendment therein.

In the context, I say with all my command that in the whole of the Constitution, nowhere it has been said that Parliament would be supreme or is 'supreme'. I failed to understand how and from where a particular section of people say that Parliament is supreme (the functions of Parliament will be discussed hereinafter). The word 'supreme' has been used only in sub-article (2) of article 7 of the

Constitution saying that *"This Constitution is, as the solemn expression of the will of the people, the supreme law of the Republic."* And again in the 4th paragraph of the preamble, it has been said *"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."* In the proclamation of Independence of Bangladesh on 10th April, 1971 which is the first basic document of sovereign Bangladesh, it has been also said that " . . . *we the elected representatives of the people of Bangladesh, as honour bound by the mandate given to us by the people of Bangladesh whose will is supreme duly constituted ourselves into a Constituent Assembly."*

In the context, it would be appropriate to deal with Parliament and its functions and see whether the

Constitution has given any power/mandate to Parliament to initiate any proceedings to investigate into the alleged misbehaviour or incapacity of a Judge of the Supreme Court and then to impeach him on the ground of proved misbehaviour or incapacity.

Part V of the Constitution has dealt with the Legislature, one of the 3(three) organs of the State. In this part, there are 3(three) Chapters, Chapter I has specifically dealt with Parliament, in this chapter, there are as many as 16(sixteen) articles, i.e. 65-79, Chapter II has dealt with legislative and financial procedure and Chapter III has dealt with the Ordinance making power of the President (there is only one article being article 93 in this chapter).

For ready reference and to see what sorts of powers have actually been given to Parliament by the Constitution? I consider it a must to quote all the articles from 65-79 which are as under:

> "**65.** (1) 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 powers of the Republic:

Provided that nothing in this clause shall prevent Parliament from delegating to any person or authority, by Act of Parliament, power to make orders, rules, regulations, bye laws or other instruments having legislative effect.

(2) Parliament shall consist of three hundred members to be elected in accordance with law from single territorial constituencies by direct election and, for so long as clause (3) is effective, the members provided for in that clause; the members shall be designated as Members of Parliament.

(3) Until the dissolution of Parliament occurring next after the expiration of the period of ten years beginning from the date of the first meeting of the Parliament next after the Parliament in existence at the time of the commencement of the Constitution (Fourteenth Amendment) Act, 2004, there shall be reserved fifty seats exclusively for women members and they will be elected by the aforesaid members in accordance with law on the basis of procedure of proportional representation in the Parliament through single transferable vote:

Provided that nothing in this clause shall be deemed to prevent a woman from being elected to any of the seats provided for in clause (2) of this article.

(3A) For the remaining period of the Parliament in existence at the time of the commencement of the Constitution (Fifteenth Amendment) Act, 2011, Parliament shall consist of three hundred members elected by direct election provided for in clause (2) and fifty women members provided for in clause (3).

(4) The seat of Parliament shall be in the capital.

66. (1) A person shall subject to the provisions of clause (2), be qualified to be elected as, and to be, a member of Parliament if he is a citizen of Bangladesh and has attained the age of twenty five years.

(2) A person shall be disqualified for election as, or for being, a member of Parliament who –

(a) is declared by a competent court to be of unsound mind;

(b) is an undischarged insolvent;

(c) acquires the citizenship of, or affirms or acknowledges allegiance to, a foreign state;

(d) has been, on conviction for a criminal offence involving moral turpitude, sentenced to imprisonment for a term of not less than two years, unless a period of five years has elapsed since his release;

(e) has been convicted of any offence under the Bangladesh Collaborators (Special Tribunals) Order, 1972 ;

(f) holds any office of profit in the service of the Republic other than an office which is declared by law not to be disqualified its holder ; or

(g) is disqualified for such election by or under any law.

(2A) Notwithstanding anything contained in sub-clause (c) of clause (2) of this article, if any person being a citizen of Bangladesh by birth acquires the citizenship of a foreign State and thereafter such person-

(i) in the case of dual citizenship, gives up the foreign citizenship ; or

(ii) in other cases, again accepts the citizenship of Bangladesh-

for the purposes of this article, he shall not be deemed to acquire the citizenship of a foreign State.

(3) For the purposes of this article, a person shall not be deemed to hold an office of profit in the service of the Republic by reason only that he is the President, the Prime Minister, the Speaker, the Deputy Speaker, a Minister, Minister of State or Deputy Minister.

(4) If any dispute arises as to whether a member of Parliament has, after his election, become subject to any of the disqualifications mentioned in clause (2) or as to whether a member of Parliament should

vacate his seat pursuant to article 70, the dispute shall be referred to the Election Commission to hear and determine it and the decision of the Commission on such reference shall be final.

(5) Parliament may, by law, make such provision as it deems necessary for empowering the Election Commission to give full effect to the provisions of clause (4).

67. (1) A member of Parliament shall vacate his seat –

(a) if fails, within the period of ninety days from the date of the first meeting of Parliament after his election, to make and subscribe the oath or affirmation prescribed for a member of Parliament in the Third Schedule:

Provided that the Speaker may, before the expiration of that period, for good cause extend it;

(b) if he is absent from Parliament, without the leave of Parliament, for ninety consecutive sitting days;

(c) upon a dissolution of Parliament;

(d) if he has incurred a disqualification under clause (2) of article 66; or

(e) in the circumstances specified in article 70.

(2) A member of Parliament may resign his seat by writing under his hand addressed to the Speaker, and the seat shall become vacant when the writing is received by the Speaker or, if the office of Speaker is vacant or the Speaker is for any reason

unable to perform his functions, by the Deputy Speaker.

68. Members of Parliament shall be entitled to such remuneration, allowances and privileges as may be determined by Act of Parliament or, until so determined, by order made by the President.

69. If a person sits or votes as a member of Parliament before he makes or subscribes the oath or affirmation in accordance with this Constitution, or when he knows that he is not qualified or is disqualified for membership thereof, he shall be liable in respect of each day on which he so sits or votes to a penalty of one thousand taka to be recovered as a debt due to the Republic.

70. 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.

71. (1) No person shall at the same time be a member of Parliament in respect of two or more constituencies.

(2) Nothing in clause (1) shall prevent a person from being at the same time a candidate for two or more constituencies, but in the event of his being elected for more than one –

(a) within thirty days after his last election the person elected shall deliver to the Chief Election Commissioner a signed declaration specifying the constituency which he wishes to represent, and the seats of the other constituencies for which he was elected shall thereupon fall vacant;

(b) if the person elected fails to comply with sub clause (a) all the seats for which he was elected shall fall vacant; and

(c) the person elected shall not make or subscribe the oath or affirmation of a member of Parliament until the foregoing provisions of this clause, so far as applicable, have been complied with.

72. (1) Parliament shall be summoned, prorogued and dissolved by the President by public notification, and when summoning Parliament the President shall specify the time and place of the first meeting:

Provided that except the period of ninety days as mentioned in sub-clause (a) of clause (3) of article 123 for remaining term] a period exceeding sixty days shall not intervene between the end of one session and the first sitting of Parliament in the next session:

Provided further that in the exercise of his functions under this clause, the President shall act in accordance with the advice of the Prime Minister tendered to him in writing.

(2) Notwithstanding the provisions of clause (1) Parliament shall be summoned to meet within thirty days after the declaration of the results of polling at any general election of members of Parliament.

(3) Unless sooner dissolved by the President, Parliament shall stand dissolved on the expiration of the period of five years from the date of its first meeting:

Provided that at any time when the Republic is engaged in war the period may be extended by Act of Parliament by not more than one year at a time but shall not be so extended beyond six months after the termination of the war.

(4) If after a dissolution and before the holding of the next general election of members of Parliament the President is satisfied that owing to the existence of a state of war in which the Republic is engaged it is necessary to recall Parliament, the President shall summon the Parliament that has been dissolved to meet.

(5) Subject to the provisions of clause (1) the sittings of Parliament shall be held at such times and places as Parliament may, by its rules of procedure or otherwise, determine.

73. (1) The President may address Parliament and may send messages thereto.

(2) At the commencement of the first session after a general election of members of Parliament and at the commencement of the

first session of each year the President shall address Parliament.

(3) Parliament shall, after the presentation of an address by the President, or the receipt of a message from him, discuss the matter referred to in such address or message.

73A. (1) Every Minister shall have the right to speak in, and otherwise to take part in the proceedings of, Parliament, but shall not be entitled to vote or to speak on any matter not related to his Ministry] unless he is a member of Parliament also.

(2) In this article, "Minister" includes a Prime Minister, Minister of State and Deputy Minister.

74. (1) Parliament shall at the first sitting after any general election elect from among its members a Speaker and a Deputy Speaker, and if either office becomes vacant shall within seven days or, if Parliament is not then sitting, at its first meeting thereafter, elect one of its members to fill the vacancy.

(2) The Speaker or Deputy Speaker shall vacate his office –

(a) if he ceases to be a member of Parliament;

(b) it he becomes a Minister;

(c) if Parliament passes a resolution (after not less than fourteen days' notice has been given of the intention to move the resolution) supported by the

votes of a majority of all the members thereof, requiring his removal from office;

(d) it he resigns his office by writing under his hand delivered to the President;

(e) if after a general election another member enters upon that office; or

(f) in the case of the Deputy Speaker, if he enters upon the office of Speaker.

(3) While the office of the Speaker is vacant or the Speaker is acting as President, or if it is determined by Parliament that the Speaker is otherwise unable to perform the functions of his office, those functions shall be performed by the Deputy Speaker or, if the office of the Deputy Speaker is vacant, by such member of Parliament as may be determined by or under the rules of procedure of Parliament; and during the absence of the Speaker from any sitting of Parliament the Deputy Speaker or, if he also is absent, such person as may be determined by or under the rules of procedure, shall act as Speaker.

(4) At any sitting of Parliament, while a resolution for the removal of the Speaker from his office is under consideration the Speaker (or while any resolution for the removal of the Deputy Speaker from his office is under consideration, the Deputy Speaker) shall not preside, and the provisions of clause (3) shall apply in relation to every such sitting as they apply

in relation to a sitting from which the Speaker or, as the case may be, the Deputy Speaker is absent.

(5) The Speaker or the Deputy Speaker, as the case may be, shall have the right to speak in, and otherwise to take part in, the proceedings of Parliament while any resolution for his removal from office is under consideration in Parliament, and shall be entitled to vote but only as a member.

(6) Notwithstanding the provisions of clause (2) the Speaker or, as the case may be, the Deputy Speaker, shall be deemed to continue to hold office until his successor has entered upon office.

75. (1) Subject to this Constitution –

(a) the procedure of Parliament shall be regulated by rules of procedure made by it, and until such rules are made shall be regulated by rules of procedure made by the President;

(b) a decision in Parliament shall be taken by a majority of the votes of the members present and voting, but the person presiding shall not vote except when there is an equality of votes, in which case he shall exercise a casting vote;

(c) no proceeding in Parliament shall be invalid by reason only that there is a vacancy in the membership thereof or that a person who was not entitled to do so was present at, or voted or otherwise participated in, the proceeding.

(2) If at any time during which Parliament is in session the attention of the person presiding is drawn to the fact that the number of members present is less than sixty, he shall either suspend the meeting until at least sixty members are present, or adjourn it.

76. (1) Parliament shall appoint from among its members the following standing committees, that is to say –

(a) a public accounts committee;

(b) committee of privileges; and

(c) such other standing committees as the rules of procedure of Parliament require.

(2) In addition to the committees referred to in clause (1), Parliament shall appoint other standing committees, and a committee so appointed may, subject to this Constitution and to any other law –

(a) examine draft Bills and other legislative proposals;

(b) review the enforcement of laws and propose measures for such enforcement;

(c) in relation to any matter referred to it by Parliament as a matter of public importance, investigate or inquire into the activities or administration of a Ministry and may require it to furnish, through an authorised representative, relevant information and to answer questions, orally or in writing;

(d) perform any other function assigned to it by Parliament.

(3) Parliament may by law confer on committees appointed under this article powers for –

(a) enforcing the attendance of witnesses and examining them on oath, affirmation or otherwise;

(b) compelling the production of documents.

77. (1) Parliament may, by law, provide for the establishment of the office of Ombudsman.

(2) The Ombudsman shall exercise such powers and perform such functions as Parliament may, by law, determine, including the power to investigate any action taken by a Ministry, a public officer or a statutory public authority.

(3) The Ombudsman shall prepare an annual report concerning the discharge of his functions, and such report shall be laid before Parliament.

78. (1) The validity of the proceedings in Parliament shall not be questioned in any court.

(2) A member or officer of Parliament in whom powers are vested for the regulation of procedure, the conduct of business or the maintenance of order in Parliament, shall not in relation to the exercise by him of any such powers be subject to the jurisdiction of any court.

(3) A member of Parliament shall not be liable to proceedings in any court in respect of anything said, or any vote given, by him in Parliament or in any committee thereof.

(4) A person shall not be liable to proceedings in any court in respect of the publication by or under the authority of Parliament of any report, paper, vote or proceeding.

(5) Subject to this article, the privileges of Parliament and of its committees and member may be determined by Act of Parliament.

79. (1) Parliament shall have its own secretariat.

(2) Parliament may, by law, regulate the recruitment and conditions of service of persons appointed to the secretariat of Parliament.

(3) Until provision is made by Parliament the President may, after consultation with the Speaker, make rules regulating the recruitment and condition of service of persons appointed to the secretariat of Parliament, and rules so made shall have effect subject to the provisions of any law.

From the articles quoted above, it is clear that article 65 vested legislative power of the Republic in Parliament subject to the provisions of the Constitution; in other words, it is the prerogative

of Parliament to enact laws and again this prerogative is circumscribed by the limitation as imposed by article 7(2), 7B and 26(2) of the Constitution. This power is general legislative power. Power to amend the Constitution is embodied in Part X in article 142 and this power to amend the Constitution is a constituent power. The scheme of the Constitution and the history of making the Constitution needed specific mandate from the people to assume constituent power. It is to be remembered that power to legislate under article 65 and power to amend the Constitution under article 142 are distinct and different. Parliament, the creature of the Constitution, must act within the ambit of the Constitution and nowhere in the Constitution, the people have empowered Parliament and its members to initiate any parliamentary proceedings to investigate into the allegations of misbehaviour or incapacity against a Judge of the Supreme Court and then to impeach him on the ground of proved misbehaviour or incapacity. And I repeat to give emphasis that

nowhere in the Constitution, the people expressed any will to amend the Constitution empowering and authorising their elected representatives in Parliament, namely, the members of Parliament, to impeach the Judges of the Supreme Court and the power to ensure highest standard of conduct belongs to the sovereign people and a body in the Supreme Judicial Council is in place. The people have not also made any grievance about the ineffectiveness of the Supreme Judicial Council. From the election manifesto of the party in power, Bangladesh Awami League of 2014 which has been quoted in the judgment of my learned brother, Muhammad Imman Ali, does not show that it wanted any mandate from the people to amend article 96 after Fifteenth Amendment empowering Parliament to impeach the Judges of the Supreme Court on proved misbehaviour or incapacity. As far as I could ascertain that the other political parties, who participated in the election held on 5th January in 2014, did not also seek any mandate from the people to amend article 96 empowering Parliament to impeach

the Judges of the Supreme Court. Thus, it is clear that the people have not expressly or impliedly mandated the members of 10th Parliament to constitute themselves as constituent Assembly and then bring fundamental change in their functions, i.e. to add to their functions of investigating the allegation of misbehaviour or incapacity of the Judges of the Supreme Court other than the legislative functions.

That the people have not given power to Parliament to impeach the Judges of the Supreme Court is clear from the 3(three) other articles of the Constitution as well, namely, articles 88(b)(ii), 89(1) and 94(4). Clause (b)(ii) of article 88 has provided that remuneration of the Judges of the Supreme Court shall be charged upon the Consolidated Fund. Sub-article (1) of article 89 has clearly stated that *"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."* When the Constitution has imposed bar even for submission to

the vote of Parliament on the remuneration of the Judges, how Parliament can be given the power to vote for the impeachment of the Judges? I failed to understand. Sub-article (4) of article 94 has clearly mandated that subject to the provisions of the Constitution, the Chief Justice and the other Judges shall be independent in the excise of their judicial functions, but by giving the power of impeachment of the Judges of the Supreme Court to Parliament, security of tenure of the Judges, one of the essential conditions for ensuring effective independence of the judiciary, has been seriously affected. In the context, I consider it appropriate to quote from the case of Secretary, Ministery of Finance Vs Mr. Md. Masder Hossain, 52 DLR(AD) 82 (popularly known as Masder Hossain case, hereinafter shall be referred so):

> "58. Reverting back to the case of Walter Valente Vs Her Majesty the Queen (1985) 2 RCS 673, we find that the Supreme Court of Canada listed three essential conditions for judicial independence. To cite from the said case

> *" . . .Security of tenure, because of the importance traditionally attached to it, is the first of the essential conditions of judicial independence for purposes of section 11(d) of the Charter. The essentials of such security are that a judge be removed only for cause, and that cause be subject to independent review and determination by a process at which the judge affected is afforded a full opportunity to be heard. The essence of security of tenure for purposes of section 11(d) is a tenure, whether until an age of retirement, for a fixed term, or for a specific adjudicative task, that is secure against interference by the Executive or other appointing authority in a discretionary or arbitrary manner."*

Mr. Ajmalul Hossain also made another fundamental mistake when he said in his written submission that *"The 16th Amendment has raised a very sensitive issue: it brings to the forefront a tension between the two organs of the Republic: the Legislature and the Judiciary."* Because as I said in the beginning, the core question to be decided in this appeal is whether Sixteenth Amendment has impaired the independence of Judiciary, a basic structure of the Constitution or not and article 102

having given the High Court Division the onerous task of judicial review to examine the question, it, in its wisdom, decided the same in the affirmative and this Division having been given the jurisdiction to hear an appeal arising from a certificate given by the High Court Division under article 103(2)(a) of the Constitution, it is constitutionally obliged to hear the same. Therefore, I do not see any tension as perceived by Mr. Ajmalul Hossain, the perception of him as to the sensitively and tension in deciding the constitutionality of Sixteenth Amendment is absolutely imaginary and illusory.

It is by now well established that the independence of judiciary is a basic structure of the Constitution and with the independence of judiciary, the rule of law, another basic structure of the Constitution, is inextricably mixed. Without going into the detailed discussion on the subject, I just refer to the leading constitutional cases of this Court, such as: Eighth Amendment case, Masdar Hossain case, Khondker Delwar Hossain, Secretary, BNP and

another-Vs-Bangladesh Italian Marble Works and others, 62DLR(AD) (2010) 298 (popularly known as Fifth Amendment case and hereinafter shall be referred so) and Bangladesh represented by the Secretary, Ministry of Justice and Parliamentary Affairs and others versus Md. Idrisur Rahman, Advocate and others) 17 BLT(AD) 231, but I cannot prevent myself from quoting paragraph 80 from Fifth Amendment case which reads as follows:

> "80. About the independence of judiciary and its power of judicial, review, B.H. Chowdhury, J, in the above case (Eighth Amendment case) further observed, quoting Bhagwati, J. and Justice Krishna Iyer, J at para-240-241 page 105:
>
> 240.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 a 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 delivery of social justice to the vulnerable sections of the Community. It is this principle of independence of the judiciary which must kept in mind while interpreting the relevant provisions of the Constitution (S.P. Gupta and others v. President of India and others A.I.R.1982 at page 152).

241. He further says, "what is necessary to have Judges who are prepared to fashion new tools, forge new methods, innovate new strategies and evolve a new jurisdiction, who are judicial statesmen with a social vision and a creative faculty and who have, above all, a deep sense of commitment of the Constitution with a activist approach and obligation for accountability, not to any party in power nor to the opposition. …….. We need Judges who are alive to the socioeconomic realities of Indian life, who are anxious to wipe every tear from every eye, who have faith in the constitutional objectives (at page 179). He quoted the eloquent words of Justice Krishna Iyer:

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

Now the question, whether Sixteenth Amendment has impaired the independence of judiciary, it being a basic structure of the Constitution and if so, how? And to see this, we have to see the constitutional scheme of our Constitution. The independence of judiciary is engrained in our Constitution and to have a clear idea as to the independence of judiciary in our Constitution, we have to look first at article 22 of the Constitution; it is one of the fundamental principles of state policy. This article says "*The State shall ensure the separation of the Judiciary from the executive organs of the State*" (in Masdar Hossain's case elaborate discussion has been made on separation of judiciary, so I do not require to re-open it). The importance of an independent judiciary, free from the interference of the other two organs of the State as enshrined in the Constitution, has been clearly emphasised in articles 94(4), 116A and 147 of the Constitution. In article 94(4), in unequivocal term, it has been spelt out that subject to the provisions of the Constitution, the Chief Justice and

the other Judges shall be independent in the exercise of their judicial functions. Article 116A has said that subject to the provisions of the Constitution, all persons employed in the judicial service and all magistrates shall be independent in the exercise of their judicial functions (Article 147 will be discussed later on at appropriate place). And the Constitution has not said about the independency of the other two organs. There has been a historic struggle by the people of this region for an independent judiciary to uphold the supremacy of the Constitution and to protect the citizens from violation of their fundamental rights and from exercise of arbitrary power. In Eight Amendment case, this Court observed that

> *"Democracy, Republican Government, Unitary State Separation of Powers, Independency of the Judiciary Fundamental Rights are basic structures of the Constitution."*

In the same case, Shahabuddin Ahmed, J (as then he was) held that

> "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 matter of great importance in connection with independence of Judges."

In the same case, Badrul Haider Chowdhury, J (as then he was) observed that

> "Judges cannot be removed except in accordance with provisions of Article 96- that is the Supreme Judicial Council. Sub-article (5) says 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 misconduct, the President shall, by order remove the Judge from office. This is unique feature because the Judge is tried by his own peer, 'thus there is secured a freedom from political control' (1965-AC 190)"

In Masdar Hossain case, this Division cited with approval, the judgment of Canadian Supreme Court in the case of Walter Valente-V-The Queen in the following terms:

> "Security of tenure, financial security and administrative independence are the three

> 'core characteristics' or 'essential conditions' of judicial independence . . . 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 government… "*

In the same case, it was further held:

> "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 cannot be demolished, whittled down, curtailed or diminished in any manner whatsoever, except under that this independence, as emphasised 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. Article 115, Article 133 or Article 136 does not give either the Parliament or the President the authority to curtail or diminish the independence of the subordinate judiciary by recourse to subordinate legislation or rules. What cannot be done directly, cannot be done indirectly."

In Fifth Amendment case, this very Division held as under:

> "It also appears that the provision 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. This substituted provisions being more transparent procedure than that of the earlier ones and also safeguarding independence of judiciary, are to be condoned."(emphasis added)

Thus, from the above, it is abundantly clear that this Court, in two constitutional cases, in unequivocal term, endorsed the removal procedure of a Judge of the Supreme Court through the Supreme Judicial Council as the unique feature, because the Judge is tried by his own peer *"thus there is secured a freedom from political control"* and *"being more transparent procedure than that of the earlier ones*

and also safeguarding independence of judiciary" respectively and thereby expressly decided to retain the provisions relating to the Supreme Judicial Council and the provisions of the Supreme Judicial Council are very much linked with the security of tenure of a Judge of the Supreme Court.

The above quoted observations and findings by this Division, in the two constitutional cases on the Supreme Judicial Council, are binding upon all authorities, executive and judiciary, in the Republic in view of the provisions of articles 111 and 112 of the Constitution and those findings and the observations have become the Judge made law and are very much part of our Constitution and constitutional jurisprudence.

In the context, it must be kept on record that Fifteenth Amendment to the Constitution was made pursuant to the judgment passed by this Court in Fifth Amendment case in which all the amendments brought in the Constitution made by the military rulers, were declared void. So, it can be easily

presumed that Parliament knew about the observations and the findings of this Court in the said two cases as to the provisions of the Supreme Judicial Council and more particularly in Fifteenth Amendment, the provisions of the Supreme Judicial Council was very much retained which was a clear departure from the original provisions of the Constitution relating to the removal of Judges by the Parliament.

In the case of M. Nagaraj-Vs- Union of Indian (2006) 8 SCC 212 the Indian Supreme Court held:

> "9… the Constitution, according to the respondents, is not merely what it says. It is what the last interpretation of the relevant provisions of the Constitution given by the Supreme Court which prevails as a law. The interpretation placed on the Constitution by the Court becomes part of the Constitution and therefore, it is open to amendment under article 368. An interpretation placed by the Court on any provision of the Constitution gets in built in the provisions interpreted. Such articles are capable of amendment under Article 368."

And following the said case, it was held in the case of N. Kannadasan-V-Ajoy Ghose (2009) 7 SCC 1 by the Indian Supreme Court that

> *"In our constitutional scheme, the Judge made law becomes a part of the constitution."*

I, with respect, fully endorse the views of the Indian Supreme Court and at the risk of repetition say that the interpretation given by this Division in the cases of Eighth Amendment, Masdar Hossain and Fifth Amendment on the question of basic structures of the Constitution, the independence of judiciary, rule of law and the Supreme Judicial Council have become part of our Constitution and constitutional jurisprudence. Unless the interpretation given in the said cases as to the un-amenabilities of the basic structures of the Constitution is changed in exercise of the power of judicial review, the interpretation remains a part of the Constitution. Sixteenth Amendment has come in direct conflict with the interpretation given in those cases as to the un-amendability of the basic structures of the Constitution, it falls outside the ambit of the constituent power of 10th Parliament.

The constitutional principle of independence of judiciary prohibits any kind of partisan exercise of power by the legislature in relation to judiciary, particularly, the power of the legislature to remove the Judges of the Supreme Court. In a Unitary State like ours with unicameral legislature, the Executive Government is likely to command two thirds majority in Parliament with whose support, the Executive Government will be in a position to exercise control over the judiciary. The possibility of abuse of power by the Executive Government through Parliament to remove a Judge of the Supreme Court for political or party consideration will always remain. Besides, the possibility of abuse of the power by the Executive Government, Sixteenth Amendment is incompatible with the provisions of articles 7, 22, 94(4), 116A and 147(2) of the Constitution which have mandated for separation of power, independence of judiciary, two basic structures of the Constitution and these basic structures cannot be destroyed in exercise of the constituent power of amendment of the Constitution by

Parliament. And Sixteenth Amendment, in fact, has rendered the security of the tenure of the Judges, one of the essential conditions of ensuring effective independence of the Judiciary, unsecured and thereby the judiciary has been made vulnerable to a process of impeachment by the legislature, which would be influenced by political influence and pressure. The risk of political influence upon the independence of judiciary has been noted by H.M.Seervai in The Position of the judiciary under the Constitution of Indian, Bombay University Press, at page 109 in the following statement:

> " . . . 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 is made, political and party considerations have come into play."

Thus, the risk of impeachment highly politicized will be even more prominent in the current political context of Bangladesh, especially due to the effect of article 70 of the Constitution

which stipulates that 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 votes in Parliament against that party and in view of the provisions of article 70, it is very much a pertinent question as to what extent the member of Parliament can be impartial and free from partisan political directives at the time of exercising the power of impeachment.

The implication of political displeasure was specifically noted by Mr. Justice M.H. Mclelland of the Supreme Court of New South Wales. He observed:

> " ..... The subsequent development of the party system and cabinet Government, (especially with modern ideas of strict party discipline) has radically altered the position. In modern times, the executive Government and the lower house (and frequently the upper house, where there is one) are effectively under control of a single individual or cohesive group, so that now a Judge may be at risk of removal under the parliamentary address procedure if he or she were to incur the sole displeasure of that individual or group."

In the context, we may also refer to the observation made by Sir Maurice Byers, former Solicitor General of the Commonwealth of Australia to the effect:

> *"..... A federal system involves a tension between the High Court and the Parliament and the executive. Recent years have seen this tension increase because interpretations of the Constitution have become party dogma....."*

And he also raised concern that the Court should not be exposed to such hazard of attack from Parliament.

When the learned Attorney General was confronted with the fact that although the concept of the Supreme Judicial Council was introduced by the Martial Law Proclamation, the said provision was very much retained in Fifteenth Amendment and thus it lost its character as an instrument of the military rulers. He tried to argue that Fifteenth Amendment to the Constitution was required to be passed hurriedly in order to avoid the disastrous consequences due to the order of this Division declaring all Martial Law

Proclamations since the 15th August, 1975 to the 9th April, 1979, illegal and void. I consider it better to quote the relevant portion of the written submission of the learned Attorney General which reads as under:

> "The 15th Amendment was required to be passed hurriedly along with many other provisions, in order to avoid the disastrous consequences due to the order of the Appellate Division declaring all Martial Proclamations since 15th August to 9th April 1979, illegal and void."

The learned Attorney General did not also hesitate to blame the then Minister-in-charge of the Ministry of Law, Justice and Parliamentary Affairs, Barrister Shafique Ahmed by saying that he was a technocrat Minister and he being a Senior Advocate *"wanted to give a good turn to the learned Judges of the Supreme Court, most of whom if not all of them, wouldn't like the idea of facing the House of the Nation, if such situation arises in future, even if at all"* in not scraping the Supreme Judicial Council in Fifteenth Amendment. The submission of the learned

Attorney General is absolutely unfortunate, shocking and disparaging for the Judges of the Supreme Court and bereft of factual basis as well inasmuch as it is on record that the judgment in Fifth Amendment case was passed by this Division on February 1, 2010 and a Special Committee for amendment of the Constitution was formed on 21st July, 2010 and upto 5th June, the Special Committee held as many as 27 sittings. The Committee had also meetings with eminent citizens of the country, the former Chief Justices and constitutional Experts, "বুদ্ধিজীবী" and "সুশীল সমাজ" other than the Prime Minister. It may be stated that the Chairman of the Special Committee was Syeda Chowdhury, a very senior veteran leader of Bangladesh Awami League and Mr. Suranjit Sen Gupta, another veteran Parliamentarian and senior leader of Bangladesh Awami League, i.e. party in power, as its co-Chairman. The other members of the committee were Mr. Amir Hossain Amu, Mr. Abdur Razzaque, Mr. Tofael Ahmed, all members of the Advisory Council of Bangladesh Awami League; Sheikh Fazlul Karim,

Presidium Member of Bangladesh Awami League, Advocate Rahmat Ali, member of the Advisory Council of Bangladesh Awami League, Syed Ashraful Islam, its General Secretary, Advocate Fazle Rabbi Mia, a member of Parliament from Bangladesh Awami League and Abdul Matin Khasru, its Law Secretary, Mr. Rashed Khan Menon, President of Workers Party, Mr. Hasanul Haque Inu, President of Jatiya Samaj Tantric Dal, Mr. Anisul Islam Mahmood, member of the Parliament from Jatiya Party, Dr. Hasan Mahmood, State Minister, Ministry of Environment, Dr. Shirin Sharmin Chowdhury, State Minister, Ministry of Women and Children Affairs. It is unbelievable and inconceivable that all these members of the Special Committee did not notice the provision of the Supreme Judicial Council inserted by the military rulers in the Constitution and the further fact that in Fifth Amendment case, the same was condoned on the observation that the same *"being more transparent than the earlier ones and also safeguarding the independence of judiciary"*, when they had sittings

stretching over a period of one year, more particularly when Fifteenth Amendment to the Constitution was made because of the judgment passed this Court declaring all the martial law dispensations in the Constitution *ultra vires*.

The learned Attorney General also tried to argue by placing the report of Mr. Suranjit Sen Gupta, Chairman, Standing Committee, Law, Justice and Parliamentary Affairs (hereinafter referred to as the Standing Committee) and co-Chairman of the Special Committee for amendment of the Constitution to Parliament that although there were discussions on the question of amendment and retention of the other provisions of the Constitution introduced in the Constitution during the martial law period such as 'Bismillah-hir-Rahmanir Rahim', there was no discussion on article 96. This submission of the learned Attorney General is not correct. From a book written by one Amin Al Rashid, a journalist, under the title "সংবিধানের পঞ্চদশ সংশোধনী আলোচনা-তর্ক বির্তক" placed by Mr. Monzil Morshed, learned Advocate for the writ-

petitioner-respondents, it appeared that the Special Committee had its meeting with the Prime Minister on 30th May 2011 and there was discussion on article 96 who opined for retaining the provisions of the Supreme Judicial Council, i.e. article 96 as it stood on that date. The relevant passage of the book in that respect reads as follows:

> "প্রধানমন্ত্রীর সঙ্গে ৩০ মের ওই দীর্ঘ বৈঠকে তত্ত্বাবধায়ক সরকার ছাড়া আরও কিছু গুরুত্বপূর্ণ বিষয়ে সিদ্ধান্ত হয়। বিশেষ করে, তত্ত্বাবধায়ক সরকার বাতিল হলে বিরোধী দল রাজপথে আন্দোলনে যাবে, সেক্ষেত্রে আওয়ামী লীগ, জাতীয় পার্টি, জাসদ, ওয়ার্কার্স পার্টিসহ মহাজোটের সব দল মিলে এই আলোন্দলন মোকাবিলা করা হবে বলেও বৈঠকে আলোচনা হয়।
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> বিচারপতিদের অপসারণে সুপ্রিম জুডিশিয়াল কাউন্সিলের ক্ষেত্রে বিশেষ কমিটি যে সুপারিশ করেছিল, আজকের বৈঠকে সেটিও বাতিল করা হয়। ফলে সুপ্রিম জুডিশিয়াল কাউন্সিলকে সংসদের কাছে জবাবদিহি করতে হবে না। আগের মতোই তারা রাষ্ট্রপতির কাছে প্রতিবেদন জমা দেবে। বৈঠকে বিচারপতিদের অভিসংশনের ক্ষমতা জাতীয় সংসদের ওপর ন্যস্ত করার প্রস্তাব সরাসরি নাকচ করে দিয়ে প্রধানমন্ত্রী বলেন, বিচার বিভাগ এখন সম্পূর্ণ স্বাধীন। স্বাধীন বিচার বিভাগের ওপর কোনো ধরনের হস্তক্ষেপ করা যাবে না। যদিও ২৭ এপ্রিল বিশেষ কমিটির সঙ্গে বৈঠক শেষে ওইদিন বিকেলে গণভবনে তিনি যে সংবাদ সম্মেলন করেন, সেখানে বিচারপতিদের অভিশংসনের ক্ষমতা সংসদের ওপর ন্যস্ত থাকা উচিত বলে মত দিয়েছিলেন।"

Mr. Attorney General in his reply tried to dispute the quoted passage on the submission that the writer of the book was not present in the meeting of the committee and whatever he said in his book was hearsay, so that cannot be accepted as the opinion of

the Prime Minister. The book was published by the author in December, 2011, but till this date, the authenticity of the passage as quoted hereinbefore has not been challenged or questioned either by the Government or from the Prime Minister's Secretariat or by any agency of the Government or by any of the members of the Special Committee. The very fact that the provisions of impeachment of the Judges of the Supreme Court through their peers, i.e. by the Supreme Judicial Council was retained in Fifteenth Amendment as it stood on the date of the passage of the said amendment *prima-facie* substantiates the truth/correctness of the passage in the book "সংবিধানের পঞ্চদশ সংশোধনী আলোচনা-তর্ক-বির্তক" as quoted hereinbefore. Even for argument's sake, if the submission of the learned Attorney General is accepted that there was no discussion in the meeting of the Standing Committee on article 96, the very retention of the provisions of the Supreme Judicial Council in Fifteenth Amendment, supports the passage written by Mr. Amin Al Rashid that the Prime Minister in her meeting with

the Special Committee had opined to retain the provisions of the Supreme Judicial Council as was inserted in the Constitution by Fifth Amendment. Be that as it may, non discussion on article 96 in the meeting of the Standing Committee as well as in the meeting of the Special Committee shall not make the constitutional presumption of Fifteenth Amendment which retained article 96 therein as inserted by Fifth Amendment maintaining coma, semi-colon and full stop. I also see no reason to discuss about article 96 in the meeting of the Special Committee as well as in the meeting of the standing committee inasmuch as this Division in Fifth Amendment case had already found the provision of the Supreme Judicial Council *"being more transparent procedure than that of the earlier ones and also safeguarding independence of judiciary"* and accordingly condoned the same. And by retaining article 96 in Fifteenth Amendment as it stood on the date of judgment of Fifth Amendment, Parliament as a legislative organ of the State, has discharged its constitutional obligation and acted in

aid of the Supreme Court in compliance with the provisions of articles 111 and 112 of the Constitution.

The learned Attorney General also argued that article 96 containing the Supreme Judicial Council was just retained in Fifteenth Amendment without any deliberation and *"it remained in the 15th amendment for whatever the reason may be",* so that cannot justify martial law dispensation. The argument of the learned Attorney General appeared to me a bit absurd and is not factually correct. As stated earlier, it is inconceivable that Fifteenth Amendment of the Constitution retaining the provisions of the Supreme Judicial Council was made without deliberations by the members of Special Committee on article 96, when so many veteran politicians of the ruling party and its allies were the members of the Special Committee; in other words, the Supreme Judicial Council could escape the notice of the Special Committee and that Barrister Shafique Ahmed, the then Minister-in-charge of the Ministry of Law, Justice and Parliamentary

Affairs who was not even a member of the Special Committee could win over all of them to retain article 96 in the Constitution with the provisions of the Supreme Judicial Council just *"to give a good turn to the learned Judges of the Supreme Court."* Such an argument of the learned Attorney General is derogative for the members of the Special Committee, members of the Standing Committee who were members of Parliament and other members of Parliament and it questioned upon their capability and wisdom. Further it is inconceivable that a constitutional provision like the Supreme Judicial Council shall be retained in the Constitution without understanding its implication more particularly, when the amendment to the Constitution was made pursuant to the judgment passed in Fifth Amendment case wherein the provisions of the Supreme Judicial Council being the martial law dispensation was condoned with the finding in unequivocal terms that the same *"being more transparent procedure than that of the earlier ones and also safe guarding independence of judiciary."*

That all the Heads were put together and serious deliberations were made by the members of the Special Committee, the members of the Standing Committee before placing the bill of Fifteenth Amendment in Parliament are apparent from the report of the Chairman of the Standing Committee and the speech delivered by the then Minister-in-charge of the Ministry of Law, Justice and Parliamentary Affairs in Parliament which are quoted below. Firstly, the report of the Chairman of the Standing Committee (only the relevant paragraphs of the report are quoted); the report reads as under:

> "২। সংবিধান (পঞ্চদশ সংশোধন) বিল, ২০১১ পরীক্ষাকরণ সম্পর্কিত স্থায়ী কমিটির রিপোর্ট কমিটির সভাপতি হিসেবে আমি সুরঞ্জিত সেনগুপ্ত কার্যপ্রণালী-বিধির ২১১ বিধি অনুযায়ী এই মহান সংসদে উপস্থাপন করছি।
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> ৩। মাননীয় স্পীকার,
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> আজ আমি গণপ্রজাতন্ত্রী বাংলাদেশের সংবিধানের প্রতিস্থাপনমূলক সংশোধন সম্পর্কিত স্থায়ী কমিটির রিপোর্ট এই মহান সংসদে উপস্থাপন করছি। এ সম্পর্কে আমি আনন্দের সাথে আপনার মাধ্যমে এ মহান সংসদে জানাচ্ছি যে, এটা এক বিরল এবং ঐতিহাসিক ঘটনা। আমি আজ থেকে প্রায় ৩৮ বৎসর পূর্বে গণপরিষদের একজন সদস্য হিসেবে সংবিধান প্রণয়ন কমিটির সদস্য হয়ে সদ্য স্বাধীনতাপ্রাপ্ত বাংলাদেশের জাতির পিতা বঙ্গবন্ধু শেখ মুজিবুর রহমানের নেতৃত্বে যে সংবিধান প্রণয়ন করেছিলাম আজ সে সংবিধানের প্রতিস্থাপনমূলক সংশোধন সম্পর্কিত স্থায়ী কমিটির রিপোর্ট এ মহান সংসদে উপস্থাপন করছি। আমি এজন্য কৃতজ্ঞতা জ্ঞাপন করছি বঙ্গবন্ধু শেখ মুজিবুর রহমানের প্রতি এবং তাঁরই তনয়া প্রধানমন্ত্রী শেখ হাসিনার প্রতি এবং এরই পাশাপাশি এ দেশের জনগণের প্রতি।
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২৩। মাননীয় স্পীকার,

কমিটি ২৭-০৬-২০১১ ও ২৮-০৬-২০১১ খ্রিঃ তারিখ বৈঠকে মিলিত হয়ে বিলটি পরীক্ষা করে। বৈঠকে উপস্থিত থেকে কমিটির যে সকল মাননীয় সদস্যগণ বিলটি পরীক্ষায় সক্রিয়ভাবে অংশগ্রহণ করে অবদান রেখেছেন তাঁরা হলেন সর্বজনাব মোঃ কামরুল ইসলাম, ১৭৫ ঢাকা-২, মোঃ ফজলে রাব্বী মিয়া, ৩৩ গাইবান্ধা-৫, আজহাজ্ব এডভোকেট মোঃ রহমত আলী, ১৯৬ গাজীপুর-৩, আব্দুল মতিন খসরু, ২৫৩ কুমিল্লা-৫, খান টিপু সুলতান, ৮৯ যশোর-৫, এডঃ মোঃ জিয়াউল হক মৃধা, ২৪৪ বাক্ষণবাড়ীয়া-২, নুরুল ইসলাম সুজন, ২ পঞ্চগড়-২, শেখ ফজলে নূর তাপস, ১৮৫ ঢাকা-১২। তাছাড়া কমিটির বিশেষ আমন্ত্রণে আইন, বিচার ও সংসদ বিষয়ক মন্ত্রণালয়ের মাননীয় মন্ত্রী ব্যারিস্টার শফিক আহমেদ বৈঠকে উপস্থিত ছিলেন।

২৫। মাননীয় স্পীকার,

বৈঠকে উপস্থিত থেকে কমিটির রিপোর্ট প্রণয়নে সহায়তা করার জন্য আইন, বিচার ও সংসদ বিষয়ক মন্ত্রণালয়ের মাননীয় মন্ত্রী এবং আইন, বিচার ও সংসদ বিষয়ক মন্ত্রণালয় সম্পর্কিত স্থায়ী কমিটির মাননীয় সদস্যবৃন্দকে আমি আন্তরিক ধন্যবাদ জ্ঞাপন করছি।

তাছাড়া আইন, বিচার ও সংসদ বিষয়ক মন্ত্রণালয় এবং জাতীয় সংসদ সচিবালয়ের যে সকল কর্মকর্তা/কর্মচারী বিলটি পরীক্ষার কাজে কমিটিকে সহায়তা প্রদান করেছেন, এ কমিটির পক্ষ থেকে আমি তাঁদেরকেও জানাই আন্তরিক ধন্যবাদ।

২৩। মাননীয় স্পীকার,

কমিটি সংবিধান (পঞ্চদশ সংশোধন) বিল, ২০১১/The Constitution (Fifteenth Amendment) Bill, 2011 কমিটি কর্তৃক সংশোধিত আকারে সংসদে পাস করার জন্য সর্বসম্পতিক্রকে সুপারিশ করছে।"

The Speech of Barrister Shafique Ahmed:

"**ব্যারিস্টার শফিক আহমেদ (আইন, বিচার ও সংসদ বিষয়ক মন্ত্রী)ঃ** মাননীয় স্পীকার, মাননীয় সংসদ-সদস্য যে বক্তব্য রেখে গেলেন, তিনি নিশ্চয় ভুলে যাননি যে, সামরিক ফরমান দ্বারা সংবিধানের কতগুলো বিধান পরিবর্তন করা হয়েছিল। বিশেষ করে যেগুলোকে আমরা বলি 'সংবিধান এবং রাষ্ট্রের মৌলিক স্তম্ভ' এগুলো পরিবর্তন করেছিল এবং ৫ম সংশোধনীর মাধ্যমে তা valid করা হয়েছিল। যেটাকে আমরা বলি ratification. মাননীয় সংসদ-সদস্য নিশ্চয় ভুলে যাননি যে, আমাদের সর্বোচ্চ আদালত সুপ্রীম কোর্ট এই পঞ্চম সংশোধনী আইন বাতিল করে দিয়েছে। বাতিল করেছে এই বলে যে, 'সামরিক ফরমান দিয়ে সংবিধান পরিবর্তন করার কোন ক্ষমতা নেই এবং সামরিক ফরমান দিয়ে যে সংবিধান পরিবর্তন করা হয়েছে, সেটা সংসদেরও সঠিক বলে কোন আইন পাস করার ক্ষমতা নেই।'

মাননীয় স্পীকার, মার্শল-ল সম্বন্ধে একটি কথা আছে। লর্ড ওয়েলিংটনকে একবার পার্লামেন্টে জিজ্ঞেস করা হয়েছিল, What is Martial Law? আঁর জবাব ছিল, 'Martial-law is what the commander-in-chief of the army does and think in respect of an occupied land and it is nothing more nothing less and it is no law at all.' অর্থাৎ যেই আইনটি কখনো আইন নয়, সে আইন দিয়ে সংবিধানের অনেক অনুচ্ছেদ পরিবর্তন করা হয়েছে'। কাজেই, একটি প্রেক্ষিত হল, পঞ্চম সংশোধনী আইন বাতিল হয়ে যাওয়া সেই সমস্ত বিধানবলী আবার সংবিধানে আনা যাবে না। সেই লক্ষ্যেই আপনি জানেন, ২১-০৭-২০১০ ইং তারিখে আমাদের সংসদ-নেতা সংবিধানকে সংশোধন করার জন্য সংসদে একটি বিশেষ কমিটি গঠন করেন। এই কমিটি অত্যন্ত আন্তরিকতার সাথে এবং এই বিষয়টিকে অত্যন্ত গুরুত্ব দিয়ে এগারো মাস কাজ করে ২৭টি মিটিং করেছেন। সেই মিটিংয়ের সময়ে কমিটিতে প্রতিটি রাজনৈতিক দলকে আমন্ত্রণ জানিয়েছেন এবং অনেকেই এসে তাঁদের মতামত দিয়েছেন। আমাদের দেশের যাঁরা প্রথিতযশা আইনজীবী, প্রক্তান প্রধান বিচারপতি,

বিচারপতি, যাঁরা ইতোমধ্যে অবসরে গেছেন তাঁদেরকে আমন্ত্রণ জানিয়েছেন এবং তাঁরা তাঁদের মতামত দিয়েছেন। বিশেষ করে আমাদের যাঁরা সিনিয়র আইনজীবী এবং এই সংবিধান প্রণয়নের সাথে সংযুক্ত ছিলেন, তাঁদেরকেও ডেকে তাঁদের মতামত নিয়েছে। এছাড়া সংবাদপত্রের সম্পাদক, (intellectuals) বুদ্ধিজীবীগণ যাঁরা আছেন, তাঁদেরকেও ডেকে সবার সুচিন্তিত মতামত নিয়ে জুন মাসের ৮ তারিখে এই বিশেষ কমিটি সংসদে রিপোর্ট উত্থাপন করেন। সেই রিপোর্টের উপর ভিত্তি করে বিল আকারে আইন; বিচার ও সংসদ বিষয়ক মন্ত্রণালয় সম্পর্কিত স্থায়ী কমিটিতে প্রেরণ করা হয়। স্থায়ী কমিটি আরো পুঙ্খানুপুঙ্খভাবে পরীক্ষা করে এ বিলটি সম্পর্কে রিপোট দিয়েছে, যেটি আমি আজকে বিবেচনার জন্য উত্থাপন করলাম।

মাননীয় স্পীকার, কাজেই মাননীয় সংসদ-সদস্য এটা যাচাই বাছাই করার জন্য যে প্রস্তাব দিয়েছেন, সেটা ভিত্তিহীন, অমূলক এবং এটার কোন প্রয়োজন নেই। এটা গ্রহণ করার কোন যুক্তিসংগত কারণও নেই।”

The learned Attorney General also made an argument that retaining of article 96 with the Supreme Judicial Council in Fifteenth Amendment was nothing but a ‘pasting’. Therefore, we should ignore Fifteenth Amendment in deciding the vires of Sixteenth Amendment. Such argument of the learned Attorney General is devoid of any substance and absurd and unknown in the constitutional jurisprudence. None ever thought of such a constitutional jurisprudence. Once an amendment is made in the Constitution, it becomes a part of the Constitution and an amendment to that constitutional provision must be dealt with seriously deliberating

on its consequence, more particular, when it concerned with the security of tenure of the Judges of the Supreme Court, thus the independence of the judiciary and having an impact on the rule of law. It is also unheard of that Parliament passes any amendment to the Constitution just for amendment's sake without understanding its implication. The framers of the Constitution did not also thought of such a concept of 'pasting'; had they thought so, the phraseology "pasting" would have found place in article 142 of the Constitution which is the derivative constituent power of Parliament to amend the Constitution.

Another cheap, populistic and sentimental argument was advanced by the learned Attorney General and the learned Additional Attorney General which of course was endorsed by Mr. Ajmalul Hossain that by Sixteenth Amendment, Parliament in its wisdom restored what was in the Constitution on 4th November, 1972 and as such, by no logic, Sixteenth Amendment can be termed *ultra vires* the Constitution.

Such a concept of restoration of a *nonest* provision in the Constitution is equally unknown in the field of constitutional jurisprudence and such phraseology has not been used in article 142 of the Constitution as well. In support of the argument of the learned Attorney General as to the *"concept of restoration of a nonest original provision of the Constitution"* by way of amendment /substitution, he failed to cite any precedence or refer to any author on constitutional jurisdiction or constitutional history. This is absolutely a novel argument of the learned Attorney General and the learned Additional Attorney General just to give a seal of legitimacy to Sixteenth Amendment by capitalising easy sentiment. The argument of the learned Attorney General and the learned Additional Attorney General is also not factually correct. My brother, Muhammad Imman Ali, J in his judgment rightly listed the provisions in the Constitution which were inserted by the Martial Law Proclamations, but they were not erased from the Constitution by Fifteenth Amendment or Sixteenth

Amendment. So the submissions of the learned Attorney General and the learned Additional Attorney General have got no substance. In the context, I would further add that vires or the constitutionality of an amendment to the Constitution has to be tested in the constitutional scheme and the provisions in the Constitution as it stood on the date of its amendment and not what was in the original Constitution framed by the constituent Assembly. By Fourth Amendment, the original article 96 was substituted by an altogether different and new article and thereby the original article became a *nonest* article and as such, by no logic, it can be said that by Sixteenth Amendment, article 96 in its original was substituted.

Another populistic and easy consumptive argument put forward by the learned Attorney General and the learned Additional Attorney General was that if the President, the Prime Minister and the Speaker could be impeached/removed by Parliament why not the Judges of the Supreme Court, are they too big, too great and too superior to the representatives of the people?

The written submission of the learned Attorney General in this regard reads as under:

> "If some prospective candidate for the post of a Judge feels himself too big, too great, too superior to the representatives of the people they are not welcome to the judiciary, they may even quit."

In making the said submission, the learned Attorney General and the learned Additional Attorney General did not at all care to see the provisions of the Constitution. Article 48 of the Constitution has provided that there shall be a President of Bangladesh who shall be elected by the members of Parliament in accordance with law. Article 50 has provided that subject to the provisions of the Constitution, the President shall hold office for a term of five years from the date on which he enters upon his office. Proviso to article 50 further provides that notwithstanding the expiration of his term the President shall continue to hold office until his successor enters upon office. Article 52 has clearly provided that the President may be

impeached on a charge of violating the Constitution or of grave misconduct, preferred by a notice of motion signed by a majority of the total number of members of Parliament and delivered to the Speaker, setting out the particulars of the charge, and the motion shall not be debated earlier than fourteen not later than thirty days after the notice is so delivered and the Speaker shall forthwith summon Parliament if it is not in session. Sub-articles (2)(3) and (4) of article 52 have laid down the procedure in detail how the impeachment proceeding shall be conducted, proceeded and ended in respect of the charges under sub-article (1) of article 52. Sub-article (1) of article 53 has provided that the President may be removed from office on the ground of physical or mental incapacity on a motion of which notice, signed by a majority of the total number of members of Parliament, is delivered to the Speaker, setting out particulars of alleged incapacity and sub-articles (2)-(7) have detailed the procedures how the removal proceedings shall be conducted and ended.

From the above, it is clear that the President shall be elected by the members of Parliament for a fixed term of 5(five) years and he can be impeached or removed by Parliament on the grounds as mentioned in article 52(1) and 53(1) respectively following the procedure laid down in the other sub-articles of those two articles. So, the Constitution itself has given the mandate to the members of Parliament to impeach or remove the President elected by them. The post of the President is not proclaimed as independent; rather his appointment is subject to the limitation and terms and conditions as prescribed by the Constitution. On the contrary, the Judges of the Supreme Court have been declared to be independent in their judicial functions subject to the provisions of the Constitution. They are appointed for a fixed tenure of office, i.e. until the age of 67. Article 96(2) stipulates that the Judges shall not be removed from office except in accordance with the procedure laid down in article 96.

The person who enjoys the support of the majority in Parliament is appointed as the Prime Minister and the other Ministers are also appointed from the majority party in the Parliament except 1/10th of them who need not be the members of Parliament. The Constitution by article 57(2) provides, if the Prime Minister ceases to retain the support of the majority of the members of Parliament, he shall either resign his office or advise the President to dissolve the Parliament. The office of the Prime Minister is also vacated if he ceases to be a member of Parliament (article 57(1)(b) of the Constitution). Therefore, it is obvious that the Prime Minister and his Cabinet are the members of Parliament and their tenure of office is only for so long as they enjoy the support of Parliament. The scheme of the Constitution making provisions for the Prime Minister and his Cabinet has made an inbuilt mechanism that the Government is elected for the period of duration of Parliament on one hand, and its continuation in office is conditional on enjoying the

support of the majority on the other hand. Once that support is lost, anytime during the duration of Parliament, the Government falls and the President can, instead of dissolving the Parliament, induct another person as the Prime Minister if he is satisfied that there is another person who commands the support of the majority members of Parliament. If the President is not so satisfied, he can dissolve Parliament. Nowhere the Constitution proclaims the Prime Minister, the Cabinet or the Ministers to be independent. On the contrary, it is specifically provided that their continuity in their office is entirely dependent on the support of the majority in Parliament. Besides, the Constitution prescribes the situation when the office of a Minister falls vacant. In addition, the Prime Minister may also ask a Minister to resign, and if he fails to do so, the Prime Minister may advise the President to terminate the Minister. Similarly, the Constitution also specifies the contingency when the office of the Prime Minister falls vacant. It is not so much as the

Prime Minister and the Cabinet are impeachable or removable by Parliament as it is the case of them being in office so long as they enjoy the support of the majority. So, where is the provision in the Constitution for impeachment or removal of the Prime Minister?

Article 74(1) of the Constitution has mandated that Parliament shall at the first sitting after any general election elect from among its members, a Speaker and a Deputy Speaker, and if either office becomes vacant, shall, within seven days or if Parliament is not then sitting at its first meeting thereafter, elect one of its members to fill the vacancy. Sub-article (2) has provided that the Speaker or the Deputy Speaker shall vacate his office (a) if he ceases to be a member of Parliament; (b) if he becomes a Minister, (c) if Parliament passes a resolution (after not less than fourteen day's notice has been given of the intention to move the resolution) supported by votes of a majority of all the members thereof, requiring his removal from

office; (d) if he resigns his office by writing under his hand delivered to the President; (e) if after a general election another member enters upon; or (f) in the case of the Deputy Speaker, if he enters upon office of the Speaker. And the procedures of removal of the Speaker or the Deputy Speaker as the case may be, have been laid down in sub-articles (4) and 5 thereof. There is no provision for impeachment of the Speaker or the Deputy Speaker as argued.

Since the President, the Speaker and the Deputy Speaker are elected by the members of Parliament, they cannot but be answerable/accountable to anyone else, than Parliament and by providing for their impeachment and/or removal by the members of Parliament in the Constitution itself as the case may be, their answerabilities and accountabilities to Parliament have been ensured. But the Judges of the Supreme Court are not elected by the members of Parliament and they are not even appointed by Parliament. In the present constitutional scheme, the members of Parliament have no say in any manner

whatsoever in the matter of appointment of a Judge of the Supreme Court and they are appointed by the President. It is not like the appointment of a Judge in the Supreme Court of the United States of America, where after the President of the States nominates a Judge for appointment as a Judge in the Supreme Court, he has to undergo a rigorous hearing process at the Senate and if the Senate approves the nomination of the President, then and then only he is appointed as a Judge of the Supreme Court.

There are also fundamental differences between the duties of the office of the President, the Prime Minister, the Speaker and the Deputy Speaker and those of the Judges of the Supreme Court. The President and the Prime Minister are the executives and they do not adjudicate any dispute between the Government and the citizens, between the citizens and the citizens and between the poor and the powerful. Not only that sometime powerful/influential members of Parliament belonging to the ruling party, other powerful and influential persons well connected with

the ruling party, come to the Supreme Court with their grievances, disputes and the Judges have to adjudicate the disputes, grievances between them and in the end, one party will lose in the litigation, because in dispensing justice, it is impossible and absurd to please all the parties and the party which loses naturally would be irked with the concerned Judge(s).

To be more specific, in an application under article 102 of the Constitution, it is almost the Government through the respective ministry or the statutory bodies who figures as the respondent. Sometimes even order(s) of the Prime Minister's Secretariat, the President's Secretariat, are challenged; sometimes orders of the Ministry headed by a Minister is challenged and the High Court Division exercising its power of judicial review under article 102 of the Constitution interferes with the order(s) passed by those functionaries, if those are found to be illegal and without lawful authority. Not only that in exercising the jurisdiction under

article 102(b)(ii), the High Court Division may ask any person including the one holding the highest constitutional post under what authority, he claims to hold such office and this kind of powers are never exercised by the President, by the Prime Minister and the Speaker or the Deputy Speaker. And in exercising the powers of judicial review, the chance and possibility of earning displeasure and irkness of the holder of high constitutional post, the members of Parliament and other powerful persons very much linked or connected with members of Parliament, cannot just be ruled out.

The argument that since the Judges are appointed by the President and since he (the President) can be impeached/removed by Parliament, the Judges are also to be made impeachable by Parliament is absolutely fallacious for the reasons as under:

(a) the Judges of the Supreme Court are appointed by the President as the Constitution has given him that mandate;

(b) the Constitution itself has given the

members of Parliament the authority to impeach/remove the President as the case may be under certain circumstances, but the Constitution has not given any power to Parliament to initiate a proceeding to investigate the alleged misbehaviour or incapacity of a Judge of the Supreme Court and then to impeach him on the ground of proved misbehaviour or incapacity;

(c) The Constitution has guaranteed the independence of the judiciary, the Judges of the Supreme Court being its stakeholders are independent and if the power of impeachment is given to Parliament, it shall be in direct conflict with the provisions of articles 22, 94(4), 116A and 147(2) of the Constitution and that shall in effect destroy the rule of law, another basic structure of the Constitution.

Besides the above, it would not be a valid and logical argument to give the power of impeachment of the Judges of the Supreme Court to Parliament on the analogy that the President, the Prime Minister (though there is no provision in the Constitution for impeachment or removal of the Prime Minister as

discussed hereinbefore) and the Speaker or the Deputy Speaker as the case may be are impeachable or removable by Parliament, inasmuch as apart from the judiciary, no other organ of the State has been proclaimed as independent by the Constitution. Rather, offices of the President, the Prime Minister and the Cabinet have been subjected to so many fetters and conditions to ensure responsible and accountable Government. Such limitations are not prescribed by the Constitution in respect of the Judges of the Supreme Court. There is no parallel to article 94(4) of the Constitution with respect to any of the other offices or organs of the State. To subject the members of judiciary to the similar peril in terms of their removal as the holders of other office under the Constitution would, in effect, render article 94(4) a meaningless appendage to the Constitution. Independence of a Judge becomes nugatory unless his tenure in office is assured. Therefore, the removal of a Judge from the office by members of the two other organs is nugatory to

article 94(4) inasmuch as in such an event, a Judge would be dependent for his tenure on another organ of the State. Independence of judiciary does not only mean that the Judges shall be independent in their duties, but that they will also be independent in terms of the security of their tenure.

In the context, I would summarize the eventualities, a Judge would face in case Sixteenth Amendment is not struck down viz:

(a) There would be a risk that the power of removal of a judge may be exercised on a political motivation.

(b) Any decision given on an important or sensitive issue, touching upon public interest and the affairs of the State, by a judge may irk Parliament, causing it to move against such a judge for removing him from the office.

© The prospect of being removed by Parliament may weigh heavy in the mind of a Judge in exercising his judicial functions independently.

(d) Power of removal of a judge by Parliament cuts both ways: first, the risk of Parliament exercising the power being politically motivated, and the other Judge discharging his duties under a

constant pressure of worrying about the risk of incurring the wrath of the Parliament for his decision.

(e) The power and the threat of removal of a judge may compromise the position of the Supreme Court to act as the guardian of the Constitution or acting independently.

There is absolute necessity of an independent judiciary to uphold the rights of our citizens and safeguard our democratic values and institutions, but Sixteenth Amendment is a total anathema to the idea of an efficient, truly independent judiciary and also repugnant to the spirit to our Constitution.

From the discussions made above, it is apparent that if Sixteenth Amendment giving power of impeachment of a Judge of the Supreme Court to Parliament by an impeachment proceedings by its members is not struck down and in the process, the members of Parliament are allowed to sit in judgment over the Judges of the Supreme Court on the populist plea of supremacy of the people and popular will expressed through Parliament, or force of law would

surely open the door to many un-imaginable vexatious situations in future, leading to serious consequences including those as listed just before the immediate past paragraph and in the end, a Judge shall not be in a position to work/act independently in exercise of his judicial functions and in the process, the independence of judiciary shall surely be affected which shall certainly affect the rule of law, another basic structure of the Constitution and thereby, our citizens shall be deprived of getting fair justice and protecting their valuable rights and safeguard their democratic values and institutions. Sixteenth Amendment in effect has impaired the independence of judiciary, a basic structure of the Constitution. To paraphrase the famous French author Frederic Bastiat, it is not true that the legislator has absolute power over our persons and property (i.e. our rights), for the existence of persons and property (which Judges uphold) proceeded the existence of the legislator. In the case of Advocate-on-Record Association V. Union

of India (1993) 4 SCC 441, the Indian Supreme Court rightly said:

> "273. . . . under our constitutional scheme, the judiciary has been assigned the onerous task of safeguarding the fundamental rights of our citizens and of upholding the rule of law. Since the courts are entrusted the duty to uphold the Constitution and the laws, it very often comes in conflict with the State when it tries to enforce its orders by exacting obedience from recalcitrant and indifferent State agencies. Therefore, the need for an independent and impartial judiciary, manned by persons of sterling quality and character, undaunting courage and determination and resolute impartiality and independence who would dispense justice without fear or favour, ill will or affection, is the cardinal creed of our constitution and a solemn assurance of every Judge to the people of this great country. There can be no two opinions at the bar that an independent and impartial judiciary is the most essential characteristic of a free society."

The learned Additional Attorney General vehemently argued that the writ petition was a premature one as the same was filed before the enactment of any law pursuant to sub-article (3) of article 96 and the Rule ought to have been discharged

by the majority on that ground alone, instead the majority made the same absolute. The learned Additional Attorney General elaborated his argument by submitting that the High Court Division in majority failed to appreciate that Sixteenth Amendment has not been made effective and operative as yet in the absence of a law to be enacted pursuant to the said sub-article of the Constitution. So, the writ petition was premature and the majority was wrong in holding that Sixteenth Amendment was colourable, void and *ultra vires* the Constitution *"which could be decided on consideration after enactment of the said law."* The learned Attorney General has echoed with the learned Additional Attorney General.

The argument of the learned Additional Attorney General is absolutely bereft of any logic and legal substance inasmuch as a citizen of the country, who finds a constitutional amendment *ultra vires* the Constitution, need not wait for the follow up enactment pursuant to such amendment. And to wait

until the enactment pursuant to a void Act would be like the phrase *"the doctor came after the patient had died."* The constitutionality of an amendment to the Constitution shall be tested on the very amendment brought to the Constitution and if it can be shown that it is violative of any of the basic structures of the Constitution or violates any article as mentioned in article 7B (this article was inserted by Fifteenth Amendment) and articles 7(2) and 26(2) that itself would be enough to struck down the amendment. The majority rightly held 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."* Further if any law is made pursuant to sub-article (3) of article 96 that would be an ordinary law and that can be amended at any time. The argument of the learned Additional Attorney General also sounds an absurd one inasmuch as by an ordinary law, the vires of a constitutional amendment cannot be tested or

consequence of such amendment, cannot be avoided. If an amendment to the Constitution is *ultra vires* thereof, it cannot be allowed to survive even for a minute.

It has been argued by the learned Attorney General and the learned Additional Attorney General that the Judges of the Supreme Court should be accountable to Parliament, because its members are the elected representatives of the people who are supreme and through them, the Judges who are unelected people should remain accountable to the people. The argument of the learned Attorney General and the learned Additional Attorney General is devoid of any substance for the reasons as discussed earlier. And I find no other way, but to repeat and reassert that the Constitution which is the expression of the will of the people has not given the members of Parliament the status of a watch dog of the Judges of the Supreme Court; in other words, the Constitution has not placed the judiciary under the supervision of Parliament empowering its members

to take disciplinary action against the Judges, i.e. by impeaching them.

In the context, I deem it very appropriate to discuss about article 7 of the Constitution and see its depth meaning in a succinct manner as regards the people and the members of Parliament. M. H. Rahman, J (as then he was) in his judgment in Eighth Amendment case described article 7 as the poll star of our Constitution. Sub-article (1) of article 7 in unequivocal term has declared 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 the Constitution. Sub-article (2) has clearly declared that the Constitution is, as the solemn expression of the will of the people, the supreme law of the Republic and if any other law is inconsistent with the Constitution that other law, shall, to the extent of the inconsistency, be void. Thus, it is *prima facie* clear that this article prescribes the supremacy of the Constitution. Though the powers are stated to be belonging to the people,

nonetheless, such powers cannot be exercised without the authority of the Constitution, i. e. the exercise of the power is regulated by the provisions of the Constitution. For an interpretation of this article in relation to the independence of judiciary and its stakeholder, the Judges of the Supreme Court, we have to examine the other provisions of the Constitution, particularly, article 94(4). This article provides that, subject to the provisions of the Constitution, the Chief Justice and the other Judges shall be independent in the exercise of their judicial functions. In view of this independence so proclaimed, the exercise of the powers under article 7(1), while being effected by and under the authority of the Constitution, such powers cannot be exercised in a manner detrimental to or destroying the independence of the judiciary. Question that may be posed here is: can the powers that belong to the people be exercised by their representatives without the authority of the Constitution or violating the provisions of the Constitution? The answer is

certainly an emphatic No. This power under article 7(1) has been fettered by the words "shall be effected only under, and by the authority, of the Constitution." It is not the power which is the emphasis of article 7(1), but the manner of its exercise which has been restricted by article 7 itself. By emphasizing that such power can only be effected by and under the authority of the Constitution, the article proclaims supremacy of the Constitution. Therefore, there can be no amendment to the Constitution which would permit exercise of the power in derogation of the Constitution or in violation of the provisions of the Constitution.

Our Constitution embodies the doctrine of separation of power while prescribing a parliamentary form of Government. Each organ of the State has been dealt with separately and distinctly in our Constitution assigning to them clearly demarcated areas and spheres, powers and functions, and responsibilities and authorities, domain of each organ is separate and distinct from the other. There

is no scope in our Constitution to render one organ of the State subservient to the others, or one organ to control the others. The only exception is that in order to have a democratically elected Government to govern the country which would remain accountable to the people through their elected representatives, the executive organ of the State, i.e. the Prime Minister and the Cabinet, are appointed from amongst the members of Parliament, who command the majority support. This accountability is in compliance with the letter and spirit of article 7 of the Constitution. As discussed earlier in this judgment, the person who enjoys the support of the majority in the Parliament is appointed the Prime Minister and the other Ministers are also appointed from the majority party in Parliament except 1/10th of them, who need not be members of Parliament. The people, to ensure protection of their right and liberty from encroachment by Parliament and the Executive, entrusted the judiciary with the power of judicial review both of legislation and of executive, i.e. the

administrative actions. And through article 44 of the Constitution, the people have ensured their right to invoke power of the High Court Division of judicial review in exercise of plenary power under article 102(1) of the Constitution. The right to invoke article 102(1) is the key to exercise of judicial review by the High Court Division. The judicial review protects the rights of the people from parliamentary and executive encroachment. Judicial review is bull work against the joint invasion by the Parliament and the Executive. The independent judiciary is a fortress which shelters and protects the right and the liberty of our citizens and the Judges are the impregnable wall of the fortress. The leader of a political party who commands the support of the majority of the members of Parliament form the Cabinet which runs the Government and thus, the theoretical separation of power is completely diluted, because the legislatures who are in the majority of Parliament legislate and the Cabinet which is formed from amongst them discharge the

functions of the executive part of the Government. So legislation and administration falls in the hands of the same group of members of Parliament. In this connection, article 70 in any format ensures the adherence of the members of Parliament belonging to a political party to abide by the party. And by Sixteenth Amendment giving Parliament the power to initiate proceedings to investigate into the allegation of misbehaviour or incapacity of a Judge and then to impeach him on the ground of proved misbehaviour or incapacity, a clear endeavour has been made by the executive to chain the Judges by means of parliamentary power through impeachment, so that the Judges of the Supreme Court remain under the sword of Damocles, the impeachment to compel compromise. By Sixteenth Amendment all the powers have been concentrated to the executive and in the process, the judiciary, an organ of the State which is independent, has been made subservient to Parliament, who by reason of such power is elevated to a position to dictate and control the judiciary,

thus completely negating the independence of judiciary enunciated in article 94 of the Constitution and thereby, separation of power which is the corner stone of checks and balances and also a basic structure of our Constitution has been destroyed.

So far as the Judges are concerned, they do not hold any executive post, they hold constitutional post and they are certainly accountable to the people through the constitutional mechanism. A Judge of the Supreme Court (both the Divisions) is accountable to the Constitution because of his oath of office which he takes soon after he is appointed as a Judge, his oath is to *"preserve, protect and defend the Constitution and the laws of Bangladesh."* The very oath of office of a Judge show that he is oath bound to preserve, protect and defend the Constitution and the laws of Bangladesh. A Judge is also oath bound to *"do right to all manner of people according to law, without fear or favour, affection or ill-will";* this means that a Judge will dispense justice in

accordance with law by treating everybody equal, be it poor or rich, powerful or powerless so ever and irrespective of caste and creed, religion and belief without fear or favour or ill-will and when a Judge of the High Court Division disposes a matter sitting in any jurisdiction, either constitutional or civil or criminal or company matter or any other jurisdiction, he gives reasons in support of his decision keeping in view the provisions of law in the context of the given facts and circumstances of a particular case. Any one who feels aggrieved by the decision and/or the order or the decree of a Judge of the High Court Division, can approach this Division under article 103 of the Constitution and in this way, a judgment and order or order or a judgment and decree of a Judge or Judges of the High Court Division as the case may be, is under scrutiny by this Division. A Judge of the High Court Division cannot dispose of a matter whimsically and capriciously and if he does so, he shall be under the scrutiny of the members of the Supreme Judicial

Council as well. It needs to be stated that there is a Code of Conduct for the Judges of the Supreme Court framed by the Supreme Judicial Council and every Judge is obliged to follow the same. So far as the Judges of this Division are concerned, every petition filed under article 103 of the Constitution and every appeal arising out of a leave granting order under the said provisions of the Constitution from a judgment and order or order or decree of the Single Bench of the High Court Division compulsorily has to be heard by at least two Judges and by a Bench of minimum three Judges, if the impugned judgment and order or order or decree is passed by a Division Bench, so there is no chance of a whimsical and capricious decision by a Judge of this Division. Further the Judges appointed in this Division are the senior and experienced Judges and when they deliver judgment, they give reasons too and it is not like the executives who do not pass reasoned decision because of the nature of their job. It is to be further stated that an executive order is always

passed in individual capacity. The Judges of this Division are also susceptible to the Supreme Judicial Council. In the context, I would further add that any person can bring to the notice of the Supreme Judicial Council through the President about the misbehavour or incapacity of a Judge of the either Division. It is also an established practice and tradition of this Court that, in order to ensure rule of law and a fair dispensation of justice, the Judges do not hear a case when their personal interest or the interest of their kith and kin is involved in a litigation and it has been so provided in the Code of Conduct of the Judges and in this way, the Judges of the Supreme Court are accountable to the people and this is quite in conformity with the provisions of article 7 of the Constitution, which has clearly mandated that 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 the Constitution. The Supreme Court as an institution is also accountable to the people in that it acts as

a guardian of the Constitution and it protects their fundamental rights as enshrined in Part III of the Constitution uphold the rule of law by exercising the power of judicial review when the Executive and the Legislature exceed their limit affecting their rights, both fundamental and legal.

One has to visualize that the accountability of the Judges of the Supreme Court cannot be same and similar as that of the executives including the Prime Minister and the Cabinet. The executives including the Prime Minister and his colleagues are accountable to the people for good governance for which they are elected by the people. Besides they deal with many financial matters, but the Judges of the Supreme Court do not. The executives undertake many projects or development works which necessarily involve money, but the Judges do not; their duty is totally different from the executive as stated earlier, but at the risk of repetition, it is stated that their duty is to dispense justice in accordance with law without fear or favour, affection or ill-will

treating all equally, be it rich or poor, be it powerful or powerless, be it of any caste or creed or religion or faith, so they are not accountable to the members of Parliament as argued by the learned Attorney General in the way the executives are.

Sixteenth Amendment is also liable to be declared *ultra vires* as it has also varied the terms and conditions of service of the Judges of the Supreme Court in clear violation of sub-article (2) of article 147 of the Constitution. Before I elaborate I consider it profitable to quote the article in its entirety which reads thus:

> "147. (1) 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 be determined by or under Act of Parliament, but until they are so determined –
>
> (a) they shall be those (if any) appertaining to the person holding or, as the case may be, acting in the office in question immediately before the commencement of this Constitution;
>
> or

(b) if the preceding sub clause is not applicable, they shall be determined by order made by the President.

(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.

(3) No person appointed to or acting in any office to which this article applies shall hold any office, post or position of profit or emolument or take any part whatsoever in the management or conduct of any company, association or body having profit or gain as its object:

Provided that such person shall not for the purposes of this clause be deemed to hold any such office, post or position by reason only that he holds or is acting in the office first above mentioned.

(4) This article applies to the offices of –

(a) President;

(b) Prime Minister;

(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 a public service commission.”

Sub-article (2) has clearly provided that 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 person during his terms of office. The Judges of the Supreme Court who were appointed till the 7th day of September, 2014, i.e. the day on which Sixteenth Amendment was passed, could earlier be proceeded against for the misbehaviour or incapacity only by the peers through the mechanism of the Supreme Judicial Council, but Sixteenth Amendment provided that they would be proceeded against under the mechanism of parliamentary procedure of impeachment. Thus, Sixteenth Amendment has clearly varied the removal mechanism of the Judges of the Supreme Court for proved misbehaviour or incapacity to their great disadvantage during their period of office in clear violation of article 147(2) of the Constitution. When the learned Attorney General and Mr. Abdul Matin Khasru were confronted with article 147(2), they

could not give any satisfactory reply; they only said that it was in the wisdom of the members of Parliament who made the amendment to the Constitution, i.e. Sixteenth Amendment. It will not be out of context to say that this Court (both the Divisions) in hundreds of cases have held that no law/regulation/rule/order can be enacted/framed or passed varying the terms and conditions of the service of a person to his disadvantage. But today the Judges of the Supreme Court are being subjected to the great disadvantage varying their terms and conditions of their service by pushing them to the removal mechanism by Parliament instead of by their peers, i.e. the Supreme Judicial Council.

The learned Attorney General and the learned Additional Attorney General have also argued that the parliamentary impeachment procedure in respect of the Judges of the superior Court is also in practice in other countries, so Sixteenth Amendment is quite in conformity with international practice. I do not find any substance in their submission, because the

removal mechanism of other countries for removal of the Judges of their superior Court would not suit us due to the different socio economic and political conditions of our country. In construing the constitutional provisions, the law and procedure for removal of Judges in other countries at best provides a background and a comparative view and a comparative view simply affords a proper perspective for the understanding and interpretation of the constitutional scheme. But the solution must be found within our constitutional scheme. Further mechanism of other countries, which destroys the constitutional scheme of independence of the judiciary and separation of power as engrained in our Constitution, cannot be accepted simply because it is prevalent in some other countries. Further, amendment in our Constitution must be made in the context of our socio economic and political condition and within our constitutional scheme according to our need and aspiration of our people. As already discussed our constitutional scheme is not to empower Parliament to

investigate into alleged misbehaviour or incapacity of the Judges of the Supreme Court. Further, experience of other countries where Parliament has been given the power of impeachment of the Judges of the superior Court are not at all happy, rather saddened. The learned Chief Justice and my brethren, Syed Mahmud Hossain, Muhammad Imman Ali and Hasan Foez Siddique, JJJ have in *extenso* referred to and discussed the sad experience of other countries, so I would not repeat the same, I would just mention that in the case of Sub-Committee on Judicial Accountability-vs-Union of India (1991) 4SCC699, the India Supreme Court had the occasion to examine the removal procedure of the Judges in England, Canada, Commonwealth of Australia, United States of America as well as under other Constitutions. In that case, (Sub-Committee on Judicial Accountability), the India Supreme Court also examined the criticisms against the impeachment procedure existing in those countries and how it is being politicised and noted the criticisms, *inter alia*, that legislative removal is

coloured by political partisanship. The Justice Sub-Committee on judiciary in England recommended the establishment of an ad-hoc Judicial Commission to be appointed by the Lord Chancellor, if he decides that the question of removing a Judge is to be investigated and this recommendation is quite similar with the procedure of the Supreme Judicial Council in our country as it stood before Sixteenth Amendment. The Sub-committee further recommended that members of Parliament or persons who hold or have held any political appointment would be excluded from such commission.

Sixteenth Amendment is also *ultra vires* the Constitution in view of the provisions of article 7B of the Constitution inasmuch as it in effect has impaired the independence of judiciary, a basic structure of the Constitution. Article 7B was inserted in the Constitution by Fifteenth Amendment and this imposed limitation on the amending power of Parliament. In this article, it has been mandated that 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. In this article, basic structures of the Constitution has not been spelt out, but it is very much well settled that the independence of judiciary is a basic structure of the Constitution and the independence of judiciary is also fundamental in establishing the rule of law. This Division in Eighth Amendment case held that the independence of judiciary is a part of the basic structures of the Constitution and in that case as well as in Fifth Amendment case, the Supreme Judicial Council was found as unique feature because the Judge is tried by his own peer, *"thus there is secured a freedom from political control"* and *"being more transparent procedure than that of the earlier ones and also*

safeguarding independence of judiciary" respectively and thus the Supreme Judicial Council became a part of the basic structures of the Constitution. So Parliament could not amend article 96 as it stood after Fifth Amendment judgment in view of the provision of article 7B. The learned Attorney General and Mr. Ajmalul Hossain have submitted that since article 96 of the constitution was not a basic structure of the Constitution, article 7B was not a bar in amending the same by way of substitution. They are totally mistaken in making the said submission inasmuch as in view of the findings and the observations made by this Court in Eighth Amendment and Fifth Amendment cases as referred to and discussed above, article 96 with the Supreme Judicial Council assumed the status of basic structure of the Constitution.

The Supreme Judicial Council as contained in clauses (2)(3)(4)(5)(6) and (7) of article 96 having been upheld by this Division on two occasions (in Eighth Amendment and Fifth Amendment cases),

Amendment of those clauses of article 96 by Sixteenth Amendment tantamount overruling the two judgments of this Division through legislative power and thus, the Parliament assumed and exercised supra judicial power over the judgment of this Division. But the Constitution has not empowered Parliament such supra judicial power to nullify the approval of constitutional provision affecting the independence of judiciary. And such exercise of power is an invasion upon separation of power and the rule of law, two basic structures of the Constitution. Therefore, Sixteenth Amendment cannot get the seal of legitimacy by this Court. In the context, I consider it appropriate to refer the case of people's Union for Civil Liberties Vs Union of India (2003) 4SCC 399. In that case, at paragraph 34, the Indian Supreme Court held:

> "the legislature has no power to review the decision and set it at naught except by removing the effect which is the case pointed out by the decision rendered by the Court. If this is permitted, it would sound the death knell of the rule of law."

In the same case at paragraph 37, the Supreme Court held:

> "the legislature also cannot declare any decision of a court of law to be void or of no legal effect."

In the same case at paragraph 112, it was further held:

> "the legislature cannot 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 cannot trench on the judicial power vested in the courts."

Similar views were taken by the Indian Supreme Court in the cases of Cauvery Water Disputes Tribunal (1993 Suppl(1) SCC 96 (2) and Municipal Corpn of City of Ahamedabad Vs New Shrook Spg. And Wvg Co Ltd (1970, 2 SCC 280).

The Constitution is a social contract and is the "expression of the will of the people." Any amendment in the Constitution has to be directly linked with and flow from conscious expression of the opinion and consent of the people to the proposed amendment. A more important, the proposed amendment must not destroy the separation of power, so eventual to

secure and preserve the independence of judiciary. And an amendment must be out of necessity to achieve an object hitherto unattended. A constitutional machinery for disciplinary process affecting Judges is in place operating without obstacle. But Sixteenth Amendment bill was placed in Parliament without paying any consideration to the above aspect and was placed in a very casual manner like the ordinary legislation showing some gallery playing old reasons and using some catchy words without mentioning the relevant articles, such as, articles 22, 94(4), 116A and 147(2) of the Constitution which guaranteed the independence of judiciary. Sixteenth Amendment bill placed in Parliament is as under:

"গণপ্রজাতন্ত্রী বাংলাদেশের সংবিধানের অনুচ্ছেদ ৯৬ এর অধিকতর সংশোধনকল্পে আনীত

বিল

যেহেতু সংবিধানের অনুচ্ছেদ ৭ অনুযায়ী প্রজাতন্ত্রের সকল ক্ষমতার মালিক জনগণ এবং জনগণের পক্ষে এ ক্ষমতার প্রয়োগ কেবল সংবিধানের অধীন ও কর্তৃত্বে কার্যকর হইবে; এবং

যেহেতু সংসদের মাধ্যমে জনগণের ইচ্ছার বহিঃপ্রকাশ হিসাবে রাষ্ট্রের সর্ব্বোচ্চ পদে অধিষ্ঠিত রাষ্ট্রপতি, প্রধানমন্ত্রী বা স্পীকারকে, যথাক্রমে, অভিশংসন, পদত্যাগ বা অপসারণের বিধানাবলী (১৯৭২ সনে প্রণীত সংবিধানের অনুচ্ছেদ ৫২, ৫৭ ও ৭৪) অদ্যাবধি অপরিবর্তিত রহিয়াছে; এবং

যেহেতু সামরিক শাসক অসাংবিধানিক পন্থায় ১৯৭২ সনের সংবিধানের ৯৬ সামরিক ফরমান Second Proclamation (Fifteenth Amendment) Order 1978 এর Second Schedule দ্বারা পরিবর্তনক্রমে সুপ্রীম কোর্টের কোন বিচারককে অসদাচরণ বা

অসামর্থ্যের অভিযোগে অপসারণের ক্ষমতা জাতীয় সংসদের পরিবর্তে সুপ্রীম জুডিসিয়াল কাউন্সিল এর নিকট ন্যস্ত করা হয়; এবং

যেহেতু সামরিক ফরমান দ্বারা সাধিত সংবিধানের উক্ত সংশোধন অনুচ্ছেদ ৭ এর চেতনার পরিপন্থী; এবং

যেহেতু জনগণের নির্বাচিত প্রতিনিধিদের দ্বারা গঠিত সংসদে রাষ্ট্রের অন্যান্য অঙ্গের ন্যায় উচ্চ আদালতের বিচারকদের জবাবদিহিতার নীতি বিশ্বের অধিকাংশ গণতান্ত্রিক রাষ্ট্রে বিদ্যমান রহিয়াছে; এবং

যেহেতু সংবিধান সংশোধনক্রমে সংসদে জনপ্রতিনিধিদের নিকট সুপ্রীম কোর্টের কোন বিচারককে অসদাচরণ বা অসামর্থ্যের অভিযোগে অপসারণের ক্ষমতা পুর্নবহাল করা সংবিধানের সামগ্রিক চেতনা ও কাঠামোর সহিত সামঞ্জস্যপূর্ণ; এবং

যেহেতু ১৯৭২ সনের সংবিধানের অনুচ্ছেদ ৯৬ পুনঃপ্রবর্তনের লক্ষ্যে সংবিধান অধিকত সংশোধন সমীচীন ও প্রয়োজনীয়;

সেহেতু এতদ্দ্বারা নিম্নরূপ আইন করা হইলঃ-

১। সংক্ষিপ্ত শিরোনাম।- এই আইন সংবিধান (ষোড়শ সংশোধন) আইন, ২০১৪ নামে অভিহিত হইবে।

২। সংবিধানের অনুচ্ছেদ ৯৬ এর প্রতিস্থাপন।- গণপ্রজাতন্ত্রী বাংলাদেশের সংবিধানের অনুচ্ছেদ ৯৬ এর পতিবর্তে নিম্নরূপ অনুচ্ছেদ ৯৬ প্রতিস্থাপিত হইবে, যথাঃ-

"৯৬। বিচারকদের পদের মেয়াদ।- (১) এই অনুচ্ছেদের বিধানাবলী-সাপেক্ষে কোন বিচারক সাতষট্টি বৎসর বয়স পূর্ণ হওয়া পর্যন্ত স্বীয় পদে বহাল থাকিবেন।

(২) প্রমাণিত অসদারণ বা অসামর্থ্যের কারণে সংসদের মোট সদস্য-সংখ্যার অন্যূন দুই-তৃতীয়াংশ গরিষ্ঠতার দ্বারা সমর্থিত সংসদের প্রস্তাবক্রমে প্রদত্ত রাষ্ট্রপতির আদেশ ব্যতীত কোন বিচারককে অপসারিত করা যাইবে না।

(৩) এই অনুচ্ছেদের (২) দফার অধীন প্রস্তাব সংস্পর্কিত পদ্ধতি এবং কোন বিচারকের অসদাচরণ বা অসামর্থ্য সম্পর্কে তদন্ত ও প্রমাণের পদ্ধতি সংসদ আইনের দ্বারা নিয়ন্ত্রন করিবেন।

(৪) কোন বিচারক রাষ্ট্রপতিকে উদ্দেশ্য করিয়া স্বাক্ষরযুক্ত পত্রযোগে স্বীয় পদ ত্যাগ করিতে পারিবেন।"

A mere look at the bill of Sixteenth Amendment shows that the observations made and the findings given by this Division in Fifth Amendment case to the effect:

> "It 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. This substituted provisions being more transparent procedure than that of the earlier ones and also safeguarding independence of judiciary, are to be condoned."

and in Eighth Amendment case to the effect:

> "Judges cannot be removed except in accordance with provisions of Article 96- that is the Supreme Judicial Council. Sub article (5) says 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 misconduct, the President shall, by order remove the Judge from office. This is unique feature because the Judge is tried by his own peer, 'thus there is secured a freedom from political control' (1965 AC190)."

were not at all brought to the notice of the members of Parliament although Fifteenth Amendment was passed

in Parliament only on 30th June, 2011 retaining clauses (2), (3), (4), (5), (6) and (7) of article 96 as those stood on that date (the Gazette was made on 03.07.2011). In the bill, five reasons were assigned to amend article 96 of the Constitution *viz*. (a) the power to remove a Judge of the Supreme Court on the ground of his misbehaviour or incapacity was conferred to the Supreme Judicial Council by changing article 96 of the Constitution enacted in 1972, by the military rulers through unconstitutional means of Martial Law Proclamation, namely, the Second Proclamation (15th amendment) Order, 1978, Second Schedule; (b) the amendment brought by the Martial Law Proclamation is against the spirit of article 7 of the Constitution; (c) the provisions relating to impeachment, resignation or removal respectively of the President, the Head of the State, the Prime Minister or the Speaker vide articles 52, 57 and 74 of the Constitution enacted in 1972 still remains unchanged. In the bill, it was not pointed out that the President, the Speaker are elected by the members

of Parliament and there are specific provisions in the Constitution itself for their impeachment or removal by the members of Parliament and that a member of Parliament who enjoys the command of the majority members of a political party becomes the Prime Minister (detailed discussion has been made earlier in this judgment, so those are not repeated herein); (d) in most of the democratic countries in the world, the principle of accountability of the Judges of the superior Court like other organs of the State lies in Parliament consisting of the elected representatives of the people; (e) reinstating the power to remove a Judge of the Supreme Court on the ground of his misbehaviour or incapacity by the elected representatives of the people in Parliament is consistent with the overall spirit and structure of the Constitution without mentioning which article of the Constitution authorized the members of Parliament to be the watch dog of the Judges of the Supreme Court and thus to initiate proceedings for investigating the allegation of misbehaviour or

incapacity of a Judge and then impeach him on proved misbehaviour and incapacity.

It was not also brought to the notice of the members of Parliament that BangaBandhu, father of the nation, himself by Fourth Amendment took away the power of impeachment of the Judges of the Supreme Court by Parliament and it was vested with the President. Therefore, before martial law dispensation, original article 96 was no more in the Constitution and, in fact, in Fifteenth Amendment, article 96 with the Supreme Judicial Council was retained and thus it became a part of the Constitution and thereby article 96 with the Supreme Judicial Council no more bore the stigma of the Martial Law Proclamation. In the written argument, the learned Attorney General took a plea that since by Fourth Amendment, presidential form of Government was introduced in place of parliamentary form of Government, so the power to impeach the Judges of the Supreme Court was taken away from Parliament and it was vested in the President. The argument of the

learned Attorney General is absolutely based on total non-consideration of the provisions of the various articles of the Constitution in Chapter I, Part V of the Constitution which have been quoted hereinbefore. I have checked up the articles in that chapter of Part V. I found no change in the provisions as to the composition and power of Parliament. It remained the same when Fourth Amendment was passed and even today it is the same as it stood on 04.11.1972. The only change made from time to time was in sub-article (3) of article 65 as to the number of nominated women members. Parliament is Parliament and its members are elected representatives of the people whatever may be form of the Government, parliamentary or presidential. I failed to understand how the learned Attorney General could make the distinction between the members of Parliament under the presidential form of Government and members of Parliament under parliamentary form of Government. The only distinction between the two forms of Government is that in the presidential form of Government, the

President is the chief executive and in the parliamentary form of Government, the Prime Minister is the chief executive. The powers and functions of Parliament under both the forms of Government are the same and similar. In the context, it is very very pertinent to state that though the provisions of the impeachment of a Judge of the Supreme Court by Parliament was in the Constitution from Fourth November, 1972 upto 25th January, 1975, i.e. upto Fourth Amendment, no law was enacted pursuant to sub-article (3) of original article 96 and therefore, article 96 as it stood then never became effective and it just remained in the Constitution.

With reference to article 7, it was stated in the bill 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 (earlier I have discussed and shown that there is no provision in the Constitution giving members of Parliament or the Parliament itself to be the watch dog of the Judges

of the Supreme Court or initiate a proceeding for impeachment of a Judge) without specifying which article of the Constitution gave power to Parliament to investigate into the alleged misbehaviour or incapacity of a Judge of the Supreme Court and then to impeach him.

All the reasons assigned in the bill for amendment of article 96 were very much existent on the date when Fifteenth Amendment was passed. After Fifteenth Amendment retaining the provision of the Supreme Judicial Council, election to the 10th Parliament was held on 5th January, 2011, but as stated earlier in another context, no mandate was taken by any of the political parties/group from the people to amend article 96 giving power to Parliament to impeach the Judges of the Supreme Court. So the people did not express any will in that respect.

The amendment of the Constitution should not be like milked rice (দুধ ভাত), but it appears that it is so. The reason why I say this is that Fifteenth Amendment to the Constitution retaining the provision of the

Supreme Judicial Council was passed on 30.06.2011 and then just after 3(three) years 2(two) months 10(ten) days, Sixteenth Amendment was passed on 07.09.2014 without assigning any new reason and giving the back up facts which prompted Parliament to pass Sixteenth Amendment, particularly, in the face of article 7B as discussed earlier.

One of the reasons assigned for amending article 96 is that in most of the democratic countries in the world, the principle of accountability of the Judges of the superior Court, like the other organs of the State, lies in Parliament consisting of the elected representatives of the people. Such reason is absolutely beyond all the concepts of constitutional amendment and constitutional jurisprudence for amendment of the Constitution. The Constitution is the "expression of the will of the people" and its amendment must reflect the will of the people and any amendment to the Constitution must reflect the necessity and it must reflect public opinion which is the foundation of necessity. Amendment must be out of

necessity to achieve an object hitherto unattended, but the bill of Sixteenth Amendment *prima-facie* does not show any such object, in particular, when the constitutional machinery for disciplinary process affecting the Judges of the Supreme Court is in place and operating without obstacle. As stated earlier in other contexts that the parliamentary election of January 2014 for 10th Parliament was held on the representation made by political parties and their alliances seeking mandate on the basis of Election Manifesto (emphasis supplied). The manifesto of none of the political parties and their allies did seek any mandate for Parliament to arrogate to itself to:

(a) assume authority to function as constituent Assembly to amend the Constitution,
(b) dilute separation of power,
(c) place the Judges of the Supreme Court under its supervision through the power to take disciplinary action against the Judges, i.e. by impeachment of a Judge,
(d) curtail fundamental right to move the High Court Division (article 44) for enforcement of fundamental rights which cannot be attained without the independence of judiciary (article 94(4)).

And it will be noticed that the Proclamation of Independence of Bangladesh on 10th April, 1971, took notice of the "Mandate" for framing a Constitution for the Republic so as to ensure "equality, human dignity and social justice" and a democratic form of Government. By wining the election to 10th Parliament held on 5th January, 2014 the party in power and its allies got the mandate to form the Government and run the country. But they could not go for any constitutional amendment like Sixteenth Amendment as it had/has no mandate from the people to amend the Constitution, in particular, impairing the independence of judiciary, a basic structure of the Constitution. Moreso, it did not appear from the proceedings of Parliament that any deliberation was ever made in Parliament for the compelling necessity for replacement of the Supreme Judicial Council with that of parliamentary impeachment mechanism.

It does not need citation of any authority that the power to frame a Constitution is a primary power whereas a power to amend a rigid Constitution (ours

is a rigid constitution) is a derivative power derived from the Constitution and subject at least to the limitations imposed by the prescribed procedure. Secondly, laws made under a rigid Constitution, as also the amendment of such a constitution can be *ultra vires*, if they contravene the limitations put on the law making or amending power by the Constitution, for the Constitution is the touch stone of validity of the exercise of powers conferred by it. But no provision of the Constitution can be *ultra vires* because there is no touch stone outside the Constitution by which the validity of a provision of the Constitution can be judged (M H. Seervai, Constitutional law of India, at page 1522-23).

Professor Baxi while talking about Indian Constitution said that the Supreme Court reiterated that what is supreme is the Constitution; "neither Parliament nor the judiciary is by itself supreme. The amending power is but a power given by the Constitution to Parliament; it is a higher power than any other given to Parliament but nevertheless it is

a power within and not outside of, the Constitution . . . Article 368 is one part of the Constitution. It is not and cannot be the whole of Constitution" (Indian Constitution Trends and Issues at page 123).

Professor K.C. Wheare in Modern Constitutions quoted Alexander Hamilton in the Federalist when he said:

> "There is no position which depends on clearer principles than that every act of a delegated authority, contrary to the tenor of the Commission under which it is exercised, is void. No legislative act, therefore, contrary to the Constitution can be valid. To deny this would be to affirm that the deputy is greater than his principal; that the servant is above his master, <u>that the representatives of the people are superior to the people themselves</u>; that men acting by virtue of powers may do not only what their powers do not authorize, but what they forbid. And he concludes that "the Constitution ought to be preferred to the Statute, the intention of the people to the intention of their agents."

It is true that in expounding the laws or legal principle sometimes cases of other jurisdiction than

ours are referred to and relied upon by this Court to enrich our judgment as well as to develop jurisprudence, but no constitutional amendment can be made with reference to the practice or system prevalent in other countries as has been done in Sixteenth Amendment. There is not a single precedence anywhere in the world where an amendment to the Constitution has been made giving reference to the system/practice prevalent in other countries. Ours is an "autochthonous" Constitution. "Autochthonous" in its most common acceptance is the characteristic of a Constitution which has been freed from any trace of subordination to and any link with the original authority of Parliament of the foreign power that made it. The aim is to give a constitutional instrument the force of law through its own native authority. A factually "autochthony" is generally achieved after a revolution (on autochthony: K.C. wheare, the Constitutional structure common wealth 1960). Our Constitution refers to the sacrifice of

the people through historic struggle for national liberation after having proclaimed our independence.

In this background, our Constitution is to be interpretated and any amendment made to the Constitution has to be looked upon keeping in view the constitutional scheme and the expressed will of the people.

Chief Justice, Marshall of the United States of America "Who is generally recognized as the most competent and successful of all the Chief Justices to date, and is ranked among the two or three most powerful and influential jurist ever to sit in the Supreme Court" often reminded his country men that *"We must never forget that it is Constitution that we are expounding."* Mr. Justice Frankfurter considered the Marshal statement to be *"the single most important utterance in the literature of constitutional law-most important because most comprehensive and comprehending"* (69 Harvard Law Review 217, 1955, at page 219").

It is known to the whole world that we achieved independence at the cost of 3(three) million people. So, whatever amendment has to be made in our Constitution must be made according to our need keeping in view our socio economic and political condition and public opinion as the foundation of necessity and in no case, the rule of law which is the fabric of our Constitution must not be impaired. By referring to the practice/system prevalent in the other countries in the bill of Sixteenth Amendment "we, the people of Bangladesh", have been undermined, disgraced, degraded, belittled and disrespected.

This Division having found the system of removal of the Judges of the Supreme Court through the mechanism of the Supreme Judicial Council as Unique feature because the Judge is tried by his own peer *"thus there is secured a freedom from political control"* and *"being more transparent procedure than that of the earlier ones and also safeguarding independence of judiciary"*, it became part of the Constitution, it could not be overlooked or by passed

and ought to have brought to the notice of the members of Parliament and serous deliberations/discussion on the amendment must have been preceded before passing Sixteenth Amendment amending article 96, but unfortunately that was not done. I strongly believe that had the materials as pointed out hereinbefore been mentioned in the bill of Sixteenth Amendment or otherwise brought to the notice of the members of Parliament during the discussion on the bill, Parliament would not have passed Sixteenth Amendment.

In the context, I find it most appropriate to refer to the case of N. Kannadasan Vs Ajoy Khose and others (2009) 7SCC 1. In this case Indian Supreme Court held:

> "It is the Majesty of the institution that has to be maintained and persevered in the larger interest of the rule of law by which we are governed. It is the obligation of each organ of the State to support this important institution. Judiciary holds a central stage in promoting and strengthening democracy, human rights and the rule of law. People's faith is the very foundation of any

> judiciary. Injustice anywhere is a threat to justice everywhere and therefore, people's faith in the judiciary cannot be afforded to be eroded (paragraph 48)."

In the same case in paragraph 47, it was further held:

> "The system of governance established by the Constitution is based on distribution of powers and functions among the three organs of the State. It is the prerogative of the legislature to enact laws; responsibility of the executive to enforce the laws and administer the country; and the duty of the judiciary to adjudicate upon the disputes that arise between individuals, between an individual and the State or between different State. In this scheme of things, the Supreme Court has been assigned the duty of being the final arbiter, including on the question of interpretation of the Constitution and the laws."

From the constitutional scheme of our Constitution as discussed above, we can safely conclude that democracy, judicial independence, rule of law among others are the basic structures of the Constitution and there cannot be a democracy 'of the

people, by the people, for the people' without the pivotal role of independent judiciary. It is indeed the life blood of a democracy, and a bulwark against an autocratic Government. Judicial independence includes separation of powers, rule of law, and fundamental human rights. Modern democracy is not based alone on the rule of people through their elected representatives in Parliament. This is simply 'a formal democracy'. In fact, our Constitution envisages 'the substantive democracy' that depends more on judicial independence, separation of power, rule of law and human rights. 'A formal democracy' may destroy the 'substantive democracy' in absence of an independent judiciary. History speaks that the 'formal democracy' had destroyed the 'substantive democracy' to the agony of the people providing scope to unconstitutional authority to make their levee in the very Constitution, 'we, the people adopted, enacted and gave to ourselves.'

As held hereinbefore, the Supreme Judicial Council now a part of our Constitution is the safety

valve against the executive onslaughts and it shall save the Judges of the Supreme Court from the onslaughts of the executive and this safety valve cannot be allowed to be fused by any logic and under any circumstances, but that is what has actually been done by Sixteenth Amendment, so the High Court Division very rightly struck down the same. At the same time, I strongly feel that steps need be taken to make the Supreme Judicial Council more effective

Since the certificate given by the High Court Division under article 103(2)(a) relates to the constitutionality of Sixteenth Amendment only, I refrain myself from making any comment concerning any matter beyond the *vires* of Sixteenth Amendment.

For the reasons stated hereinbefore, the appeal is dismissed with the expunction of some of the observations of the High Court Division as noted in the judgment of the learned Chief Justice.

J.

Nazmun Ara Sultana, J. I agree with the judgment prepared by the learned Chief Justice.

J.

Syed Mahmud Hossain, J: Pursuant to a certificate issued by the High Court Division under Article 103(2)(a) of the Constitution, this appeal has arisen against the judgment and order dated 05.05.2016 passed by the High Court Division in Writ Petition No.9989 of 2014 making the Rule absolute.

On an application under Article 102 of the Constitution filed by nine learned Advocates, the High Court Division issued Rule Nisi calling upon the respondents to show cause as to why the Constitution (16th Amendment) Act,2014 (Act No.13 of 2014) should not be declared to be void, illegal and ultra vires the Constitution of the People's Republic of Bangladesh.

The Rule Nisi issued was made absolute by the judgment and order now impugned before us after

hearing the learned Advocates of the parties as well as amici curiae.

The submissions were made before us with regard to the extent of power of the legislature to amend the Constitution under Article 142 of the Constitution. I would like to give my reasons for decision separately.

Mr. Mahbubey Alam, learned Attorney General and Mr. Murad Reza, learned Additional Attorney General, appearing on behalf of the appellants, submit that the procedure for removal of the Judges is absolutely a policy decision which is the domain of the Parliament. They also submit that the verdict of the High Court Division declaring 16th Amendment ultra vires the Constitution is violative of the principles of the separation of the powers and as such, the impugned judgment should be set aside.

Mr. Ajmalul Hossain, learned Amicus Curiae and Mr. Abdul Matin Kasru, learned Senior Advocate, supporting the submission of the learned Attorney General and the learned Additional Attorney General,

submit that repealed Article 96 of the Constitution is not a basic structure of the Constitution and as such, no question arises to declare 16th Amendment to be ultra vires the Constitution.

Mr. T.H. Khan, Dr. Kamal Hossain, Mr. Abdul Wadud Bhuiyan, Mr. M. Amirul Islam, Mr. Rokanuddin Mahmud, Mr. A.J. Mohammad Ali, Mr. Hasan Ariff, Mr. M.I. Farooqui and Mr. Fida M. Kamal, learned Senior Advocates appearing as amici curiae, supporting the impugned judgment, submit that independence of judiciary is a basic structure of the Constitution and security tenure of the Judges is ingrained in the concept of the independence of judiciary and as such, 16th Amendment is ultra vires the Constitution.

SEPARATION OF POWERS:

Separation of powers refers to the division of responsibilities into distinct branches of the State to limit any one branch from exercising the core functions of another. The intent is to prevent the concentration of power and provide for checks and balances. The Powers of the State are generally

classified as the legislative power of making rules, the executive power of enforcing those rules and the judicial power of adjudicating disputes by applying those rules. In order to avoid autocratic exercise of powers of the State it is thought that these three powers should be entrusted to three different organs. In practice, however, no water-tight separation of powers is possible or desirable. Even in the United States of America a strict separation of powers is not followed. The prevalent "doctrine of checks and balances requires that after the main exercise has been allocated to one person or body, care should be taken to set up a minor participation of other persons or bodies. "Independence of judiciary is a basic feature of the Constitution and separation of powers as contemplated under art.22 of the Constitution is a *sine qua non* for such independence. Though the Constitution in art.22 required separation of judiciary from the executive and made special provision in Paragraph 6(6) of the Fourth Schedule for implementation of Chapter II of Part VI no step

whatsoever was taken by the legislative or executive branch of the government and in such situation the Appellate Division gave direction to parliament and the President to enact laws and promulgate rules in terms of art.115 and 133 of the Constitution to give effect to the policy enunciated in art.22 of the Constitution.

In our Constitution executive and legislative powers are expressly vested but the vesting of such power in judicature is absent. Vesting is a necessary decisive factor, where judicial powers have been in the hands of the judicature since before the birth of our Constitution.

In the majority judgment the learned judges have expressed the separation of powers between Legislature, Executive and the Judiciary in the following terms:

> ".....The executive power of the Republic is vested in the Executive. The legislative power is vested in the Legislature. The judicial power of the Republic is necessarily vested in the judiciary....."

In the case of ***Hinds vs. The Queen (1976)1 ALL ER 353*** Lord Diplock held as under:

> "As respects the judicature, particularly if it is intended that the previously existing courts shall continue to function, the Constitution itself may even omit any express provision conferring judicial power on the judicature. Nevertheless, it is well established as a rule of construction applicable to constitutional instruments under which the governmental structure is adopted that the absence of express words to that effect does not prevent the legislative, the executive and the judicial powers of the new state being exercisable by the legislature, by the executive and by the judicature respectively."**(emphasis supplied)**

Relying on the dicta of Lord **Diplock in Hinds vs. *The Queen (ibid)*** Mustafa Kamal,J has pointed out in the case of ***Mujibur Rahman vs. Bangladesh, 44 DLR (AD)*** **111,** paragraph 6 of the 4th Schedule of our Constitution to show the continuity of the incumbent Chief Justice and other judges of the erstwhile High Court and held thus:

> ".....Our Constitution, therefore, expressly intended that the previously existing superior Courts shall continue to function, albeit in a new dispensation, and the subordinate Courts too shall continue to function. Although the Constitution itself omitted to confer judicial power on the

> Supreme Court and the Subordinate Courts by any express provisions there can be no doubt whatever that the Supreme Court and the Subordinate Courts are the repository of judicial power of the State because they have been previously existing and the Constitution allows them to function, although in a new form.....”

In this regard it will be profitable to refer to the views of ***K. Hossain, CJ., in Jamil Huq vs. Bangladesh,34 DLR (AD) 125***. In order to find out whether judicial power is conferred on the Supreme judiciary, his Lordship has referred to the Preamble, Article 22, Article 7, Article 26 and Article 108 and has held:

> “A combined reading of the provisions set out above indicates that full judicial powers have been conferred by Bangladesh Constitution on the Supreme judiciary as an independent organ of the State. It has power to declare a law passed by the Legislature inconsistent with the Constitution or fundamental rights *ultra vires*.”

These are the two approaches that go together to find out the vesting of judicial power in the judicature of a constitution based on the Westminister model.

In the other jurisdictions:

In India: Supreme Court in ***I.R. Coelho (Dead) by LRs Vs. State of Tamil Nadu & others, 2007 AIR (SC)861; at para-64*** has observed as follows:

> "Separation of Powers: The separation of powers between Legislature, Executive and the Judiciary constitutes basic structure, has been found in Kesavananda Bharati's case [(1973) 4 SCC 255; AIR 1973 SC 1461] by the majority. Later, it was reiterated in Indira Gandhi's case. A large number of judgments have reiterated that the separation of powers is one of the basic features of the Constitution.
>
> In fact, it was settled centuries ago that for preservation of liberty and prevention of tyranny it is absolutely essential to vest separate powers in three different organs. In Federalist 47, 48 and 51 James Madison details how a separation of powers preserves liberty and prevents tyranny. In Federalist 47, Madison discusses Montesquieu's treatment of the separation of powers in the Spirit of Laws (Book XI,Ch.6). There Montesquieu writes "when the legislative and executive powers are united in the same person, or in the same body of Magistrate, there can be no liberty.....Again there is no liberty if judicial power be not separated from the legislative and executive."

In the aforesaid judgment, the Supreme Court of India has quoted the views of Alexander Hamilton as under:

> "The complete independence of the Courts of justice is peculiarly essential in a limited constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, that it shall pass no bills of attainder, no ex post facto laws, and the like. Limitations of this kind can be preserved in practice in no other way than through the medium of courts of justice, whose duty it must be to declare all acts situation void. Without this, all the reservations of particular rights or privileges would amount to nothing."

The Supreme Court of India has also quoted Montesquieu as under:

> Montesquieu finds tyranny pervades when there is no separation of powers:
>
> > "There would be an end of everything, were the same man or same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals."

Having considered the aforesaid quotations the Indian Supreme Court observed as under:

> "The Supreme Court has long held that the separation of powers is part of the basic structure of the Constitution. Even before the basic structure doctrine became part of Constitutional law, the importance of the separation of powers on our system of governance was recognized by this Court in Special Reference No.1 of 1964 [(1965)1 SCR 413].

Contentions in the light of the aforesaid developments, the main thrust of the argument of the petitioners is that post-1973, it is impermissible to immunize Ninth Schedule laws from judicial review by making part III inapplicable to such laws. Such a course, it is contended, is incompatible with the doctrine of basic structure. The existence of power to confer absolute immunity is not compatible with the implied limitation upon the power of amendment in Article 368, is the thrust of the contention."

In Pakistan: Supreme Court in the ***State vs. Zia-ur-Rahman and others [PLD 1973 SC 49]*** has expressed in the following terms:

"In saying this, however, I should make it clear that I am making a distinction between "judicial power" and "jurisdiction." In a system where there is a tracheotomy of sovereign powers, then *ex necessitate rei* from the very nature of things the judicial power must be vested in the judiciary. "Judicial Power" has been defined in the *Corpus Juris Secundum*, Vol.XVI, para 144, as follows:

"The judiciary or judicial department is an independent and equal co-ordinate branch of Government, and is that branch thereof which is intended to interpret, construe, and apply the law, or that department of Government which is charged with the declaration of what the law is, and its construction, so far as it is written law.

This power, it is said, is inherent in the judiciary by reason of the system of division of powers itself under which, as Chief Justice Marshal put it, "the Legislature makes, the

> executive executes, and the judiciary construes, the law." Thus, the determination of what the existing law is in relation to something already done or happened is the function of the judiciary while the pre-determination of what the law shall be for the regulation of all future cases falling under its provisions is the function of the Legislature."

Supremacy of the Constitution:

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 in spirit. If any action is actually inconsistent with the provisions of the Constitution, such action shall be void and cannot 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 Consti-tution. 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 cannot 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.

PARLIAMENTARY SOVEREIGNTY:

Parliamentary sovereignty is a concept in the constitutional law of some parliamentary democracies. It holds that the legislative body has absolute sovereignty, and is supreme over all other government institutions, including executive or judicial bodies. It also holds that the legislative body may change or repeal any previous legislation, and so it is not bound by written law (in some cases, even a constitution) or by precedent.

Parliamentary sovereignty may be contrasted with separation of powers, which limits the legislature's scope often to general law-making, and judicial

review, where laws passed by the legislature may be declared invalid in certain circumstances.

In our country, Article 65 provides for a unicameral legislature called Parliament (Jatiya Sangshad) in which is vested the legislative powers of the Republic. The dominant characteristic of the British Constitution is the supremacy of Parliament which means the power of the British Parliament in enacting laws is without any fetter or restraint. It can legally pass any law, no matter whether it is unreasonable or arbitrary. The British courts cannot hold any Act of Parliament unconstitutional or refuse to enforce it as has been held in the case of ***R vs. Transport Secretary. Ex p. Factortame Ltd.[1990] 2 AC 85*** that the dispute between the parties as to the existence of the Community rights claimed by the applicants was one of law rather than of fact; that the provisions of Part II of the Merchant Shipping Act,1988 were unambiguous in their terms and required no assistance from the court for their enforcement; and that the Court had no power to make an order

declaring an Act of Parliament not to be the law until some uncertain future date and conferring on the applicants rights directly contrary to the sovereign will of Parliament. But they have the power to interpret the law and in exercise of this power they remove any unjust or unreasonable element in an Act of Parliament stating that Parliament cannot be ascribed an intention of prescribing something unreasonable or arbitrary. Under our constitutional dispensation, it is the Constitution, and not Parliament, which is supreme. Parliament's legislative power is subject to the provisions of the Constitution and any law to the extent of inconsistency with the provisions of the Constitution is void. The Supreme Court has been given the power of judicial review to see that Parliament does not overstep the limits set by the Constitution.

Independence of the Judiciary:

Independence of the judiciary is the *sine qua non* of modern democracy and so long as judiciary

remains truly distinct from legislature and executive, the general power of the people will never be endangered. The significance of an independent judiciary, free from the interference of other two organs of the government as embodied in Article 22 of the Constitution has also been emphasized in Articles No.94(4), 116A and 147 of the Constitution. There has been a historic struggle by the people of this region for an independent judiciary, to up hold the supremacy of the Constitution and to protect the citizens from violation of their fundamental rights and from exercise of arbitrary power. In Anwar Hossain Chowdhury etc. v. Bangladesh and others, BLD 1989(SPL)1, the Appellate Division in paragraph 377, observed that-

> "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 structure 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 cannot 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 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 cannot be replaced by Monarchy, Democracy by Oligarchy or the Judiciary cannot 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 cannot destroy the others. These are structural pillars of the Constitution and they stand beyond any change by amendatory process."**(emphasis supplied)**

The constitutional principle of independence of judiciary precludes 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.

What is important to note here is that in the original 1972 Constitution, removal of judges by impeachment was based on certain assumptions, which in the light of subsequent amendment would appear to be difficult to sustain. The impeachment power was vested in the Parliament on the premises that the Parliament being constituted by elected representatives of the citizens, would in exercising their power, conscientiously and independently, free from any party directive. This is how it was perceived when a similar provision was adopted in the Indian Constitution. Furthermore, in the Indian Constitution and in the original 1972 Constitution the power of impeachment could only be exercised after inquiry conducted by an independent Judicial Inquiry Committee.

Security of Tenure:

One of the essential conditions for ensuring effective independence of the judiciary is the

security of tenure of the judges. **In *Secretary, Ministry of Finance v. Md. Masdar Hossain and others, reported in 2000 BLD(AD) 104, the Appellate Division in para 55,*** *page-133* referred to the judgment of *Walter Valente vs. The Queen,[1985] 2 S.C.R.673* and quoted as follows:

> *".....Security of tenure, because of the importance traditionally attached to it, is the first of the essential conditions of judicial independence for purposes of section 11(d) of the Charter. The essential of such security are that a judge be removable only for cause, and that cause be subject to independent review and determination by a process at which the judge affected is afforded a full opportunity to be heard. The essence of security of tenure for purposes section 11(d) is tenure, whether until an age of retirement, for a fixed term or a specific adjudicative task, that is secure against interference by the Executive or other appointing authority in a discretionary or arbitrary manner."*

In *S.P. Gupta and others v. President of India and others, 1982 AIR (SC) 149,Gupta, J.* in paragraph 122, page 284 observed that-

> "The independence of the judiciary depends to great extent on the security of tenure of the Judges. If the Judge's tenure is uncertain or precarious, it will be difficult for him to perform the duties of his office without fear or favour."

Judge made law becomes part of the Constitution:

In the case of N. Kannadasan V. Ajoy Khose reported in (2009) 7 SCC 1 the Supreme Court of India quoted their earlier decision in M. Nagaraj V. Union of India reported in (2006) 8 SCC 212 and observed:

> "In our constitutional scheme, the Judge made law becomes a part of the Constitution. It has been held so in M. Nagaraj V. Union of India in the following terms (SCC P.238, Para-9):
>
> "9.....The Constitution, according to the respondents, is not merely what it says. It is what the last interpretation of the relevant provisions of the Constitution given by the Supreme Court which prevails as a law. The interpretation placed on the Constitution by the Court becomes part of the Constitution and therefore, it is open to amendment under Article 368. An interpretation placed by the Court on any provision of the Constitution gets inbuilt in the provisions interpreted. Such articles are capable of amendment under Article 368."**(emphasis supplied)**

The interpretation given by the Appellate Division in the Eighth Amendment case and Masdar Hossain's case on the question of basic structures of the Constitution and independence of judiciary and rule of law have become part of the Constitution.

Unless the interpretation given in those cases as to unamendability of the basic structures of the Constitution is changed in exercise of the power of judicial review the interpretation remains a part of the Constitution. The Sixteenth Amendment having come in conflict with the interpretation given in those cases as to unamendability of the basic structures of the Constitution, the Sixteenth Amendment falls outside the ambit of the constituent power of Parliament.

Origin of Article 96:

The concept of self-regulation of the Judiciary in Bangladesh can be traced back to British-India. Under section 220(2)(b) of the Government of India Act,1935, investigation against Judges was required to be conducted by the Judicial Committee of the Privy Council which would then recommend removal to the King or Queen.

Upon partition in 1947, the provision of section 220(2)(b) of the Government of India Act,1935

remained valid in Pakistan (by virtue of section 8(2) of the Indian Independence Act,1947) until the framing of the Constitution of Pakistan in 1956.

According to Article 169 of the 1956 Constitution, a Judge of the High Court of East Pakistan (predecessor of the Bangladesh Supreme Court), could not be removed except on the basis of the report of the Supreme Court to the President.

After the abrogation of the Constitution of Pakistan in 1958, these provisions were continued by the Laws (Continuance in Force) Order,1958. In 1962, a new Constitution was framed which introduced the concept of the Supreme Judicial Council for the purpose of initiating and conducting disciplinary measures against Judges of the Supreme Court (Article 128). Thus, it is clear that from the pre-partition era to the pre-liberation era, Judges of the erstwhile Dhaka High Court enjoyed security of tenure in the sense that self-regulation governed their disciplinary procedures.

Following liberation, the Constitution of 1972 was enacted, which introduced provisions for impeachment of Judges by Parliament (Article 96).

By the Constitution (Fourth Amendment) Act,1975 ("the 4th Amendment") a number of amendments were made to Part VI of the Constitution. Articles 95, 96, 98, 102, 109, 115 and 116 were amended.

Thereafter by various constitutional amendments including the Constitution (Fifth Amendment) Act,1979 ("the 5th Amendment") and the Constitution (Fifteenth Amendment) Act,2011 ("the 15th Amendment"), the original versions of Articles 102 and 109 were restored.

The original Article 96 (which provided for removal of Judges of the Supreme Court) was not restored until 2014.

Thus, following the independence of Bangladesh, except for the brief period from 1972-1977, self-regulation has been the preferred method of disciplining Judges in comparison with the impeachment provisions. Between 1977 and 2014, the

original Article 96 was replaced by peer review (in the form of Supreme Judicial Council) which according to the Appellate Division was a "more transparent procedure than that of the earlier one." Under this new transparent procedure involving the introduction of the Supreme Judicial Council in 1977 which remained in force till 2014 a Judge of the Supreme Court could not be removed except upon inquiry by the Supreme Judicial Council (comprising the Chief Justice and two Senior most Judges of the Appellate Division).

Constitutionality of Sixteenth Amendment:

Pursuant to the Sixteenth Amendment of the Constitution of Bangladesh, the Parliament is empowered to remove a judge from his office. Be that it may, the Constitution clearly provides for an impartial and independent judiciary as one of its foundation stones.

In this connection, it is to be mentioned here that Article 96 in the original 1972 Constitution

relating to the removal of judges was materially affected by the Fourth Amendment in 1975 which deleted Clause (3) of Article 96. After that, by the Fifth Amendment provision for removal of judges by the Supreme Judicial Council was introduced. The Fifth 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 (HCD) (2010) 70,* which was also affirmed by the Appellate Division in ***Khondker Delwar Hossain, Secretary, BNP and another v. Bangladesh Italian Marble Works and others reported in 62 DLR (AD) (2010)298.*** In that case, the Appellate Division had the occasion to examine different provisions of 5th Amendment. With regard to the provisions of Article 96 of the Constitution (which was amended by the 2nd Proclamation (10th Amendment), the Appellate Division expressly decided to retain the provision relating to the Supreme Judicial Council.

The Appellate Division in Khondker Delwar Hossain, Secretary, BNP and another v. Bangladesh

Italian Marble Works and others reported in 62 DLR (AD)(2010)298 in para 232 clearly decided to retain the provision of Supreme Judicial and observed as under:

> "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. This substituted provisions being more transparent procedure than that of the earlier ones and also safeguarding independence of judiciary, are to be condoned."

The judgment quoted above of the Appellate Division is binding under Articles 111 and 112 of the Constitution and therefore, the impugned amendment is violative of the above judgment of the Appellate Division.

The effect of 16th Amendment is to render the tenure of the judges insecure and such amendment created an opportunity to undermine the independence

of the judiciary by making the judiciary of the country vulnerable to undue influences and pressure and thus jeopardising the rule of law. The Appellate Division in the Fifth Amendment Case ***(Khondker Delwar Hossain, Secretary, BNP and another v. Bangladesh Italian Marble Works and others, 62 DLR(AD)(2010)298 in para 200*** observed as under:

> "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 legislative and administrative actions, also violated two other more basic features of the Constitution, namely, independence of judiciary and its power of judicial review."

In addition to above, Article 7B of the Constitution of Bangladesh provides that the basic structure of the Constitution cannot be amended. The independence of judiciary is indispensable in establishing the rule of law. The Appellate Division of the Supreme Court, has decided in its judgment on the Eighth Amendment (Anwar Hossain Chowdhury etc. v. Bangladesh and others, BLD 1989 (SP1)1 that the

independence of the judiciary is part of the basic structure of the Constitution.

The Sixteenth Amendment impairs the independence of the judiciary by making the judiciary vulnerable to a process of impeachment by the legislature which would be influenced by political influence and pressure.

In America, the procedure of impeachment has been criticized as an unsatisfactory process in which "political and party influence has come into play." Thus, the risk of impeachment being highly political will be even more prominent in the current political context of Bangladesh, especially due to the effect of Article 70 of the Constitution of Bangladesh. Article 70 provides that a person elected as a Member of Parliament at an election in which he was nominated as a candidate by a political party shall vacate his seat if he votes in Parliament against that party. In view of such stringent provision, it is doubtful as to what extent the members of Parliament can be impartial and free from partisan

political directives at the time of exercising the power of impeachment.

The Indian Supreme Court examined the removal procedure of Judges in England, Canada, Commonwealth of Australia, United States of America as well as under other constitutions in the case of Sub-Committee of Judicial Accountability vs. Union of India (1991) 4 SCC 699. The Indian Supreme Court noted that in most of these countries the appropriateness of the process of impeachment of Judges was questioned, mainly on the ground of partisanship or political consideration being injected into the process by which the removal of judges is adversely affected. The suggestions for change/reform have generally provided for an independent judicial council or commission for a quasi-judicial determination, following investigation and evaluation of evidence to determine if the ground for removal is substantiated by an independent judicial commission/council. This invariably implies

that such commission or council is required to be composed of judges.

IMPEACHMENT IN INDIA:

The case of Justice S.P. Sinha, Judge of the Allahabad High Court was the only case prior to the commencement of the Constitution where a Judge was removed pursuant to a reference under section 220(2)(b) of the Government of India Act,1935.

On 20th July,1948, pursuant to a petition by the Government of United Provinces, a reference was made by the Governor General of India, under section 220(2)(b) of the Government of India Act,1935.The complaint was forwarded to the Federal Court of India. Earlier, the procedure was to refer such cases to the Privy Council. But, the reference came before the Federal Court because of the India (Provisional Constitution) Order,1947 and the India (Provisional Constitutional) Amendment Order,1948.

The proceedings took place in camera before the Federal Court, which, however, stated that this should not be regarded as a precedent. After

considering the materials on five charges, the Federal Court held that one charge relating to his conduct concerning two cases was proved. As two instances of misbehaviour were proved the Federal Court opined that his continuance in office will be prejudicial to the administration of justice and to public interest. The Court recommended removal.

By order dated 22nd April,1949, the Governor-General, Mr. C. Rajagopalachari passed an order of removal under section 220(2)(b) of the Government of India Act,1935, citing that it was the only case in the history of Indian High Courts.

The procedure outlined for the removal of a Supreme Court Judge was activated for the first time in 1991, since the constitution came into force. In regard to investigation and proof of misbehaviour alleged against Justice V. Ramaswami of the Supreme Court, a three-member committee was appointed under the Judges (Inquiry)Act. It comprised Justice P.B. Sawant of the Supreme Court as presiding officer, P.D. Desai, Chief Justice, Bombay High Court and

Justice O. Chinnappa Reddy, former judge of the Supreme Court, as members. This committee unanimously found the charges leveled against Justice V. Ramaswami proved but the motion for his removal in the Lok Sabha failed because of political considerations. The enquiry committee indicted the sitting Supreme Court judge but Parliament absolved him. Thus the removal of a Supreme Court judge by parliamentary process was unsuccessful.

In the case of *Justice Soumitra Sen* of Kolkata High Court, a committee was set up, consisting of a sitting judge of the Supreme Court, an eminent lawyer and the Chief Justice of the Punjab and Haryana High Court which found him to be guilty of retaining the monies of a client that he received as an advocate-receiver, and of holding on to that money in his account even after becoming a judge of the High Court. He returned the money only later, after the High Court ordered him to do so. This was considered to be misbehaviour on the part of the judge. Instead of accepting the findings given by an impartial

committee, Justice Sen chose to challenge the findings in Parliament. Subsequently, his trial was conducted in Rajya Sabha where he was held guilty of charges leveled against him. Then the tendered his resignation to the President which was accepted and the proceedings against him were dropped.

Another such motion was initiated against Chief Justice Dinakaran of Sikkim High Court who resigned from his post.

Parliamentary Standing Committee reports on the Judicial Standards and Accountability Bill,2010(JSAB) in the midst of impeachment motions against Justice Sen and Dinakaran in India came in for severe criticism from the Campaign for Judicial Accountability and Reforms (CJAR).

The resignations of Justices Sen and Justice Dinakaran have exposed the inadequacies of the present system to make judges answerable for their omissions and commissions because of the inherent politicisation of the parliamentary mechanism. The

fact that tainted judges can simply evade parliamentary scrutiny and censure by resigning.

IMPEACHMENT IN SRI-LANKA:

Chief Justice Shirani Bandaranayake, the 43rd Chief Justice of Sri Lanka, was impeached by Parliament and then removed from office by President Mahinda Rajapaksa in January,2013. Chief Justice Bandaranayake was accused of a number of charges including financial impropriety and interfering in legal cases, all of which she has denied. The impeachment followed a series of rulings against the Government by the Supreme Court, including one against a bill proposed by Minister Basil Rajapaksa, President Rajapaksa's brother. Chief Justice Bandaranayake was replaced as Chief Justice by former Attorney General Mohan Peiris. Chief Justice Bandaranayake refused to recognise the impeachment and lawyers groups refused to work with the new Chief Justice. Chief Justice Bandaranayake's controversial impeachment drew much criticism and concern from

within and outside of Sri Lanka. On 28th January 2015 she was reinstated and retired on 29 January, the next day.

IMPEACHMENT IN MALAYSIA:

The 1988 Malaysian constitutional crisis (also known as the 1988 judicial crisis) was a series of events that began with United Malays National Organisation (UMNO) party elections in 1987 and ended with the suspension and the eventual removal of the Lord President of the Supreme Court, Tun 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 then came to a head when Dr. Mahathir Mohammad, who believed in the supremacy of the executive and legislative branches, became Prime Minister. Many saw his eventual sacking of Lord President Salleh Abas and two other Supreme Court Judges as the end of judicial independence in Malaysia, and Dr. Mahathir's actions were condemned internationally.

Since 1988, there have been regular calls for an official review of the Government's actions throughout the crisis. In 2008, newly appointed *de facto* Law Minister Zaid Ibrahim said the Government had to make an open apology to the sacked judges, calling the Government's actions during the crisis "inappropriate." Not long after, Prime Minister Abdullah Ahmad Badawi called the crisis one which the nation had never recovered from, and announced *ex gratia* compensation for the sacked and suspended judges.

It can therefore be implied from incidental reference to the experiences and incidents of Sri Lanka, Malaysia and India and particularly that of the removal of Judges by way of Parliamentary impeachment undermined Judicial Independence and impartiality.

The scope of this appeal is limited to the certificate granted by the High Court Division under Article 103(2)(a) of the Constitution. Constitutionality of Article 116 of the Constitution

and the validity of laws made during martial law period and ratification thereof by Acts VI and VII of 2013 are not at all issues of the present appeal. Therefore, there is no scope to make any decision on those issues or other issues not covered by the certificate granted by the High Court Division.

Accordingly, the appeal is dismissed.

J.

Muhammad Imman Ali, J. This civil appeal has arisen from a certificate issued by the High Court Division of the Supreme Court of Bangladesh under article 103(2)(a) of the Constitution upon making the Rule absolute in Writ Petition No.9989 of 2014 by judgement and order dated 05.05.2016.

Nine learned Advocates, of whom eight are described as practising advocates in the Supreme Court of Bangladesh, filed the aforesaid writ petition praying for issuance of a Rule Nisi upon the respondents to show cause as to why the Constitution (Sixteenth Amendment) Act, 2014 (Act No.13 of 2014) should not be declared to be void, illegal and *ultra*

vires the Constitution of the People's Republic of Bangladesh. Rule Nisi was issued and upon hearing the learned Advocates for the parties as well as *amici curiae*, was made absolute by the judgement and order now impugned before us.

The issues involved are of utmost importance and raise fundamental questions regarding the powers of the Legislature and the Judiciary. The arguments placed before us bring into focus the question with regard to the extent of the power of the Legislature to amend the Constitution under article 142 of the Constitution. I agree with the view that the appeal should be dismissed with observations and expunging some of the comments made by the High Court Division. However, as my views are likely to be different in some aspects of the issues raised in the case, I wish to give the reasons for my decision separately.

Parliamentary sovereignty

Sovereignty entails having supreme power. Parliamentary sovereignty means that Parliament can make laws concerning anything. It connotes the

unlimited power of Parliament to enact laws. Hence, the Swiss political theorist Jean-Louis de Lolme wrote in his 1771 book on the English Constitution: "Parliament can do everything but make a woman a man and a man a woman."

Of course, these days, even that is a moot point, given recent medical advances, the Courts can now decide on the gender of a person and declare a person to be either male or female.

In the course of arguments before us copious references have been made to the British Parliament and its powers. The British parliament is sovereign, and this means that, unlike in the United States, no court, including the Supreme Court, can strike down legislation passed by Parliament. However, the only exception is that the Supreme Court must give effect to directly applicable European Union law, and interpret domestic law as far as possible consistently with European Union law. It must also give effect to the rights contained in the European Convention on Human Rights.

The doctrine of parliamentary sovereignty of the United Kingdom has been regarded as the most fundamental element of the British Constitution. It can be summarised in this way: parliament has the power to make any law, no parliament can create a law that a future parliament cannot change, and only parliament can change or reverse a law passed by parliament. The Westminster Parliament thus has unconditional power. A.V. Dicey describes it as 'the dominant characteristic of our political institutions', 'the very keystone of the law of Constitution'. Consequently, it is said that the courts have no authority to judge statutes invalid, and that there are no fundamental constitutional laws that parliament cannot change, other than the doctrine of parliamentary sovereignty itself. As Lord Campbell pronounced in ***Edinburgh & Dalkeith Railway Co. V Wauchope (1842) 8 CI & F 710:***

> "..... all that a court of justice can do is to look at the Parliamentary roll: if from that it should appear that a bill has passed both houses

> and received the Royal Assent, no court of justice can inquire into the mode in which it was introduced into Parliament....."

Thus the court is bound simply to obey and apply every Act of Parliament, and the court cannot hold any such Act to be *ultra vires*.Conversely it also means that no parliament can "bind" a future parliament to something on which it has previously legislated. In the case of the British Parliament, it also means that a valid Act of Parliament cannot be questioned in a court of law.

Context of Bangladesh

At the outset it may be stated that by now we have a wealth of decisions on Constitutional matters which were decided upon extensive consideration of decisions from many other jurisdictions, including India, USA, UK, Australia, etc. The resulting decisions of our Supreme Court are now sufficient authority on matters concerning our Constitution for the purpose of deciding issues relating to our Constitution and Parliament. We therefore need not

refer to other jurisdictions, particularly since there are considerable dissimilarities in the parliamentary and Constitutional set up prevailing in the different countries.

At this juncture, I may profitably quote from the judgement of this Division in the case of ***Khondker Delwar Hossain, Secretary, BNP Party & Ors v. Bangladesh Italian Marble Works Ltd. &Ors. 2010 BLD (Spl) 2*** [commonly known as the ***Fifth Amendment case***]per Md. Tafazzul Islam, CJ (para.82)

> "In this part of the world we generally follow the common law principles but Bangladesh has got a written Constitution. This Constitution may be termed as controlled or rigid but in contradistinction to a Federal form of Government, as in the United States, it has a Parliamentary form of Government within limits set by the Constitution. Like the United States, its three grand Departments, 'the Legislature makes, the Executive executes and Judiciary construes the law' (Chief Justice Marshall). But the Bangladesh Parliament lacks the omnipotence of the British Parliament while the President is

not the executive head like the US President but the Prime Minister is, like the British Prime Minister. However, all the functionaries of the Republic owe their existence, powers and functions to the Constitution. 'We the people of Bangladesh', gave themselves this Constitution which is conceived of as a fundamental or an organic or a Supreme Law rising loftily high above all other laws in the country and Article 7(2) expressly spelt out that any law which is inconsistent with this Constitution, to that extent of the inconsistency, is void. As such, the provisions of the Constitution are the basis on which the vires of all other existing laws and those passed by the Legislature as well as the actions of the Executive, are to be judged by the Supreme Court, under its power of judicial review."

That in a nutshell outlines the powers of the three organs of State. There is no doubt about the separation of powers between these three organs, namely Executive, Legislature and Judiciary - no one organ can transgress the limits set by the Constitution. Each organ is bound to act in

accordance with the powers delineated within the Constitution. It may be added that no organ can claim superiority over any of the other organs, and each acts in accordance with the provisions of the Constitution, and hence, the will of the people. Thus, even when the Judiciary declares any law enacted by the Legislature to be *ultra vires* the Constitution, the Judiciary is not exercising any superior power, but simply acting in line with its constitutional duty. The Judiciary upon scrutiny of the law enacted by the Legislature may declare that law to be *ultra vires* if it considers that the Legislature acted beyond the powers given to it by the Constitution.

Power of amendment

The egislative powers of the Republic are vested in Parliament by article 65 of the Constitution subject to the provisions of the Constitution.

With regard to the power of amendment of the Constitution, I may refer to the decision in the

Eighth Amendmentcase, per B. H. Chowdhury, J. (as his Lordship was then):

> "The laws amending the Constitution are lower than the Constitution and higher than the ordinary laws. That is why legislative process is different and the required majority for passing the legislation is also different.... what the people accepted is the Constitution which is baptised by the blood of the martyrs. That Constitution promises 'economic and social justice' in a society in which 'the rule of law, fundamental human right and freedom, equality and justice' is assured and declares that as the fundamental aim of the State. Call it by any a name – 'basic feature' or whatever, but that is the fabric of the Constitution which cannot be dismantled by any authority created by the Constitution itself – namely, the Parliament. Necessarily, the amendment passed by the parliament is to be tested as against article 7. Because the amending power is but a power given by the Constitution to Parliament, it is a higher power than any other given by the Constitution to Parliament, but nevertheless it is a power within and not outside the Constitution."

The Constitution itself, in its present form, provides power for amendment of its provisions in article142, which is reproduced below:

"142. Notwithstanding anything contained in this Constitution-(a) any provision thereof may be amended by way of addition, alteration, substitution or repeal by Act of Parliament:

Provided that –

(i) no Bill for such amendment shall be allowed to proceed unless the long title thereof expressly states that it will amend a provision of the Constitution;

(ii) no such Bill shall be presented to the President for assent unless it is passed by the votes of not less than a two-thirds of the total number of members of Parliament;"

Certain acts in relation to the Constitution and the power of amendment under article 142 were modified by the Fifteenth Amendment, 2011 by the introduction of articles 7A and 7B of the Constitution, which provide as follows:

"7 A. (1) If any person, by show of force or use of force or by any other un-constitutional means-

(a) abrogates, repeals or suspends or attempts or conspires to abrogate, repeal or suspend this Constitution or any of its article;

or

(b) subverts or attempts or conspires to subvert the confidence, belief or reliance of the citizens to this Constitution or any of its article,his such act shall be sedition and such person shall be guilty of sedition.

(2) If any person-

(a) abets or instigates any act mentioned in clause (1); or

(b) approves, condones, supports or ratifies such act,his such act shall also be the same offence.

(3) Any person alleged to have committed the offence mentioned in this article shall be sentenced with the highest punishment prescribed for other offences by the existing laws.

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 7A is an ambitious way of deterring usurpers of power, who in the past have hampered the democratic progress of the country. The mighty power of the people and one of the best drafted Constitutions of the world did not thwart the might of the powerful, murderous usurpers, who managed to brush aside the Constitution. The Father of the Nation along with many family members was killed in cold blood. National leaders were slain in a most cowardly fashion while they were in confinement. The Constitution became powerless as did the people. Sadly, it took too long for the might of the people to prevail, which it did decisively eradicating dictatorial rule and re-establishing parliamentary democracy and the power of the people.

Effectively, article 7B makes the power of amendment given in article 142 subservient in respect of certain aspects detailed in article 7B. The introduction of articles 7A and 7B are not under challenge before us and do not call for any comments at this stage. Suffice it to say that parliaments will come and go as will members of Parliament. But the age old principle that Parliament cannot bind its successors will continue. For, the power of the people continues so long as the people continue to exist. Power of the people who exist at present is given to them in the Constitution. The people exercised their power to create the provisions of the Constitution. In five years' time the people then existing will be armed with the same power as their predecessors had given themselves, which means that they can do as is necessary through their representatives in Parliament. Their power is no less than the power of their predecessors. Hence, the force of articles 7A and 7B would appear to be open

to question as they purport to bind the megalomaniac, and the people of the future.

Reference may be made to the case of ***Shahriar Rashid Khan v. Bangladesh*** reported in ***1998 BLD (AD) 155, para 54,*** where it was held that the Legislature cannot bind its successor.

So far as the basic structures are concerned, this Division gave a list in the case of ***Anwar Hossain v. Bangladesh 1989 BLD (Spl.)1*** per Shahabuddin Ahmed J, as his Lordship was then:

> "Supremacy of the Constitution as the solemn expression of the will of the people, Democracy, Republican Government, Unitary State, separation of powers, independence of judiciary, fundamental rights are basic structures of the Constitution....."

Until 2011 there was no mention of 'basic structures' in the Constitution, nor was there any description of such basic structures. The Fifteenth Amendment of the Constitution introduced article 7B in an attempt to solidify certain provisions of the Constitution including basic structures in such a way

that they would not be amenable to amendment in the future.

For our purposes, it is sufficient to note that independence of the judiciary is listed as a basic structure of the Constitution, which fact is not denied by anyone. Although Mr. Ajmalul Hossain, learned *amicus curiae*, argued that article 96 of the Constitution of 1972 is a basic structure thereof, none of the other learned Counsel supported his view. Mr. A.J. Mohammad Ali, learned *amicus curiae*, specifically submitted the exact opposite by pointing out that not being a basic structure or feature of the Constitution, it was amended by the Fourth Amendment in 1975. However, there was consensus among eight out of nine of the learned *amici curiae* and Counsel for the respondent, that the independence of the judiciary, which is a basic structure of the Constitution, would be detrimentally affected by any amendment to article 96 of the Constitution. Any amendment which impinges upon the independence of the judiciary would have the effect of whittling down or

diminishing the basic structure of the Constitution, and hence, such amendment is *ultra vires* the Constitution.

The main thrust of the argument of the learned Attorney General was that the purpose of the amendment was to revert to the Constitution of 1972, and that having been done by the Sixteenth Amendment, it is beyond challenge. He submitted that it was the power of the people which created the Constitution of 1972 and the provisions thereof cannot be said to be *ultra vires*. In the same way, since the amendment has brought back article 96 exactly as it was in 1972, such amendment is not open to challenge. [Itmay be noted in passing that in fact article 96(1) has not been restored to the 1972 position.]

In this regard, I would observe that, certainly the validity of the provisions of the Constitution of 1972 are not open to question since they can be said to be the 'mother law' and there is no yardstick against which to test their validity. The people have exercised their power to give themselves the

Constitution which is the supreme law of the land. However, it must not be forgotten that the Constitution of 1972 was not engraved in stone. Although it bore sacrosanctity, it was amenable to amendment as provided by it in article 142.

In the case of ***Abdul Mannan Khan –VS- Government of Bangladesh, represented by the Secretary, Ministry of Law, Justice and Parliamentary Affairs and others (Thirteenth Amendment case)*** reported in ***ADC Volume IX (A) 2012 1.*** S.K. Sinha J. as his Lordship was then, referring to what ShahabuddinAhmed J. said in the ***Eighth Amendmentcase,*** observed "even if the 'constituent power' is vested in the Parliament the power is a derivative one and the mere fact that an amendment has been made in exercise of the derivative constituent power will not automatically make the amendment immune from challenge."

Article 142 of the 1972 Constitution provides as follows:

"১৪২ । এই সংবিধানে যাহা বলা হইয়াছে, তাহা সত্ত্বেও

(ক) সংসদের আইন-দ্বারা এই সংবিধানের কোন বিধান সংশোধিত বা রহিত হইতে পারিবে;

তবে শর্ত থাকে যে,

(অ) অনুরূপ সংশাধনী বা রহিতকরণের জন্য আনীত কোন বিলের সম্পূর্ণ শিরনামায় এই সংবিধানের কোন বিধান সংশোধন বা রহিত করা হইবে বলিয়া স্পষ্টরূপে উল্লেখ না থাকিলে বিলটি বিবেচনার জন্য গ্রহণকরা যাইবে না;

(আ) সংসদের মোট সদস্য-সংখ্যার অন্যূন দুই-তৃতীয়াংশ ভোটে গৃহীত না হইলে অনুরূপ কোন বিলে সম্মতিদানের জন্য তাহা রাষ্ট্রপতির নিকট উপস্থাপিত হইবেনা;

(খ) উপরি-উক্ত উপায়ে কোন বিল গৃহীত হইবার পর সম্মতির জন্য রাষ্ট্রপতির নিকট তাহা উপস্থাপিত হইলে উপস্থাপনের সাত দিনের মধ্যে তিনি বিলটিতে সম্মতিদান করিবেন, এবং তিনি তাহা করিতে অসমর্থ হইলে উক্ত মেয়াদের অবসানে তিনি বিলটিতে সম্মতিদান করিয়াছেন বলিয়া গণ্য হইবে।''

Thus the Constitution was amenable to amendment or repeal by Act of Parliament. Subsequently, article 142 was itself amended to include provision for addition, alteration and substitution as well as repeal. It must also be borne in mind that any amendments to the Constitution must be tested, with regard to their validity, legality etc., against the yardstick of the existing Constitution. There can be no justification for arguing that any amendment to the Constitution must be tested against the Constitution of 1972. When any provision of the Constitution is amended that becomes part of the Constitution as of that date. Hence, for example,

article 96 of the Constitution of 1972 was amended by the Fourth Amendment in January 1975. That amendment having not been challenged, remained as part of a valid Constitution from 25 January 1975. So far as article 96 was concerned, the Constitution of 1972 stood amended. The validity of any subsequent amendment of article 96 would have to be tested against the Constitution of January 1975, that amendment having been made by democratically elected Parliament Members, comprising a Parliament, which incidentally was headed by the Father of the Nation Bangabandhu Sheikh Mujibur Rahman. It is important to note that whenever any provision of law or amendment to the Constitution is scrutinised to see whether it is *intra vires* or *ultra vires* to the Constitution, it is the then existing Constitution which is the touchstone by which the legislation or amendment to the Constitution is to be tested, not the Constitution of 1972 or any Constitution other than the current Constitution.

There is no gainsaying that amendments to the Constitution made under Martial Law Proclamations are all *non-est*. The decision of this Division in this regard is clear and need not be revisited here. It can be simply stated that, so far as article 96 is concerned, all amendments/manipulations of that provision during the period post August 1975 to January 1991 are void.

By reference to the election manifesto of the Awami League dated 28 December 2013 and the Bill relating to the Sixteenth Amendment, the learned Attorney General submitted that it is the intention of Parliament to erase all the vestiges of the Martial Law Proclamations from the Constitution, and that has necessitated further amendment of article 96, in spite of the amendment by way of the Fifteenth Amendment in 2011. He further submitted that the Fifteenth Amendment failed to address the intention of Parliament to revert to the Constitution of 1972 and simply copied and pasted the earlier article 96 without any real discussion of this provision in

Parliament before it was enacted as an amendment. In this connection I may reproduce a portion of the said election manifesto, which reads as follows:

"বাংলাদেশ আওয়ামীলীগ প্রথম থেকেই সামরিক শাসকদের অবৈধ সংবিধান সংশোধনীর বিরোধিতা করেছে। '৭২এর সংবিধানে ফিরে যাওয়ার ব্যাপারে আওয়ামীলীগ ছিল প্রতিশ্রুতিবদ্ধ। ২০১০ সালে আওয়ামীলীগ সরকারের পক্ষ থেকে '৭২-এর সংবিধানের মূল চেতনায় ফিরে যাওয়ার লক্ষ্যে সংবিধানের পঞ্চদশ সংশোধনী বিল সংসদে উত্থাপন করা হয়। ২১ জুলাই ২০১০ জাতীয় সংসদের সকল দলের সদস্য সমন্বয়ে ১৫ সদস্য বিশিষ্ট একটি সংবিধান সংশোধনী সংসদীয় কমিটি গঠিত হয়। দীর্ঘ প্রায় এক বছর সংসদীয় কমিটি দেশের প্রতিষ্ঠিত প্রায় সকল রাজনৈতিক দল, সংবিধান বিশেষজ্ঞ, আইনজীবী, বুদ্ধিজীবী, সাংবাদিক, পেশাজীবী, সুশীল সমাজের বিভিন্ন সংগঠন এবং সমাজের বিভিন্ন স্তরের মানুষের সঙ্গে আলোচনা ও মতবিনিময় করে। অসংখ্য সংগঠন/ প্রতিষ্ঠান ও ব্যক্তি লিখিতভাবেও তাদের মতামত জানায়। সংসদীয় কমিটির ২৭টি সভায় এসব নিয়ে বিস্তারিত আলোচনা হয়। ৩০ জুন ২০১১ জাতীয় সংসদে পঞ্চদশ সংবিধান সংশোধনী বিল পাস হয়। এ সংশোধনীর ফলে মুক্তিযুদ্ধের চেতনাসংবলিত '৭২-এর সংবিধানের চার মূলনীতি সংবিধানে পুনঃসংযোজিত হয়। অসাংবিধানিক পন্থায় ক্ষমতা দখলের পথ রুদ্ধ হয়।"

This manifesto, as the date suggests, is subsequent to the Fifteenth Amendment. The language used tends to indicate that the promulgation of the Fifteenth Amendment had sufficiently satisfied the desire to return to the Constitution of 1972 and that the said amendment had been enacted after deliberation over a period of one year and upon consultation with experts on the Constitution, lawyers, etc. The amendment was passed on 30 June

2011 as the Fifteenth Amendment as a result of which the fundamentals of the 1972 Constitution were reinstated and assumption of power unconstitutionally has been forestalled by means of article 7A. It is found from other papers supplied by the learned Attorney General that the issue of article 96 and other issues relevant to the Fifteenth Amendment were discussed at length and the final result, so far as article 96 is concerned, was that the amendment retained the provision of Supreme Judicial Council. As far as can be seen, this was a conscious decision of Parliament to retain the concept of Supreme Judicial Council. Moreover, one may not lose sight of the fact that when any enactment is passed by Parliament and thereafter receives assent of the President, it will be deemed to have been done in accordance with the Constitution. I do not find that any question of legality of the process followed in enacting the said amendment has been raised at any point in time.

Reverting to the 1972 Constitution

Why is it necessary to go back to the 1972 Constitution? Presumably to give the amendment the sacrosanctity commanded by the 1972 Constitution. However, it must be admitted that any amendment done in accordance with article 142 of the Constitution

automatically attains the sanctity as the highest law of the land because the Constitution is the supreme law of the Republic. But use of the words from the 1972 Constitution does not make the amendment any more sacrosanct.

One can very well understand the desire to erase all the vestiges of Martial Law Proclamations, and note that this court has all along stated that 'martial law' is no law. But one cannot avoid noticing that a democratically elected parliament chose to retain the procedure for removal of Supreme Court Judges as contained in article 96 after lengthy discussion, including the provision of Supreme Judicial Council. That is not to say that the next Parliament cannot amend this very article with a provision which to it appears more appealing. This is parliamentary sovereignty. However, using the words used in the 1972 Constitution will not make any such amendment sacrosanct and unquestionable. The Constitution of 1972 has sacrosanctity only because it was 'plenary law' created for the first time by the will of the people and there is nothing against which to compare or test its validity.

With regard to the submission of the learned Attorney General that it is the intention of Parliament to rid the Constitution of any vestiges of

Martial Law Proclamations, I would make the following observations:

- The original 1972 Constitution describes the Government of Bangladesh as "secular", but in 1977 an executive proclamation deleted the word "secular" and inserted a phrase stating that a fundamental State principle is "absolute trust and faith in the Almighty Allah". The phrase "bismillah-ar-rahman-ar-rahim"- (in the name of Allah, the beneficent, the merciful) was inserted before the Preamble of the Constitution. Undoubtedly these were political moves in order to strengthen relationships with the Muslim countries, including wealthy Arab oil-producing countries. But no attempt has been made to erase these amendments from the Constitution. On the contrary, after lengthy discussion, there was a conscious decision to retain these provisions.

- The Fourth Amendment of the Constitution dated 25 January 1975 clearly altered the basic structure of the Constitution by changing the form of government; and in the case of ***Hamidul Huq Chowdhury and others Vs. Bangladesh represented by the Secretary, Ministry of Information and***

Broadcasting, Government of the People's Republic of Bangladesh and others reported in ***33 DLR 381*** the amendment was found to have so altered the basic structure, but the court did not declare the amendment invalid as, in the opinion of the court, the Constitutional process in the country had followed a different course in view of the change of the political system, the people have not resisted it and it has been recognised by the judicial authorities.

- It is also noted that article 99 of the 1972 Constitution provided that a judge after retirement or removal could not practice as a lawyer in any court or before any authority nor could be appointed in any post of the Republic. Martial law proclamations amended this article and allowed judges to be appointed in a judicial or quasi-judicial capacity and permitted a Judge of the High Court Division to practice in the Appellate Division after retirement or termination of service. These amendments were validated by the Fifth Amendment. This amendment was declared unconstitutional, but the Fifteenth Amendment reintroduced article 99 as amended by the Martial Law Proclamations.

- It is interesting to note that in the original 1972 Constitution there was provision for the President to be sworn in by the Chief Justice. The Fourth Amendment provided that the President would be sworn in by the Speaker. Thereafter the Martial Law Proclamations reverted back to the position whereby the President would be sworn in by the Chief Justice. The Fifteenth amendment reverted to the position under the Fourth Amendment, and not the 1972 Constitution, thus the President is to be sworn in by the Speaker. That is the position as it stands to date. If it was the intention of Parliament to revert to the 1972 Constitution, then the provision should allow the Chief Justice to swear in the President.

Hence, it appears that the desire of reverting to the 1972 Constitution has been carried out somewhat whimsically and arbitrarily.

Amendments to the Constitution made by Martial Law Proclamations cannot be said to be constitutional as the Constitution cannot be amended by any process or by an authority other than that prescribed under article 142.

In his book titled ***"Constitutional Law of Bangladesh"*** Third Edition, Mahmudul Islam states, "All those amendments and acts were made and done in direct contravention of the provisions of the Constitution and defying the supremacy of the Constitution. ...it is an undeniable fact that a martial law administrator had no authority to amend that Constitution and such amendments made during the martial law regime are *ex facie ultra vires* and void *ab initio*." I am in respectful agreement with that. So, what happens if one takes away all the illegal activities of the usurpers, which landed upon us by way of Martial Law Proclamations? The answer must be that we go back to the Constitution of January 1975 when article 96 placed the power of removal of a judge of the Supreme Court in the hands of the President. But the Fourth Amendment did not spell out the way in which the judge to be removed was to be given the opportunity to be heard.

The Supreme Judicial Council

The facts of the instant case disclose a somewhat different scenario, as far as the Supreme Judicial Council is concerned. It is true that the concept of Supreme Judicial Council was introduced by Martial Law Proclamation Order No.1 of 1977. In the ***Fifth Amendment case*** this Division held 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 legislative and administrative actions,also violated two other more basic features of the Constitution, namely, independence of the judiciary and its power of judicial review. However, this Division condoned several past actions taken under Martial Law including provision of Supreme Judicial Council introduced by Martial Law Proclamation in article 96 of the Constitution. With regard to article 96, it was held in the ***Fifth Amendment case*** as follows:

"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) to 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. This substituted provision being more transparent procedure than that of the earlier ones and also safeguarding the independence of judiciary, are to be condoned." (emphasis added)

After hearing a review application in the ***Fifth Amendment case*** there was a further amendment with regard to article 96, which provided that "the Second Proclamation (Tenth Amendment) Order, 1977 (Second Proclamation Order No. 1 of 1977) inserting clauses (2), (3), (4), (5), (6) and (7) to Article 96 and also clause (1) to Article 102 to the Constitution are hereby provisionally condoned until 31st of

December, 2012 in order to avoid disastrous consequence to the body politic for enabling the Parliament to make necessary amendment to the Constitution and also for enacting laws promulgated during the aforesaid period." This order in review was passed on 29th of March 2011 and culminated in enactment of the Fifteenth Amendment to the Constitution in June 2011. As stated earlier, Parliament chose to retain the Supreme Judicial Council. That Parliament being a duly elected democratic parliament, had the choice of keeping the Supreme Judicial Council or replacing the same with any other body, chose to retain the Supreme Judicial Council.

It may be noted here that in the ***Fifth Amendment case*** this Division also said as follows:

> "It is our earnest hope that Articles 115 and 116 of the Constitution will be restored to their original position by the Parliament as soon as possible."

However, in the case before us only article 96 is a live issue and articles 115 and 116 are not in issue,

hence, I do not consider it relevant to discuss the same here.

The learned Attorney General insisted that the retention of the Supreme Judicial Council in the Fifteenth Amendment was not done after due and proper discussion. However, one finds otherwise. A book by one Amin Al Rashid, who is a senior reporter and compiled the book called "সংবিধানের পঞ্চদশ সংশোধনী-আলোচনা-তর্ক-বিতর্ক" was produced before us by the learned Attorney General. From this book it is found that the special committee set up to consider the Fifteenth Amendment recommended that the judiciary would be accountable to the Parliament and the removal of judges would be by way of impeachment by Parliament. However, in a meeting held on 30 May 2011, where the Prime Minister was present, it was decided to reject the recommendation of the committee. The Prime Minister rejected the proposal to give the power of impeachment to Parliament and stated that the judiciary is independent, and that there will be no interference with the independent judiciary. I am, therefore, left with no doubt that the decision to retain the Supreme Judicial Council was a positive decision taken after due consideration and deliberation.

However, the power of amendment and further amendment still lies with the people and they may at any time amend the Constitution with the aid of their representatives. This is the power of the people. They gave themselves the Constitution and in that Constitution retained for themselves the power to amend the same. The only rider to that is the fact that in the Constitution the people desired the existence of an independent judiciary and also gave power to the Judiciary to oversee that any law enacted by the Legislature is in accordance with the Constitution and existing laws, and that any law inconsistent with the Constitution shall to the extent of the inconsistency, be void. In the ***Eighth Amendment case,*** M. H. Rahman, J. (as his Lordship was then) observed as follows:

> "It is now well settled that the power of judicial review extends to enable a court to decide whether a purported amendment to a Constitution has been validly made in accordance with the procedure prescribed by the Constitution itself."

At this juncture I may quote from the decision in the ***Fifth Amendment case, 62DLR (AD) 298,*** per Md. Tafazzul Islam, C.J.

> "The power to amend the Constitution is an onerous task assigned to the parliament which represents the will of the people through their chosen representatives. It is to be carried out in accordance with the procedure prescribed in Article 142 of the Constitution and by no other means, in no other manner and by no one else. Suspending the Constitution in the first place, and then making amendments in it by one man by the stroke of his pen, that is to say in a manner not envisaged or permitted by the Constitution, are mutilation and/or subversion of the Constitution simpliciter and no sanctity is attached to such amendments *per se*."

Power of the people

It is not necessary to go into detail about the Preamble and article 7 of the Constitution since elaborate discussions have been recorded by this Division in the cases of the ***Fifth Amendment, Masdar Hossain, Thirteenth Amendment*** etc. There is no room for questioning the fact that the people of this country gave to themselves the Constitution, which is a solemn expression of their will. Article 7 of the

Constitution categorically states that all powers in the Republic belong to the people. The people have reposed their power in the hands of their representatives, who are the Members of Parliament. However, it is to be noted that the power so given has to be exercised in accordance with the provisions of the Constitution. To that extent, the people have agreed to exercise their power within the bounds of the Constitution, which they have created. It should also be remembered that the power of the people through creation of the Constitution has also given power to the Judiciary to oversee the law-making power of the Legislature. His Lordship Md. Tafazzul Islam, C.J. put it most succinctly in the ***Fifth Amendment case*** thus:

> "…our Constitution is supreme and under the Constitution all the powers and functions of the Republic are vested in the three organs of the government, namely, Legislature, Executive and Judiciary and since all these organs owe their existence to the Constitution, which is the embodiment of the will of the people as held by the superior Courts, the basic features of the Constitution cannot be changed by Proclamations, Martial Law Regulations and Orders."

The question then arises as to whether, when an amendment is incorporated in the Constitution, that amendment can ever become un-amendable. Arguably the introduction of article 7B by way of amendment of the Constitution has made certain provisions of the Constitution un-amendable. So long as this provision exists, basic structures of the Constitution cannot be amended. The argument of the learned Attorney General was that when the exact provisions of the 1972 Constitution are put into the present Constitution by way of amendment, that amendment assumes the quality of the 1972 Constitution and becomes un-amendable. It is interesting to note that article 96(1), which relates to the age of retirement of judges of the Supreme Court, was amended on 11.11.1986 (when the country was not under democratic government) changing the retiring age from 62 years under the 1972 Constitution to 65 years. On 17.05.2004, article 96(1) was again amended changing the age of retirement of Supreme Court Judges from 65 to 67 years, this time by a democratically elected

government. The Fifteenth Amendment of 2011 gave a seal of approval to article 96(1) of the Constitution of 2004 as well as the Supreme Judicial Council. If we are to accept the argument of the learned Attorney General about return to the 1972 Constitution, then we have to question why article 96(1) should not also revert to the 1972 Constitution, and why he is not advocating for that also.

I am of the view that the argument of the learned Attorney General with regard to 'return to the 1972 Constitution' is misconceived since there is no provision in article 142 or elsewhere in the Constitution which provides for 'return to the 1972 Constitution'. He also did not argue that article 96 was a basic structure of the Constitution. If that was his argument, and if it was accepted, then it would be difficult for him to deny that article 96 as amended by the Fifteenth Amendment, would also become a basic structure of the Constitution, and hence un-amendable in view of decisions of this Division as well as article 7B of the Constitution as it stands

now. Moreover, any amendment made to the Constitution, just as any other law, is open to scrutiny to see whether it is *ultra vires* the Constitution or any other existing law.

Genesis of the Sixteenth Amendment

The Sixteenth Amendment deals exclusively with certain clauses of article 96 of the Constitution, which relate only to the removal of judges of the Supreme Court on the ground of their misconduct or incapacity. The Official Gazette dated 7th September, 2014, which is the Bill of the Sixteenth Amendment, provides *inter alia* the following reasons for amending article 96 of the Constitution:

"যেহেতু সংবিধানের অনুচ্ছেদ ৭ অনুযায়ী প্রজাতন্ত্রের সকল ক্ষমতার মালিক জনগণ এবং জনগণের পক্ষে এ ক্ষমতার প্রয়োগ কেবল সংবিধানের অধীন ও কর্তৃত্বে কার্যকর হইবে; এবং

যেহেতু সংসদের মাধ্যমে জনগণের ইচ্ছার বহিঃপ্রকাশ হিসাবে রাষ্ট্রের সর্ব্বোচ্চ পদে অধিষ্ঠিত রাষ্ট্রপতি, প্রধানমন্ত্রী বা স্পীকারকে, যথাক্রমে, অভিশংসন, পদত্যাগ বা অপসারণের বিধানাবলী (১৯৭২ সনে প্রণীত সংবিধানের অনুচ্ছেদ ৫২, ৫৭ ও ৭৪) অদ্যাবধি অপরিবর্তিত রহিয়াছে; এবং

যেহেতু সামরিক শাসক অসাংবিধানিক পন্থায় সংবিধানের অনুচ্ছেদ ৯৬ সামরিক ফরমান Second Proclamation (Fifteenth Amendment) Order, 1978 এর Second Schedule দ্বারা পরিবর্তনক্রমে সুপ্রীম কোর্টের কোন বিচারককে অসদাচরণ বা অসামর্থ্যের অভিযোগে অপসারণের ক্ষমতা সুপ্রীম জুডিসিয়াল কাউন্সিল এর নিকট ন্যাস্ড় করেন; এবং

যেহেতু সামরিক ফরমান দ্বারা সাধিত সংবিধানের উক্ত সংশোধন অনুচ্ছেদ ৭ এর চেতনার পরিপন্থী; এবং যেহেতু জনগণের নির্বাচিত প্রতিনিধিদের দ্বারা গঠিত সংসদে রাষ্ট্রের অন্যান্য অঙ্গের ন্যায় উচ্চ আদালতের বিচারকদের জবাবদিহিতার নীতি বিশ্বের অধিকাংশ গণতান্ত্রিক রাষ্ট্রে বিদ্যমান রহিয়াছে; এবং

যেহেতু সংবিধান সংশোধনক্রমে সংসদের জন প্রতিনিধিদের নিকট সুপ্রীম কোর্টের কোন বিচারককে অসদাচরণ বা অসামর্থের অভিযোগে অপসারণের ক্ষমতা পুনর্বহাল করা সংবিধানের সামগ্রিক চেতনা ও কাঠামোর সহিত সামঞ্জস্যপূর্ণ; এবং

যেহেতু ১৯৭২ সনের সংবিধানের অনুচ্ছেদ ৯৬ পুনঃপ্রবর্তনের লক্ষ্যে সংবিধান অধিকতর সংশোধন সমীচীন ও প্রয়োজনীয়; "

It can be gleaned from the Bill of the Sixteenth Amendment (বা. জা. স. বিলনং ১৯/২০১৪) that the purposes of the amendment were as follows:

1. Acknowledge power of the people
2. Enable removal of judges of the Supreme Court by Parliament in the same way as the President, Prime Minister or Speaker
3. Removal of the concept of Supreme Judicial Council which was introduced by Martial Law Proclamation, which is contrary to article 7 of the Constitution
4. The accountability of judges of the higher judiciary is to the Parliament in half of the

democratic countries of the world, it should be the same here

5. Reinstatement of the power of the people's representatives to remove judges of the Supreme Court for misconduct or incapacity.

As I have acknowledged earlier, the power of the people cannot be denied. What that power entails has been dealt with earlier. The Constitution does not give the people any power with regard to removal of judges of the Supreme Court. After the Fifteenth Amendment, the power of removal of judges of the Supreme Court lies with the President with the aid of the Supreme Judicial Council.

Let us deal with the argument that since the President, Prime Minister and Speaker are liable to be removed by Parliament under the provisions of articles 52, 57 and 74 respectively, judges of the Supreme Court should be removed in a like manner. The learned Attorney General emphasised that our parliamentary system of government is based on the

Westminster Parliament, where judges of the higher judiciary may be removed by way of impeachment by Parliament.

The situation in the UK cannot be equated with that prevailing here. What was done in the UK was to protect the judges from the draconian and pernicious actions of the Kings/Queens of the day who could whimsically remove their judges. As it happens, not a single English judge has been impeached since the coming into force of the Act of Settlement in 1701. Moreover, the system of appointment of judges in the UK and other countries referred by the learned Attorney General is not the same as the one operating in our country. Hence, there is no logic in wishing to follow those other countries. This country was born in 1971 as a result of the martyrdom of millions. The country is now almost 46 years old and has by now gathered sufficient experience and wisdom to be able to decide how to deal with removal of our Supreme Court Judges. Moreover, the President, the Prime Minister and the Speaker are all part and

parcel of the Executive. Unlike the judges of the Supreme Court, they find themselves in their respective positions through executive actions/decisions. Effectively they are being removed by those who put them in their positions. Judges of the Supreme Court are appointed by the President and may be removed only by order of the President.

With regard to accountability of judges, there can be no question that they are accountable first and foremost to the Constitution and then to the people. It is the power of the people which has created the Constitution, which in turn has given this country the three organs of State, namely, the Executive, the Legislature and the Judiciary. The judges of the Supreme Court are appointed under the provisions of the Constitution. They are oath bound to preserve, protect and defend the Constitution and the laws of Bangladesh. Hence, judges are accountable to the Constitution and the people who created the Constitution.

The question arises as to whether the judges of the Supreme Court are accountable to Parliament. The Bill for the Sixteenth Amendment seemingly provides that judges of the Supreme Court should be accountable to Parliament, just as in half of the democratic countries of the world. Here again, I would reiterate that in dealing with our constitutional matters we need not look to other countries. It would be a dangerous thing to require judges to be accountable to Parliament. Possibly for this reason the government in its affidavit in opposition penned through those sentences which mentioned accountability of judges to Parliament. The Sixteenth Amendment is tantamount to making judges accountable to Parliament, which is not the intention of the Constitution. In the said affidavit in opposition there are sixteen mentions of accountability of judges, seven specifically to Parliament. May be this was a Freudian slip! But since those statements were penned through, I shall not mention the matter any further.

The learned Advocate for the respondent alluded to ulterior and motivated reasons for Members of Parliament to grab the power of impeachment of the judges of the Supreme Court, namely discussion in Parliament about the judgement by the High Court Division relating to the Roads and Highways' building which took place sometime in May, 2012. He also mentioned another incident in June, 2012 in Parliament concerning the comments made by a High Court Judge with regard to the statement made by the Speaker in Parliament which led to heated debate in Parliament and demand by the Members of Parliament that the concerned High Court Judge should be removed by referring him to the Supreme Judicial Council. The learned Advocate also referred to the matter of the High Court declaring the Contempt of Court Act 2013 to be illegal, which was also not to the liking of the Members of Parliament. The learned Advocate also referred to an incident in September, 2012 where Members of Parliament demanded removal of two High Court Judges who had declared the ruling by the

Speaker of the House of the Nation as baseless and of no legal effect. It was at that time that the demand arose for revival of the 1972 Constitution and impeachment of judges by Parliament.

Clearly, the incidents brought to our notice, where Members of Parliament demanded removal of judges and at the same time demanded for themselves the power to remove judges, demonstrate the knee-jerk reactions which motivate Members of Parliament to demand the power of impeachment of judges and this appears to have been reflected in the Bill for the Sixteenth Amendment.

There may be other incidents which take place in the course of a hearing of a politically charged case, for instance.The learned Advocates appearing for one of the parties could demand the removal of a judge by referring him for impeachment by the Parliament. This can happen in the heat of the moment during any debate in Parliament. One can therefore imagine that if the power of impeachment of judges is given to Parliament, judges of the Supreme Court will

not be free to decide any case where there is an element of political character involved. They will thus lose their independence in carrying out their judicial function.

As has been stated earlier, there can be no doubt they are accountable to the Constitution and the people. However, that does not make the judges accountable to Parliament. Moreover, the Constitution has not given the Legislature or Parliament any power of holding a judge to trial for any misconduct or incapacity. This should be done by an independent body, as in 62% of Commonwealth countries. In this contextit is noted that Dr. Kamal Hossain and Mr. M. Amirul Islam learned *amici curiae*, both alluded to independent bodies constituted in various Commonwealth countries to adjudicate allegations of misconduct or incapacity of judges of the Supreme Court. Dr. Kamal Hossain mentioned that the Justice Sub-Committee on Judiciary in England recommended the establishment of an Ad-hoc Judicial Commission to be appointed by the Lord Chancellor, if he decides that

the question of removing a judge is to be investigated. That Sub-Committee further recommended that Members of Parliament or persons, who hold or have held any political appointment, would be excluded from such Commission. He also mentioned that a Constitutional Commission set up in Australia for suggesting reforms of their constitution recommended that provision should be made by amendment to the Commonwealth Constitution (the Constitution of Australia) for (a) extending the security of tenure provided by Section 72 to all Judges in Australia, and (b) establishing a National Judicial Tribunal to determine whether facts found by that Tribunal are capable of amounting to misbehaviour or incapacity warranting removal of a Judge from office.

Mr. M. Amirul Islam emphasised the importance of selection procedure at the time of appointment of judges. In his submissions he referred to the Supreme Judicial Council and mentioned that despite the Guidelines and Code of Conduct, there are no concrete rules on how to receive complaints and gather

information and conduct the enquiry or monitor the entire procedures for removal of a delinquent judge. As a consequence, the Council is unable to play any pro-active or self-monitoring role for the appointment, transfer and removal of the judges. He suggested that the Court should formulate detailed rules for receiving complaints, conduct of investigation and evaluation procedures which would entail clear provisions for the appointment, transfer and removal of the judges whether in the Superior or Subordinate Courts. Mr. Islam pointed out that in a study conducted by the Bingham Centre for Rule of Law among 48 independent Commonwealth jurisdictions it was found, *inter alia*, that there is no Commonwealth jurisdiction in which the executive has the power to dismiss a judge; in 30 jurisdictions (62.5%), a disciplinary body that is separate from both the executive and 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.

With regard to the Supreme Judicial Council, it has been contended that there is no transparency in the procedure followed by the Council and the Chief Justice and two senior most Judges trying their brother Judge does not bode well for impartiality. In this regard, reference may again be made to the book written by Ameen Al Rashid, mentioned above. The author has recorded the views expressed by various eminent jurists about the composition of the Supreme Judicial Council. Barrister RafiqulHuq is recorded to have said that there is a danger that if the power of impeachment of Judges is given to Parliament they may become victim of revenge. Barrister Amirul Islam is recorded to have stated as follows:

> ''বিচারপতিদের অভিশংসনের ক্ষমতা সুপ্রিম জুডিশিয়াল কাউন্সিলের কাছেই থাকা উচিত। প্রয়োজনে এ কাউন্সিলকে আরও সংস্কার করা যেতে পারে। বিচারপতিদের অভিশংসনের ক্ষমতা জাতীয় সংসদের কাছে থাকলে সঠিকভাবে এ কাজটি সম্পন্ন হবেনা।''

Mr. Justice Mostafa Kamal (former Chief Justice) suggested that an inquiry cell may be set up under

the Supreme Judicial Council in order to deal with complaints against judges and if necessary the Supreme Judicial Council may be made further active and effective.

At this juncture, it may be stated that the complaints levelled against the Supreme Judicial Council may be met by having a differently constituted independent body comprising the Chief Justice, a Senior Judge of the Appellate Division, a Senior Judge of the High Court Division to be nominated by the President, who is the appointing authority for all the judges. Both the members would, of course, have to be senior to the judge whose case is being heard. It is a fundamental principle of the law on service that departmental proceedings against any person must be conducted by someone senior to him in rank. Hence, in the case of any proceeding against the sitting Chief Justice, the Council/body would have to be headed by a former Chief Justice and retired Judges senior to the incumbent Chief Justice. In the case of senior-most judges of the Appellate

Division, the two members of the Council/body would have to be chosen from retired judges of the Appellate Division. In both cases the nomination for the chairman/member(s) would be made by the President.Thesteps and procedures to be followed by that body will be regulated by rules to be framed. Effectively the proceedings should be of a quasi-judicial nature where the judge being proceeded against is given every opportunity to put forward his explanation/defence. It is also preferable that the judge be tried by his peers, as was expressed by B.H. Chowdhury, J. (as his Lordship was then) in the ***Eighth Amendment case*** as follows:

> "Removal of judges by the President consequent upon a report of the Supreme Judicial Council is a unique feature because the Judge is tried by his own peers, 'thus there is secured a freedom from political control'." (His Lordship quoted from the decision reported in 1965 AC 190)."

Mr. M. I. Farooqui, learned *amicus curiae* quoted from the book "***The Judge in a Democracy***", (Princeton University Press, New Jersey (2006) pp. 76-80 wherein

Lord Steyn of the House of Lords in England was quoted to have said as follows:

> "The threat of impeachment proceedings is subject to exploitation by politicians seeking to influence judges. Removing a judge from office must be done exclusively through a proceeding that guarantees the independence of the judge in his tenure. Such a proceeding should be run by judges, not politicians. It should be run as a trial in every way."

With regard to establishment of an independent body/Tribunal, reference has been made by some of the *amici curiae* to the Latimer House Principles, which I would endorse.This will also ensure transparency in the process.

Admittedly the Fifteenth Amendment was a departure from the original Constitution of 1972 and thus it was felt expedient and necessary to restore/revive the original provision, but no specific reason was given for the expediency other than that it was introduced by Martial Law Proclamation.

The learned Attorney General submitted that the government is committed to restore and revive the provisions of the original Constitution of 1972. The question that immediately arises is why only certain clauses of article 96 and not the whole of article 96 and why at this time? Is it, as claimed by the learned Advocate for the respondent, a knee-jerk reaction to decisions taken by the High Court Division which were perceived as an affront to the authority of Parliament? For our part, we need not go into those questions since we have acknowledged that the power lies with the people who have in turn empowered the Legislature to promulgate laws and to amend the Constitution.

Article 65 gives legislative power to Parliament, which is to enact laws. Impeachment of any office-holder is not part of the legislative function. That it is a worldwide concept is not necessarily a good reason to espouse such a method in Bangladesh. One may remind oneself that the power of Parliament to impeach judges of the Supreme Court was

not taken away by any Martial Law Promulgation, rather it was done by the Fourth Amendment in January 1975. I respectfully agree with Mr. Abdul Wadud Bhuiyan, learned *amicus curiae*, who submitted that since it is the prerogative of the Legislature to enact laws, the removal of judges of the Supreme Court for their provenmisbehaviour or incapacity does not fall within the ambit of the legislative function of Parliament. He went on to say that the Parliament is competent to amend the Constitution in exercise of its constituent power, but such power is a derivative power subject to the limitation imposed by the Constitution which has been expressly provided in article 7B of the Constitution as inserted by the Fifteenth Amendment in 2011.

It would be more pertinent for us to consider if and to what extent the Sixteenth Amendment impinges on the independence of the judiciary by giving the power of impeachment to Parliament in the name of power of the people.

It is a misconception to think that the challenge is on any provision of the 1972 Constitution. The Sixteenth Amendment is not exactly a transmutation ofarticle 96 of the 1972 Constitution as clause (1) of article 96, which was amended initially by a martial law authority, has been left untouched, and the test of *vires* of the amendment is against the Constitution of 2015, not the Constitution of 1972.

It is also a non-sequitur to think that because the words of the 1972 Constitution are used in the amendment, they are immune from challenge. There is no provision in article 142 for 'restoration' of earlier provisions. One must also not lose sight of the fact that article 96 of the 1972 Constitution was amended by none other than Bangabandhu Sheikh Mujibur Rahman. Thus the sanctity of article 96 of the 1972 Constitution was lost, as was the power of Parliament to impeach judges of the Supreme Court.

Independence of judiciary

In the case of ***Secretary, Ministry of Finance v. Masdar Hossain 2000 BLD (AD) 104*** this Division referred to the three essential conditions of independence of the judiciary as listed by the Canadian Supreme Court in ***Walter Valente v. Queen [1985] 2 SCR 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.

Mahmudul Islam in his book cited above states as follows:

"The provisions of articles 94 (4), 96 and 147 of the Constitution ensure the independence and impartiality of the judges of the Supreme Court.....Where a fundamental right has been conferred on some persons, a post-Constitutional law contravening those rights is void qua those persons on whom those rights have been conferred, but is valid qua other persons on whom those rights have not been conferred and it cannot be said that such law is still-born or *non est*; the

doctrine of eclipse equally applies to pre-Constitution and post-Constitution laws which violate rights conferred only on some persons." [Islam 2.230]

Article 147 provides that Parliament cannot enact law changing the terms and conditions of service to the disadvantage of the holders of those offices during the term of their office. When the present incumbent judges of the Supreme Court were appointed, they were not subject to impeachment by Parliament. Arguably, their position has been detrimentally affected by the Sixteenth Amendment. The removal of Judges being part and parcel of their terms of service, the amendment is in violation of article 147 of the Constitution.

It appears that going back to the 1972 Constitution is a simple play on the psyche of the public, including the politicians in Parliament. It is 'playing to the gallery' to gain popularity by targeting the 'liberation war sentiment' of the people. The Prime Minister herself was satisfied that

the proposal of the special committee set up for the Fifteenth Amendment for impeachment of judges by Parliament should be rejected and there should be no interference with the judiciary which is independent. Since that comment and final decision of the Prime Minister on 30.05.2011 nothing further has happened to call for an amendment of the Fifteenth Amendment, other than those incidents in Parliament highlighted by the learned Advocate for the respondents. As pointed out earlier, not even the totality of article 96 is being restored to the 1972 Constitution. Moreover, it must be remembered that Parliament's power to enact or amend laws is circumscribed by the Constitution. There is no provision in article 142 or elsewhere in the Constitution that permits 'going back to the 1972 Constitution'.

Certainly, the Judiciary cannot give direction to Parliament to make laws, but it is bound by the Constitution to ensure that the laws enacted and amendments made are not *ultra vires* the Constitution. Needless to say, the Supreme Court

cannot remain inactive if a basic structure of the Constitution is eroded by an amendment. Such amendment would be declared *ultra vires* the Constitution. Admittedly, the independence of the Judiciary is a basic feature of the Constitution. Any amendment which has the effect of eroding or detrimentally affecting the independence of judges in carrying out their judicial function is equally *ultra vires* the Constitution.

We were reminded by Mr. Abdul Wadud Bhuiyan that in the ***Masdar Hossain case*** it was held that the independence of the judiciary is one of the basic pillars of the Constitution, which cannot be demolished, whittled down, curtailed or diminished in any manner whatsoever and the Constitution does not give Parliament nor the Executive the authority to curtail or diminish the independence of the Judiciary by recourse to amendment of the Constitution, other legislation, subordinate legislation, rules, or in any other manner.

The UN Basic Principles on the Independence of Judiciary, adopted by the General Assembly in 1985 provides that judges cannot be removed without misconduct being proven by a fair, unbiased, independent and impartial body who are free to conduct the inquiry and make a determination in complete independence from the other branches of government. Parliament is not empowered by the Constitution to carry out this function. It may be mentioned also that passing the Sixteenth Amendment, Parliament with all its zeal appears to have overlooked thefact that the amendment would also affect the service conditions of the Chairman of the Anti-Corruption Commission, Chairman of the Public Service Commission and Auditor and Comptroller General.

With the above observations, the appeal is dismissed. However, the composition of the Council/body/Tribunal set up for removal of judges, whatever name may be given to it, and procedural aspects to be followed in proceeding for removal of

judges of the Supreme Court may be detailed in separate guidelines, rules or regulations to be formulated by the Supreme Court in the light of the observations made above.

J.

Hasan Foez Siddique, J: The question which arises for determination in this appeal is as to whether the Constitution (Sixteenth Amendment) Act (Act XIII of 2014) amending Article 96 of the Constitution is constitutionally valid or not. I can not persuade myself to pass an order pronouncing upon this question without a reasoned judgment, since the question is one of grave and momentous consequences involving as it does, the validity of a constitutional amendment. I have had the privilege of reading the judgment tendered by the learned Chief Justice. Though this is not a judgment and order in the nature of dissent yet it needs to be written in the first person since I do not agree with some reasons and observations of the learned Chief Justice. I feel it necessary to express my own view.

The duty of all organs of the State is that the public trust and confidence in the judiciary may not go in vain. We have no doubt that every constitutional functionary and authority involved in the process is as much concerned as we are to find out the true meaning and import of the scheme envisaged by the relevant constitutional provisions, in order to prevent any failure by anyone to discharge constitutional obligations avoiding transgression of the limits of the demarcated power.

In Carew and Co. Ltd. V. Union of India (1975) 2 SCC 791 Krishna lyer, J. opined: "The law is not 'a brooding omnipotence in the sky' but pragmatic instrument of social order." A Constitution is like a living tree, it grows and blossoms with the passage of time in order to keep pace with the growth of the country and its people. Thus, the approach, while interpreting a Constitutional provision, should be dynamic, progressive and oriented with the desire to meet the situation. The interpretation can not be

narrow and pedantic. It is the basic and cardinal principle of interpretation of a democratic Constitution that it is interpreted to foster, develop and enrich that no court is authorized to construe any clause of the Constitution and the words which defeat its obvious ends. In determining the Constitutional validly of provision therein, regard must be had to the real effect of the impact thereof. A harmonious interpretation has to be placed upon the Constitution and so interpreted, in the interpretation of the Constitution, the words of are both a framework of concepts and means to achieve the goals mentioned in the Preamble of the Constitution. The organic method requires to us to see the present social condition and interpret the Constitution in a manner so as to resolve the present difficulties. The social conditions existing at the time when the constitution was made may be very from the present conditions, and hence, if we interpret the Constitution from the angle of the Constitution makers, we may arrive at a completely outdated and

unrealistic view. It should be interpreted and construed not in a narrow and constricted sense, but in a wide and liberal manner. There must be sensible approximation, there must be elasticity of adjustment, in response to the practical necessities of the State, which cannot foresee today the developments of tomorrow in their nearly infinite variety (Ref. **Panama Refining Co. Vs. Rayan** 79 LED 446). "The Constitution is neither, on the one hand, a Gibralter Rock, which wholly resists the ceaseless washing of time and circumstances, nor is it, on the other hand, a sandy beach, which is slowly destroyed by erosion of the waves. It is rather to be likened to a floating dock, which, while firmly attached to its moorings, and not therefore at the caprice of the waves, yet rises and falls with the time of tide and circumstances". (J.M. Beck)

Constitutional Evolution of the Provisions Judging a Judge.

Since 1972 to impugned amendment, the laws relating to removal of the Supreme Court Judges in the Constitution were provided as under:

In 1972, that is, in the original Constitution:

96(2) "A Judge shall not be removed from his office except by an order of the President 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.

96(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."

On 25th January, 1975 by the Constitution (Fourth Amendment) Act, 1972 Parliament brought following changes:

"A Judge may be removed from his office by order of the President on the ground of misbehaviour or incapacity:

Provided that no judge shall be removed until he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him."

On 23rd April 1977, by the Proclamation (Amendment) Order, 1977 (Proclamations Order No.1 of 1977) the President and the Chief Martial Law Administrator enacted the following provision amending the Constitution:

"(2) A Judge of the Supreme Court or of the High Court shall not be removed from 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 of the Supreme Court.

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 of the Supreme Court who is next in seniority to those who are members of the Council shall act as such member.

(4) The functions of the Council shall be-

(a)to prescribe a Code of Conduct to be observed by the judges of the Supreme Court and of the High Court, and

(b) to inquire into the capacity or conduct of a Judge of the Supreme Court or of the High Court or of any other functionary who is not removable from office except in like manner as a Judge of the Supreme Court or of the High Court.

(5) Where, upon any information received from the Council or from any other source, the President has reason to apprehend that a Judge of the Supreme Court or of the High Court-

(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 of the Supreme Court or of the High Court may resign his office by writing under his hand addressed to the President."

On 6th April 1979, the Parliament by the Constitution (Fifth Amendment) Act, 1979 ratified and confirmed the Martial Law Proclamations.

On 11th April, 1982 by the Martial Proclamation (First Amendment) Order, 1982, the Chief Martial Law Administrator Pursuant to the Proclamation of the 24th March 1982, provides:

"(4) A person holding any office mentioned in paragraphs 3,6,7 and 9 may be removed from office by the Chief Martial Law Administrator without assigning any reason.

This Order further provided that the Chief Justice of Bangladesh, whether appointed before or

after this Proclamation, shall, unless he sooner attains the age of sixty-two years, hold office for a terms of three years and shall thereafter, retire from his office----.

On 11th November, 1986 the Constitution (Seventh Amendment) Act, 1986, the Parliament ratified and confirmed the aforesaid provision.

By the Constitution (Partial Revival)(Fourth) Order, 1986 the Chief Martial Law Administrator partially revived the Part VI of the Constitution except Article 96 and 102.

Thereafter, by the Constitution (Final Revival) Order, 1986, the Chief Martial Law Administrator revived all provisions of the Constitution, thereby, the Proclamation (Amendment) Order, 1977 as ratified and confirmed by the Constitution (Fifth Amendment) Act, 1979 was revived.

On 17th May 2004, the Parliament by the Constitution (Fourteenth Amendment) Act, 2004 amended

Article 96 providing the tenure of office of Judge untill attaining age of 67 years.

On 29th August, 2005 the High Court Division, in the case of **Bangladesh Italian Marble Works Ltd. and others Vs. Government of Bangladesh and others** (reported in 2010 BLD (Spl.) issue) declared the Constitution (Fifth Amendment) Act 1979 (Act 1 of 1979) illegal, and void *ab intio*, subject to condonation of the provisions and action taken thereon as mentioned in the judgment and order.

The High Court Division did not state anything specifically regarding Article 96 of the Constitution, i.e. it did not condone the amendment of Article 96 of the Constitution.

In February, 2010 the Appellate Division in the case of **Khondker Delwar Hossain, Secretary, B.N.P. Vs. Bangladesh Italian Marble Works Ltd.** (2010 BLD(Spl) issue) on Article 96 made following observations:

"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 "misbehavior 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. This substituted provisions being more transparent procedure than that of the earlier one and also safeguarding independence of judiciary, are to be condoned."

Accordingly, the appellate Division condoned the said provision with the following words:

"(v) The Second Proclamation(Tenth Amendment) Order, 1977 (Second Proclamation Order No.1 of 1977) so far it relates to inserting clauses (2),(3),(4),(5),(6) and (7) of Article 96 *i.e.* provisions relating to Supreme Judicial Council-------"

At the instance of the Government in Civil Review Petition Nos.17-18 of 2011 the Appellate

Division reviewed its earlier decision observing that the Second Proclamation (Tenth Amendment) Order, 1977 (Second Proclamation Order No.1 of 1977) inserting clauses (2),(3),(4),(5),(6) and (7) of Article 96 and also clause (1) of Article 102 to the Constitution are hereby provisionally condoned until 31st December, 2012 in order to avoid disastrous consequence to the body politic for enabling the Parliament to make necessary amendment to the Constitution and also for enacting laws promulgated during the aforesaid period."

On 30th June, 2011 the Parliament passed the Constitution (Fifteenth Amendment) Act, 2011 providing:

"96. Tenure of office of Judges,-

(1) Subject to the other provisions of this Article, a Judge shall hold office untill 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-

(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 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 reports 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 name addressed to the President."

Thereafter, on 7th September, 2014 the Parliament passed the Constitution (Sixteenth Amendment) Act, 2014 amending Article 96 of the Constitution providing:

"(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 misbehavior or incapacity.

(3) Parliament may by law regulate the procedure in 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."

Challenging the vires of the Constitution (Sixteenth Amendment) Act, 2014, the writ petitioners, who are members of the Supreme Court Bar Association, filed an application under Article 102 of the Constitution and obtained Rule. The High Court Division, by the impugned judgment and order, made the Rule absolute declaring that the impugned amendment was colourable, void and ultra-vires the Constitution. Thus this certificated appeal.

Constitution was assaulted by Martial Law

Killing the father of the Nation and President of the Republic in the morning of August 15, 1975 Khondker Moshtaque Ahmed and a section of the army most illegally usurping state power proclaimed Martial Law in the whole country. First proclamation was promulgated on 20th August 1975 which was as under:

"**PROCLAMATION**

The 20th August, 1975

”Whereas I, Khandaker Moshtaque Ahmed, with the help and mercy of the Almighty Allah and relying upon the blessings of the people, have taken over all and full powers of the Government of the People’s Republic of Bangladesh with effect from the morning of the 15th August, 1975.

And whereas I placed, on the morning of the 15th August, 1975, the whole of Bangladesh under Martial Law by a declaration broadcast from all stations of Radio Bangladesh;

And whereas, with effect from the morning of the 15th August, 1975, I have suspended the provisions of Article 48, in so far as it relates of election of the President of Bangladesh, and article 55 of the Constitution of the People’s Republic of Bangladesh, and modified the provisions of Article 148 thereof and form I of the Third Schedule thereto to the effect that the oath of office of the President of Bangladesh shall be administered by the Chief Justice of Bangladesh and that the President may enter upon office before he takes the oath;

Now, thereof, I, Khandaker Moshtaque Ahmed, in exercise of all powers enabling me in this behalf, do hereby declare that-

(a) I have assumed and entered upon the office of the President of Bangladesh with effect from the morning of the 15th August, 1975;

(b) I may make, from time to time, Martial Law Regulation and Orders-

(i) providing for setting up Special Courts or Tribunals for the trial and punishment of any offence under such Regulations or Orders or for contravention thereof, and of offences under any other law;

(ii) prescribing penalties for offence under such Regulations or Orders or for contravention thereof and special penalties for offences under any other law;

(iii) empowering any Court or Tribunal to try and punish any offence under such Regulation or Order or the contravention thereof;

(iv) Barring the jurisdiction of any Court or Tribunal from trying any offence specified in such Regulations or Orders;

(c) I may rescind the declaration of Martial Law made on the morning of the 15th August, 1975, at any time, either in respect of the whole of Bangladesh or any part thereof, and may again place the whole of Bangladesh or any part

thereof under Martial Law by a fresh declaration;

(d) this Proclamation and the Martial Law Regulations and Orders made by me in pursuance thereof shall have effect notwithstanding anything contained in the Constitution of the People's Republic of Bangladesh or in any law for the time being in force;

(e) the Constitution of the People's Republic of Bangladesh shall, subject to this Proclamation and the Martial Law Regulations and Orders made by me in pursuance thereof, continue to remain in force;

(f) all Acts, Ordinance, President's Orders and other Orders, Proclamations, rules, regulations, bye-laws, notifications and others legal instruments in force on the morning of the 15th August, 1975, shall continue to remain in force until replaced, revoked or amended;

(g) no Court, including the Supreme Court, or tribunal or authority shall have any power to call in question in any manner whatsoever or declare illegal or void this Proclamation or any Martial Law Regulation or Order made by me in pursuance thereof, or any declaration made by or

under this Proclamation, or mentioned in this Proclamation to have been made, or anything done or any action taken by or under this Proclamation, or mentioned in this Proclamation to have been done or taken, or anything done or any action taken by or under any Martial Law Regulation or Order made by me in pursuance of this Proclamation;

(h) I may, by order notified in the official Gazette, amend this Proclamation."

By the Proclamation, Martial Law was imposed in Bangladesh with effect from August 15, 1975. Some of its salient features are as follows:

i) The Proclamation, the Martial Law Regulations and Orders became effective in spite of the Constitution or other laws,

ii) The Constitution remained in force but subject to the Proclamation, the Martial Law Regulations and Orders,

The contents of the Proclamation made on November 08, 1975 were as under:

"PROCLAMATION

The 8th November, 1975.

Whereas the whole of Bangladesh has been under Martial Law since the 15th day of August, 1975;

And whereas Khandaker Moshtaque Ahmed, who placed the country under Martial Law, has made over the Office of President of Bangladesh to me and I have entered upon that Office on the 6th day of November, 1975;

And whereas for the effective enforcement of Martial Law it has become necessary for me to assume the powers of Chief Martial Law Administrator and to appoint Deputy Chief Martial Law Administrators and to make some modifications in the Proclamation of the 20th August, 1975;

Now, therefore, I, Justice Abu Sadat Mohammad Sayem, President of Bangladesh, to hereby assume the powers of Chief Martial Law Administrator and appoint the Chief of Army Staff, Major General Ziaur Rahman B.U. Psc; the Chief of Naval Staff, Commodore M.H. Khan, P.S.N., B.N., and the Chief of Air Staff, Air Vice Marshal M.G. Tawab, SJ. S.Bt. PSA, BAF., as Deputy Chief Martial Law Administrator and declare that-

a) Martial Law Regulations and Orders shall be made by the Chief Martial Law Administrator;

b) all Martial Law Regulations and Orders in force immediately before this Proclamation shall be deemed to have been made by the Chief

Martial Law Administrator and shall continue to remain in force until amended or repealed by the Chief Martial Law Administrator;

c) Parliament shall stand dissolved and be deemed to be so dissolved with effect from the 6th day of November, 1975 and general elections of Members of Parliament shall be held before the end of February, 1977;

d) the persons holding office as Vice- President, Speaker, Deputy Speaker, Ministers, Ministers of State, Deputy Ministers and Whips, immediately before this Proclamation, shall be deemed to have ceased to hold office with effect from the 6th day of November, 1975;

e) an Ordinance promulgated by the President shall not be subject to the limitation as to its duration prescribed in the Constitution of the People's Republic of Bangladesh

f) the provisions of Article 48 of the Constitution shall remain suspended until further order;

g) Part VIA of the Constitution shall stand omitted;

h) the Chief Martial Law Administrator may appoint Zonal or Sub- Martial Law Administrations;

i) I may, by order notified in the official Gazette, amend this Proclamation;

j) this Proclamation shall be a part of the Proclamation of the 20th August, 1975, and the Proclamation of the 20th August, 1975, shall have effect as modified by this Proclamation.

Second Proclamation (Seventh Amendment) Order, 1976

By the Second Proclamation (Seventh Amendment) Order 1976 (Second Proclamation Order No. IV of 1976), predominantly, the separate Supreme Court and High Court were set up instead of the earlier two Divisions of the Supreme Court, along with other incidental changes. It came into effect on and from August 13, 1976.

THIRD PROCLAMATION

The 29th November, 1976.

"Whereas I , Abu Sadat Mohammad Sayem, President of Bangladesh and Chief Martial Law Administrator, assumed, by the Proclamation of the 8th November, 1975, the powers of the Chief Martial Law Administrator and appointed the Chiefs of Staff of the Army, Navy and Air Force as Deputy Chief Martial Law Administrators;

And whereas I do now feel that it is in the national interest that the powers of the Chief Martial Law Administrator should be exercised by Major General Ziaur Rahman B.U., psc., the Chief of Army Staff.

Now, therefore, in exercise of all powers enabling me in this be and in modification of the provisions of the Proclamations of the 20th August, 1975, and 8th November, 1975, I, Abusadat Mohammad Sayem, President of Bangladesh, do hereby hand over the Office of Martial Law Administrator to Major General Ziaur Rahman B.U. , psc., who shall hereafter exercise all the powers of Chief Martial Law Administrator including the powers-

(a) to appoint new Deputy Chief Martial Law Administrators, Zonal Martial Law Administrators, and Sub- Zonal Martial Law Administrators,

(b) to amend the Proclamations of the 20th August, 1975 , 8th November, 1975 and this Proclamation,

(c) to make Martial Law Regulations and Orders, and

(d) to do any other act or thing or to take any other action as he deems necessary in the

national interest or for the enforcement of Martial Law."

THE PROCLAMATIONS (AMENDMENT) ORDER, 1977.

Proclamations Order No.1 of 1977.

"Whereas it is expedient further to amend the Proclamation of the 8th November, 1975, and to amend the Third Proclamation of the 29th November, 1976, for the purposes hereinafter appearing. Now, therefore, in pursuance of the Third Proclamation of the 29th November, 1976, read with the Proclamations of the 20th August 1975, and 8th November, 1975, and in exercise of all powers enabling him in that behalf, the President and the Chief Martial Law Administrator is pleased to make the following order:-

1. **Short title and commencement-(1)** This Order may be called the Proclamations (Amendment) Order, 1977.

   (2) It shall come into force at once except paragraph 2(6)(1) which shall come into force on the revocation of the Proclamations of the 20th August, 1975, and 8th November, 1975, and the Third Proclamation of the 29th November 1976, and the withdrawal of Martial Law.

2. **Amendment of the Second Proclamation.-** In the Proclamation of the 8th November, 1975,

(1) for clause (ea) the following shall be substituted, namely:-

"(ea) for Article 6 of the Constitution, the following shall be substituted, namely:

"6. Citizenship-(1) The citizenship of Bangladesh shall be determined and regulated by law.

(2)The citizens of Bangladesh shall be known as Bangladeshis",

(2)in clause (f), the words and figures "of Article 48" shall be omitted;

(3)clause (fb) shall be omitted;

(4) in clause (gc) after the word "Schedule" at the end, the words "to this Proclamation" shall be added;

(5) in clause (i), for the words "I may" the words " the Chief Martial Law Administrator may" shall be substituted;

(6) in the schedule,-

(a) entries 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10 shall be renumbered respectively as entries 8, 10, 11, 14, 15, 19, 20,21 and 22;

(b) before entry 8 as so renumbered, the following new entries shall be inserted, namely:-

1. In the beginning of the Constitution, above the Preamble, the following shall be inserted, namely:-

BISMILLAH-AR.-RAHMAN-AR – RAHIM

(In the name of Allah, the Beneficent, the Merciful),

2. In the Preamble-

(i) in the first paragraph , for the words "a historic struggle for national liberation" the words " a historic war for national independence" shall be substituted ; and

(ii) for second paragraph the following shall be substituted, namely:-

"Pleading that the high ideals of absolute trust and faith in the Almightily Allah, nationalism, democracy and socialism meaning economic and social justice, which inspired our heroic people to dedicate themselves to and our brave martyrs to sacrifice their lives in, the war for national independence, shall be the fundamental principles of the Constitution;".

3. In article 8, for clause (I) the following shall be substituted, namely:-

"(1) The principles of absolute trust and faith in the Almighty Allah, nationalism, democracy and socialism meaning economic and social justice, together with the principles derived from them as set out in this Part, shall constitute the fundamental principles of state policy.

(1A) Absolute trust and faith in the Almighty Allah shall be the basic of all actions."

4. For articles 9 and 10 the following shall be substituted, namely:-

"9. Promotion of local Government institute.- The State shall encourage local Government institutions composed of representatives of the areas concerned and in such institutions special representation shall be given , as far as possible, to peasants , workers and women.

10. Participation of women in national life.- Steps shall be taken to ensure participation of women in all spheres of national life."

5. Article 12 shall be omitted.

6. Article 25 shall be renumbered as clause

(1) of that article, and after clause

(1) as so renumbered, the following new clause shall be added, namely:-

"(2) The State shall endeavour to consolidate, preserve and strengthen fraternal relations among Muslim countries based on Islamic solidarity."

7. In article 42, for clause (2) the following shall be substituted namely:-

"(2) A law made under clause (1) shall provide for the acquisition, nationalisation or requisition compensation and shall either fix the amount of compensation or specify the principles on. Which , and the manner in which the compensation is to be assessed and paid; but no such law shall be called in question in any court on the ground that any provision in respect of such compensation is not adequate

(2) Nothing in this Article shall affect the operation of any law made before the commencement of the Proclamations (Amendment) Order, 1977 (Proclamations Order No.1 of 1977) in so far as it relates to the acquisition, nationalization or requisition of any property without compensation".

(c) after entry 8 as so renumbered, the following new entry shall be inserted, namely:-

9. In Article 47, in clause (2), for the provision the following shall be substituted, namely;-

'Provided that nothing in this Article shall prevent amendment, modification or repeal of any such law.'

(e) after entry 11 as so renumbered, the following new entry shall be inserted, namely;-

12. In Article 93, in clause (1), for the words "Parliament is not in session' the words 'Parliament stands dissolved or is not in session' shall be substituted,"

(e) in entry 13 as so renumbered, in Chapter IB as substituted by that entry,-

(i) in Article 105, for clause (2), (3) and (4) the following shall be substituted , namely:-

"(2) A Judge of the Supreme Court or of the High Court shall not be removed from 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 Council, which shall consist of the Chief Justice of Bangladesh, and the two next senior Judges of the Supreme Court.

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 of the Supreme Court who is next in seniority to those who are members of the Council shall act as such member.

(3) The functions of the Council shall be-

(a) to prescribe a Code of Conduct to be observed by the Judges of the Supreme court and of the High Court; and

(b) to inquire into the capacity or conduct of a Judge of the Supreme Court or of the High Court or of any other functionary who is not removable from office except in like manner as a Judge of the Supreme Court or of the High Court.

(5) Where, upon any information received from the Council or from any other source, the President has reason to apprehend that a Judge of the Supreme Court or of the High Court:

(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 the 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 of the Supreme court or of the High Court may resign his office by writing under his hand addressed to the President". and

(ii) in Article 107, in clause (1), after the word "period" at the end, the words and commas " as an ad hoc Judge and such Judge, while so sitting, shall exercise the same jurisdiction, powers and function as a Judge of the Supreme Court" shall be added;

(f) after entry 15 as so renumbered, the following new entries shall be inserted:

"16. In Article 118, in clause (5), in the proviso for the words "Supreme Court" the words " High Court" shall be substituted.

17. In Article 129 in clause (2), for the words "Supreme Court" the words "High Court" shall be substituted.

18. In Article 139, in clause (2), for the words "Supreme Court" the words "High Court" shall be substituted.

(g) in entry 22 as so renumbered, for the words, commas, colon and dash "In the Fourth Schedule, after paragraph 6, the following new paragraph shall be inserted, namely:-a" the following shall be substituted, namely:-

"In the Fourth Schedule-,

(i)after paragraph 3, the following new paragraph shall be inserted, namely:-

'3A. Validation of certain Proclamations, etc.-

(1) the Proclamations of the 20th August, 1975, and 8th November, 1975 , and the Third Proclamation of the 29th November, 1976, and all other Proclamations and Orders amending or supplementing them, hereinafter in this paragraph collectively

referred to as the said Proclamations, and all Martial Law Regulations, Martial Law Orders and all other laws made during the period between the 15th day of August, 1975, and the date of revocation of the said Proclamations and the withdrawal of Martial Law (both days inclusive), hereinafter in this paragraph referred to as the said period, shall be deemed to have been validly made and shall not be called in question in or before any Court or Tribunal on any ground whatsoever.

(2) All orders made, acts and things done, and actions and proceedings taken, or purported to have been made, done or taken, by the President or the Chief Martial Law Administrator or by any other person or authority, during the said period, in exercise or purported exercise of the powers derived from any of the said Proclamations or any Martial Law Regulations or Martial Law Order or any other law, or in execution of or in compliance with any order made or sentence passed by any Court or authority in the exercise or purported exercise of such

powers, shall be deemed to have been validly made, done or taken and shall not be called in question in or before any Court, or Tribunal on any ground whatsoever.

(3) No suit, prosecution or other legal proceeding shall lie in any Court or Tribunal against any person or authority for or on account of or in respect of any order made, act or thing done, or action or proceeding taken whether in the exercise, or purported exercise of the powers referred to in sub- paragraph (2) or in execution of or in compliance with orders made or sentences passed in exercise or purported exercise of such power.

(4) All amendments, additions, modifications, substitution and omissions made in this Constitution by the said Proclamations shall have effect as if such amendments, additions, modifications, substitutions and omissions were made in accordance with and in compliance with the requirements of this Constitution.

(5) Upon the revocation of the said Proclamations and the withdrawal of Martial Law this Constitution shall, subject to amendments, additions, modifications, substitutions and omissions as aforesaid, have effect and operate as if it had been in continuous operation.

(6) The revocation of the said Proclamations and the withdrawal of Martial Law shall not revive or restore any right or privilege which was not existing at the time of such revocation and withdrawal.

(7)All laws in force immediately before the revocation of the said Proclamations and withdrawal of Martial Law shall, subject to the Proclamation revoking the said Proclamations and withdrawing the Martial Law, continue in force until altered, amended or repealed by the competent authority.

(8)The General Clauses Act, 1897, shall apply to the revocation of the said Proclamations and the withdrawal of Martial Law and the repeal of Martial Law Regulations and Martial Law Orders made

during the said period as it applies to the repeal of an Act of Parliament as if the said Proclamations and the Proclamation revoking them and withdrawing the Martial Law and the Martial Law Regulations and Martial Law Orders were all Acts of Parliament.

(9) In this paragraph, "Laws" includes, rules, regulations, bye-laws, orders, notifications and other instruments having the force of law". and

(ii) after paragraph 6, the following new paragraph shall be inserted, namely:-

3. Amendment of the Third Proclamation: In the Third Proclamation of the 29th November, 1976,-

(i) in clause (b) for the words "This Proclamation" the words and comas "this Proclamation, to make new Proclamations, and to revoke them by a subsequent Proclamation" shall be substituted; and

(ii) in clause (c), for the words " to make" the words and comma " to make , amend and repeal" shall be substituted and shall be deemed always to have been so substituted.

Dacca ZIAUR RAHMAN
The 22nd April, 1977. Major General
President
and
Chief Martial Law Administrator."

That is, Constitution was amended exercising the power allegedly vested in pursuance of the Proclamations of the 20th August 1975, 8th November 1976 and 29th November 1976. Source of assumption of those powers was bullet. Exercise of such powers by the usurpers and amendment of the Constitution, made by the People of Bangladesh through their Constituent Assembly after having independence through a historic struggle for national liberation establishing independent sovereign republic, were altogether void *ab-initio*. The High Court Division in case of **Bangladesh Italian Marble Works Ltd. V. Government of Bangladesh and others** (2010 BLD spl) issue observed;

"There is no such law in Bangladesh as Martial Law and no such authority as Martial Law Authority, as such, if any person declares Martial Law, he will be liable for high treason against the Republic. Obedience to superior orders is itself no defence.

The taking over the powers of the Government of the People's Republic of Bangladesh with effect from the morning of 15th August, 1975 by Khandaker Mushtaque Ahmed, an usurper, placing Bangladesh under Martial Law and his assumption of the office of the President of Bangladesh, were in clear violation of the Constitution, as such, illegal, without lawful authority and without jurisdiction.

The nomination of Mr. Justice Abu Sadat Mohammad Sayem, as the President of Bangladesh, on November, 6, 1975, and his taking over of the Office of President of Bangladesh and his assumption of the powers of the Chief Martial Law Administrator and his appointment of the Deputy Chief Martial Law Administrators by the Proclamation issued on November 8, 1975, were all in violation of the Constitution.

The handing over of the Office of Martial Law Administrator to Major General Ziaur Rahman B.U., PSC., by the aforesaid Justice Abu Sadat Mohammad Sayem, by the Third Proclamation issued on November

29, 1976, enabling the said Major General Ziaur Rahman, to exercise all the powers of the Chief Martial Law Administrator, was beyond the ambit of the Constitution.

The nomination of Major General Ziaur Rahman, B.U., P.S.C. to become the President of Bangladesh by Justice Abu Sadat Mohammad Sayem, the assumption of office of the President of Bangladesh by Major General Ziaur Rahman, B.U. P.S.C., were without lawful authority and without jurisdiction.

The Referendum Order, 1977 (Martial Law Order No.1 of 1977), published in Bangladesh Gazette on 1st May, 1977, is unknown to the Constitution, being made only to ascertain the confidence of the people of Bangladesh in one person, namely, Major General Ziaur Rahman, B.U.

All Proclamations, Martial Law Regulations and Martial Law Orders made during the period from August 15, 1975 to April 9, 1979, were illegal, void and *non est*, because:

i) Those were made by persons without lawful authority, as such, without jurisdiction,

ii) The Constitution was made subordinate and subservient to those Proclamations, Martial Law Regulations and Martial Law Orders,

iii) Those provisions disgraced the Constitution which is the embodiment of the will of the people of Bangladesh, as such, disgraced the people of Bangladesh also,

iv) From August 15, 1975 to April 7, 1979, Bangladesh was ruled not by the representatives of the people but by the usurpers and dictators, as such, during the said period the people and their country, the Republic of Bangladesh, lost its sovereign republic character and was under the subjugation of the dictator,

v) From November 1975 to March, 1979, Bangladesh was without any Parliament and was ruled by the dictators, as such, lost its democratic character for the said period.

vi) The Proclamations etc., destroyed the basic character of the Constitution, such as, change of the secular character, negation of Bangalee nationalism, negation of Rule of law, ouster of the jurisdiction

of Court, denial of those constitute seditious offence. ”

This Division in **Khondker Delwar Hossain, Secretary BNP V. Bangladesh Marble Works Ltd. and others** affirmed the aforesaid observation. While dismissing the civil petitions, the Appellate Division observed:

“The judgment of the High Court Division is approved subject to the following modification:

(a) All the findings and observations in respect of Article 150 and the Fourth Schedule in the judgment of the High Court Division are hereby expunged, and the validation of Article 95 is not approved;

In respect of condonation made by the High Court Division, the following modification is made and condonations are made as under:

(a) all executive acts, things and deeds done and actions taken during the period from 15th August 1975 to 9th April, 1979 which are past and closed;

(b) the actions not derogatory to the rights of the citizens;

(c) all acts during that period which tend to advance or promote the welfare of the people;

(d) all routine works done during the above period which even the lawful government could have done.

(e) (i) the Proclamations dated 8th November, 1975 so far it relates to omitting Part VIA of the Constitution;

(ii) The Proclamations (Amendment) Order, 1977 (Proclamations Order No.1 of 1977) relating to Article 6 of the Constitution;

(iii) The Second Proclamation (Seventh Amendment) Order, 1976 (Second Proclamation Order No.IV of 1976) and the Second Proclamation (Tenth Amendment) Order, 1977 (Second Proclamation Order No.1 of 1977) so far it relates to amendment of English text of Article 44 of the Constitution;

(iv) the Second Proclamation (Fifteenth Amendment) Order, 1978 (Second Proclamation Order No.IV of 1978) so far it relates to substituting Bengali text of Article 44;

(v) The Second Proclamation (Tenth Amendment) Order, 1977 (Second Proclamation Order No.1 of 1977) so far it relates to inserting Clauses(2), (3),(4),(5),(6)and (7) of Article 96 *i.e.* provisions

relating to Supreme Judicial Council and also clause(1) of Article 102 of the Constitution, and

(f) all acts and legislative measure which are in accordance with, or could have been made under the original Constitution."

Thereafter, in March 2011, this Division in Civil Review Petition Nos.17-18 of 2011, filed by the Government, reviewing the judgment and order dated 01.02.2010 in Civil Petition Nos.144 and 145 of 2009, passed the following orders:

"All proclamations, Martial Law Regulations, Martial Law Orders made/promulgated during the period between 20th August, 1975 and 9th April, 1979 (Act I of 1979) are hereby declared illegal, void *ab initio* subject to the following provisions:

a) all executive acts, things and deeds done and actions taken during the aforesaid period which were required to be done for the ordinary orderly running of the country, and which were not otherwise illegal at the relevant time;

b) all transactions, which are past and closed, and no useful purpose would be served by reopening them;

c) all acts and deeds which are past and closed and are not otherwise illegal;

d) all international treatise made during that period; and

e) all day-to-day business of the executive are hereby provisionally condoned;

2. a) The Proclamation dated 8th November, 1975 omitting part VIA of the Constitution;

b) the Proclamations (Amendment) Order, 1977 (Proclamations Order No.1 of 1977) amending Article 6 of the Constitution;

c) the Second Proclamation (Seventh Amendment) Order, 1976 (Second Proclamation Order No.IV of 1976) and the Second Proclamation (Tenth Amendment) Order, 1977 (Second Proclamation Order No.1 of 1977) so far as it relates to amendment of English text of Article 44 of the Constitution;

d) the Second Proclamation (Fifteenth Amendment) Order, 1978 (Second Proclamation Order No. IV of 1978) substituting Bengali text of Article 44, and adding the words "and shall be exercised by

him in consultation with the Supreme Court" in Article 116 of the Constitution; and

e) the Second Proclamation (Tenth Amendment) Order, 1977 (Second Proclamation Order No.1 of 1977) inserting clauses (2), (3), (4), (5), (6) and (7) of Article 96 and also clause (1) of Article 102 to the Constitution are hereby provisionally condoned until 31st December, 2012 in order to avoid disastrous consequence to the body politic for enabling the Parliament to make necessary amendment to the Constitution and also for enacting laws promulgated during the aforesaid period."

From the aforesaid order passed in review petition, it appears that this Division declared all the proclamations, Martial Law Regulations, Martial Law Orders made/promulgated during the period between 20th August, 1975 and 9th April, 1979 (Act I of 1979) illegal, void *ab-initio* subject to some exceptions.

The Supreme Court has proved to be a steady and consistent unholder of the intentions of the constituent Assembly expressing the ideals and beliefs of Bangabondhu Sheikh Mujibur Rahman and

other founders of independent Bangladesh. This Court has been fireless in upholding Constitution and enforcing the provisions of the Constitution which preserve a democratic society.

The provision of amended Article 96 of the Constitution provided during martial law period was also void *ab-initio* but in order to enabling the Parliament to make necessary the amendment of the Constitution, it condoned the same provisionally till 31st December, 2012.

Since the amendment of Constitution by Martial Law proclamation and ratification of the same by 5th amendment of the Constitution was void *ab-initio* the same was a nullity. By condoning the same until 31st December, 2012 by this Division the same did not make any difference of its void character.

In such a situation, the Parliament amended the Constitution by the Constitution (Fifteenth Amendment) Act 2011. In the said amendment, the Parliament substituted Article 96 of the Constitution.

The Bengali version of the said substituted provision is as under:

৩১। সংবিধানের ৯৬ অনুচ্ছেদের প্রতিস্থাপন। - সংবিধানের ৯৬ অনুচ্ছেদের পরিবর্তে নিম্নরূপ ৯৬ অনুচ্ছেদ প্রতিস্থাপিত হইবে, যথাঃ-

"৯৬। বিচারকদের পদের মেয়াদ।- (১) এই অনুচ্ছেদের অন্যান্য বিধানাবলী সাপেক্ষে কোন বিচারক সাতষট্টি বৎসর বয়স পূর্ণ হওয়া পর্যন্ত স্বীয় পদে বহাল থাকিবেন।

(২) এই অনুচ্ছেদের নিম্নরূপ বিধানাবলী অনুযায়ী ব্যতীত কোন বিচারককে তাঁহার পদ হইতে অপসারিত করা যাইবে না।

(৩) একটি সুপ্রীম জুডিসিয়াল কাউন্সিল থাকিবে যাহা এই অনুচ্ছেদে "কাউন্সিল" বলিয়া উল্লেখিত হইবে এবং বাংলাদেশের প্রধান বিচারপতি এবং অন্যান্য বিচারকের মধ্যে পরবর্তী যে দুইজন কর্মে প্রবীণ তাঁহাদের লইয়া গঠিত হইবেঃ

তবে শর্ত থাকে যে, কাউন্সিল যদি কোন সময়ে কাউন্সিলের সদস্য এই রূপ কোন বিচারকের সামর্থ্য বা আচরণ সম্পর্কে তদন্ত করেন, অথবা কাউন্সিলের কোন সদস্য যদি অনুপস্থিত থাকেন অথবা অসুস্থতা কিংবা অন্য কোন কারণে কার্য করিতে অসমর্থ্য হন তাহা হইলে কাউন্সিলের যাহারা সদস্য আছেন তাঁহাদের পরবর্তী যে বিচারক কর্মে প্রবীণ তিনিই অনুরূপ সদস্য হিসাবে কার্য করিবেন।

(৪) কাউন্সিলের দায়িত্ব হইবে-

(ক) বিচারকগণের জন্য পালনীয় আচরণ বিধি নির্ধারণ করা; এবং

(খ) কোন বিচারকের অথবা কোন বিচারক যেরূপ পদ্ধতিতে অপসারিত হইতে পারেন সেইরূপ পদ্ধতি ব্যতীত তাহার পদ হইতে অপসারণযোগ্য নহেন এইরূপ অন্য কোন পদে আসীন ব্যক্তির সামর্থ্য বা আচরণ সম্পর্কে তদন্ত করা।

(৫) যে ক্ষেত্রে কাউন্সিল অথবা অন্য কোন সূত্র হইতে প্রাপ্ত তথ্যে রাষ্ট্রপতির এইরূপ বুঝিবার কারণ থাকে যে কোন বিচারক-

(ক) শারীরিক বা মানসিক অসামর্থ্যের কারণে তাহার পদের দায়িত্ব সঠিকভাবে পালন করিতে অযোগ্য হইয়া পড়িতে পারেন, অথবা

(খ) গুরুতর অসদাচরণের জন্য দোষী হইতে পারেন, সেইক্ষেত্রে রাষ্ট্রপতি কাউন্সিলকে বিষয়টি সম্পর্কে তদন্ড় করিতে ও উহার তদন্ড় ফল জ্ঞাপন করিবার জন্য নির্দেশ দিতে পারেন।

(৬) কাউন্সিল তদন্ড় করিবার পর রাষ্ট্রপতির নিকট যদি এইরূপ রিপোর্ট করেন যে, উহার মতে উক্ত বিচারক তাহার পদের দায়িত্ব সঠিকভাবে পালনে অযোগ্য হইয়া পড়িয়াছেন অথবা গুরুতর অসদাচরণের জন্য দোষী হইয়াছেন তাহা হইলে রাষ্ট্রপতি আদেশের দ্বারা উক্ত বিচারককে তাহার পদ হইতে অপসারিত করিবেন।

(৭) এই অনুচ্ছেদের অধীনে তদন্ড়ের উদ্দেশ্যে কাউন্সিল স্বীয় কার্য-পদ্ধতি নিয়ন্ত্রণ করিবেন এবং পরওয়ানা জারী ও নির্বাহের ব্যাপারে সুপ্রীম কোর্টের ন্যায় উহার একই ক্ষমতা থাকিবে।

(৮) কোন বিচারক রাষ্ট্রপতিকে উদ্দেশ্য করিয়া স্বাক্ষরযুক্ত পত্রযোগে স্বীয় পদ ত্যাগ করিতে পারিবেন।"

The word "প্রতিস্থাপিত", that is, substituted means replaced by deleting/cancelling the previous one. The literal meaning of the word "substitute" is to replace. That is the new provision of Article 96 has been substituted in Fifteenth Amendment replacing the previous void legislation. There is no ambiguity in the substituted provision in respect of Article 96 of the Constitution. The learned Attorney General tried to make out a case that the said provision is simply a pasting in place of previous provision as promulgated by exercising the power illegally assumed by the Martial Law Authority. It is difficult to

accept the submission of the learned Attorney General that the provision substituted in the constitution was simply pasting. Moreso, Article 96(1) was newly enacted by the Constitution (Fourteenth Amendment) Act not by the Martial Law Proclamation. Thus, by Fifteenth Amendment, the Parliament provided the provision of Supreme Judicial Council system for removing the Judge of the Supreme Court by way of substitution. Again by fifteenth amendment substituting Article 96 in the Constitution, the same was made the integral part of the Constitution.

Democracy

The word "Democracy" denotes that form of Government in which the ruling power of State is largely vested, not in a particular class or classes but, in the members of the community as a whole. It is the Government of the people, for the people and by the people. It is a form of Government in which the sovereign power resides in and is exercised by the whole body of free citizens through a system of representation. Democracy means rule of the majority.

It is a system of Government in which the citizen exercised directly or elect representative from among themselves to form a Parliament for choosing and replacing the Government through free and fair election active participation of the people. Our Constituent Assembly provided shape to the aspirations of the people, by destroying Pakistani control and evolving a democratic form of Government. The preamble of the Constitution of the People's Republic of Bangladesh emphatically declares that we were giving to ourselves the Constitution with a firm resolve to constitute a sovereign, democratic republic, with equality of status and opportunity to all its citizens. It stands for the actual, active and effective exercise of power by the people in this regard. Schumpeter gives a simple definition of democracy as the ability of a people to choose and dismiss a Government. **Giovanni Sartori** said that democracy is a multi-party system in which the majority governs and respect the right of minority.

Article 11 of the Constitution provides that the Republic shall be a democracy----. While explaining provision S.K. Sinha, J. (then his lordship was) has explained the same very lucidly in the case of **Abdul Mannan Khan Vs. Government of Bangladesh and others**, popularly known as 13th Amendment case (20 BLT special issue), in the following manner:

"The preamble starts with the expression 'we', the people of Bangladesh. The independence of Bangladesh was achieved not as a course but it was achieved by the people through a historic struggle for national liberation. The Constituent Assembly pledged that the fundamental aim of the state should be realized through 'democratic process' 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. The supremacy of the Constitution was declared. The framers of the Constitution describe the qualitative aspects of the

polity the Constitution is designed to achieve. In this situation, the preamble of the Constitution and in its role cannot be relegated to the position of the preamble of a statute.

This preamble is different from other Constitutions of the globe which reflected the philosophy, aims and objectives of the Constitution and describes the qualitative aspect of the Constitution as designed to achieve. The preamble declares in clear terms that all powers in the Republic belong to the people. It emphatically declares to constitute a sovereign Peoples Republic in which democracy with equality of status and of opportunity of all citizens in all spheres of life be ensured. Their exercise on behalf of the people shall be effected only under and by the authority of the Constitution. This preamble speaks of representative democracy, rule of law and the supremacy of the Constitution. The beginning of the expressions 'we the people' means the machineries and the apparatus

of the Republic, that is, the Executive, the Legislature, the Judiciary including the President and the Cabinet, the disciplinary forces including the army are subservient to the will of the people. They are answerable to the people for every action taken. If this preamble is read along with Articles 7 and 11, provisions of Parts III, IV,V and VI, there is no denying the fact that the sovereignty of the people, the four ideals, such as, nationalism, socialism, democracy and secularism which inspired the martyrs to sacrifice their lives, the will of the people, the rule of law, the fundamental rights of the citizens and the parliamentary form of Government are the main pillars of the Constitution. The will of the people is to be expressed through their elected representatives in the administration at all levels.

Thus, our preamble contains the clue to the fundamentals of the Constitution and the basic constituent of our Constitution is the administration of the Republic through their elected

representatives. These two integral parts of the Constitution form a basic element which must be preserved and can not be altered. The Parliament has power to amend the Constitution but such power is subject to certain limitation which is apparent from a reading of the preamble. The broad contours of the basic elements and fundamental features of the Constitution are delineated in the preamble.

Chandrachud, C.J. while expressing views on preamble of Indian Constitution in **Minerva Mills Ltd. V. Union of India**, AIR 1980 S.C. 1789 stated: "The preamble assures to the people of India a polity where basic structure is described therein as a Sovereign Democratic Republic." S. Ahmed, J. in **Anwar Hossain Chowdhury Vs. Bangladesh**, [1989 BLD (special)] argued that the preamble of our Constitution is something different from that of ordinary statute and it is the intention of the makers the Constitution that it is the guide to its interpretation. M.H. Rahman, J. in Anwar Hossain's is

of the opinion that the preamble is not only a part of the Constitution, it now stands as an entrenched provision that can not be changed and any amendment to the Constitution is to be examined in the light of the preamble. In **Kuldip Nayar V. Union of India**, AIR 2006, 3127 it has been argued; "the edifice of democracy in the country (India) rests on a system of free and fair elections. These principles are discernible not only from the preamble, which has always been considered as part of the Constitution, but also from its various provisions.

The basic feature of the Constitution is that all powers belong to the people. The preamble outlines the objectives of the whole Constitution. The people's participation in the affairs of the State are through their elected representatives. This is an essential characteristic of a Parliamentary form of Government and it is the 'main fabric' of the system set up by the Constitution. An alteration of this 'main fabric' is to destroy it altogether and it

can not altogether be changed even for a short period, similar to those conventions of the British Constitution that "The King must assent to, or 'can not veto any bill passed by the two Houses of Parliament', "the House of Lords does not originate any money bill" (A.V. Dicey-The Law of the Constitution) and those of the American conventional rules that 'No President has ever been re-elected more than once'.

Our Constitution establishes political institutions designed to ensure a workable, democratic form of Government that protects basic personal liberties; divides and separates power to that no person or office holder can become too powerful; ensures a degree of equality and guarantees the rule of law. The Constitution, by creating several governmental institutions and dividing power among them, stresses the importance of considering those institutions as part of one Government, working together. Under the Constitution there is a threefold

distribution of powers, and those powers are co-extensive.

Article 7 says "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." Article 8 provides for the fundamental principles of state policy. Article 11 highlights the democracy and human rights of the citizens. Part III protects the fundamental rights of the citizens. This Division held in Anwar Hossain Chowdhury's case that Article 7 of the Constitution declares the supremacy of the Constitution, there must be some authority to maintain and preserve the supremacy of the Constitution and there can be no doubt that judiciary must be that authority. One of the basic features of the preamble of our Constitution is to safeguard, protect and defend the Constitution and to maintain its supremacy as the embodiment of the will of the people of Bangladesh. One of the fundamental

principles contained in Article II is that the Republic shall be a democracy in which fundamental human rights and freedoms and respect for the dignity and worth of the human person be guaranteed. The expression 'democracy' used in the Article has been explained to the effect that 'effective participation by the people through their elected representatives in administration at all levels shall be ensured.'

The basic concept underlying the sovereignty of the people is that the entire body politic becomes a trustee for the discharge of sovereign functions. In a complex society every citizen cannot personally participate in the performance of the affairs of the State, the body politic appoints state functionalities to discharge these functions on its behalf and for its benefit, and has the right to remove the functionary so appointed by it if he goes against the law of appointed by it if he goes against the law of the legal sovereign, or commits any other breach of trust or fails to discharge his obligation

under a trust. The head of the state is chosen by the people and has to be assisted by a Council of Ministers which holds its meetings in public view. They remain accountable to public. It is, therefore, said the government becomes government of laws and not of men, for; no one is above the law. All powers lie with the people, not on any particular individual."

Our Constitution is not a mere pedantic legal text but it embodies certain human values, cherished principles and spiritual norms upholding the dignity of men. The idea of Republic indicates the representative character of the sovereign democracy that is sought to be installed, it means that the power rests in the people of Bangladesh under the Constitution to be exercised by them through their duly elected representative. The framer of the Constitution attached importance of the people.

SEPARATION OF POWERS

The **separation of powers** is a model for the governance of a state (or who controls the state). Under this model, the state is divided into branches, each with separate and independent powers and areas of responsibility so that the powers of one branch are not in conflict with the powers associated with the other branches. The typical division is into three branches: a legislature, an executive, and a judiciary, which is the *trias politica* model.

Separation of powers, therefore, refers to the division of responsibilities into distinct branches to limit any one branch from exercising the core functions of another. The intent is to prevent the concentration of power and provide for checks and balances.

Calvin appreciated the advantages of democracy, stating: "It is an invaluable gift if God allows a people to elect its own government and magistrates." In order to reduce the danger of misuse and abuse of

political power, Calvin suggested setting up of several political institutions which should complement and control each other in a system of checks and balances. In this way, Calvin and his followers resisted political absolutism and furthered the growth and spirit of democracy. Calvin aimed to protect the rights and the well-being of ordinary people.

Montesquieu described the separation of powers among a legislature, an executive, and a judiciary. Montesquieu's approach was to present and defend a form of government which was not excessively centralized in all its powers to a single monarch or similar ruler. He based this model on the Constitution of the Roman Republic and the British constitutional system. Montesquieu took the view that the Roman Republic had separated powers so that no one could usurp complete power. In the British constitutional system, Montesquieu discerned a

separation of powers among the Monarch, Parliament, and the Courts of law.

Montesquieu did actually specify that "the independence of the judiciary has to be real, and not apparent merely". "The judiciary was generally seen as the most important of powers, independent and unchecked", and also was considered dangerous.

To prevent one branch from becoming supreme, protect the "opulent minority" from the majority, and to induce the branches to cooperate, government systems that employ a separation of powers need a way to balance each of the branches. Typically this was accomplished through a system of "**checks and balances**". Checks and balances allow for a system-based regulation that allows one branch to limit another, such as the power of the United States Congress to alter the composition and jurisdiction of the federal courts. Both bipartite and tripartite governmental systems apply the principles of the separation of powers to allow for the branches

represented by the separate powers to hold each other reciprocally responsible to the assertion of powers as apportioned by law.

Constitutions with a high degree of separation of powers are found worldwide. The UK’s system is distinguished by a particular entwining of powers. Countries with little separation of powers include New Zealand and Canada. Canada makes limited use of separation of powers in practice, although in theory it distinguishes between branches of government.

New Zealand's Constitution is based on the principle of separation of powers through a series of constitutional safeguards, many of which are tacit. The Executive's ability to carry out decisions often depends on the Legislature, which is elected under the mixed member proportional system. This means the government is rarely a single party but a coalition of parties. The Judiciary is also free of government interference. If a series of judicial decisions result in an interpretation of the law which the

Executive considers does not reflect the intention of the policy, the Executive can initiate changes to the legislation in question through the Legislature. The Executive cannot direct or request a judicial officer to revise or reconsider a decision; Court's decisions are final. Should there be a dispute between the Executive and Judiciary, the Executive has no authority to direct the Judiciary, or its individual members and vice versa.

India follows constitutional democracy which offers a clear separation of powers. The judiciary is fairly independent of the other two branches with the power to interpret the constitution. Parliament has the legislative powers. Executive powers are vested with the President who is advised by the Union Council of Ministers headed by the Prime Minister. The Constitution of India has vested the duty of protecting, preserving and defending the Constitution with the President as common head of the executive, parliament, armed forces, etc. not only for the union

government but also for the various state governments in a federal structure. All the three branches have **"checks and balances"** over each other to maintain the balance of power and not to exceed the constitutional limits.

The three branches would have define ability to check the powers of other branches. The legislative, executive and judicial branches of the State are kept distinct in order to prevent abuse of power. The Parliament has the sole power to legislate, executive powers is vested to the cabinet and judicial power is vested in the Supreme Court and others. The separation of powers means that the Judiciary is independent and untouchable within the judicial sphere. Judiciary alone holds all powers relative to the judiciary function and that the Legislative and Executive branches may not interfere in any aspect of the Judicial branch.

It is true that no democratic system exists with an absolute separation of powers or an absolute lack

of separation of powers. Governmental powers and responsibilities are too complex and interrelated to be neatly compartmentalized. As a result, there is an inherent measure of competition and conflict among the branches of government. Both the Parliament and the Courts ought to have been careful not to act so as to cause conflict between them. The concept of separation of powers is a model for good governance of democratic State like Bangladesh. The three branches of the State have been exercising the three distinct activities of the State through which the will of the people are expressed. Though the terms of the concept of separation of power has not been mentioned in the Constitution, it is a doctrine which is fundamental to the concept of constitutional lissome; in so far as it prescribed the appropriate allocation of powers. Hazrat Omer (RA) opined to separate the Judiciary from other organs of the State. He appointed Abu Darda (RA) as Judge in Medina, Abu Musa-Al- Ashry (RA) in Kufa and Suray (RA) in Basra. He issued a "Farman" to act

independently and in accordance with the Holy Quran and Sunnah and to do Justice treating all equal in the eye of law.

It is the basic postulate under the Constitution of Bangladesh that the legal sovereign powers have been distributed to the legislature to make law the executive to implement the law; and the judiciary to interpret the law within the limit set down by the Constitution. Complete separation of power is no where found in the constitutional system of the world. Some overlaps are inevitable in the street of application of this doctrine. The judiciary, the executive and the legislature have generally managed to work out a *compromise formula.* It is hope that there will never arise a stalemate situation in which one organ's function have been completely subverted by the others.

A fact is relevant here to mention regarding the separation of power in Pakistan that was reaction of the judiciary on the enactment of the Eighteenth

Constitutional Amendment of the Pakistan Constitution. The passing of Eighteenth Amendment on 19th April, 2010 and then Nineteenth Amendment on the reaction of the Supreme Court is viewed in perspective of separation of power case in Pakistan. In the Eighteenth Amendment of the Constitution, 98 Articles were amended with the insertion of some new articles also. Amongst other appealing achievement: the prime achievement was the empowered of the province by abolishing the current list which had given overlapping power to the federal legislature but it in a curtail the absolute power of Chief Justice in the appointment of the Judge before the enactment of 18th Amendment. It was the exclusive power of the Chief Justice to appoint the Judge of the Courts. Article 75(A), introduced by this amendment, deprive of the Chief Justice from the right of appointment. The powers of the Chief Justice were share with the executive and legislature also. Many judiciary experts apprehended those changed as an assault on the independence of judiciary.

Considering this amendment as a threat of independence of judiciary, the Court sent the matter back to the Parliament for reconsideration of the said Article along with proposed satisfaction. Those recommendations of the Court were not contrary to the basic skill of the Article 175. The major demand of the Court were to gain effective control over the appointment process by increasing the strait and power of judicial member. The Parliament accepted the judicial review and resultantly, passed the 19th Amendment in the Constitution of Pakistan on First January 2011.

JUDICIAL INDEPENDENCE

Impartiality, independence, fairness and reasonableness in decision making are the hallmarks of the Judiciary. If " Impartiality" is the soul of the Judiciary, "Independence" is the lifeblood. Independence is not the freedom for Judges to do what they like. It is independence of judicial thought. It is freedom from interference and pressures which provides the Judicial atmosphere where he can work

with absolute commitment to the cause of justice and constitutional values. If existence depends not only on philosophical, ethical or moral aspects but also upon several mundane thins- security in tenure, freedom from ordinary worries, freedom from influences and pressures within or outside. In order for the decision of the judiciary to be respected and obeyed, the judiciary must be impartial. To be impartial, the judiciary must be independent. To be independent, the judiciary must be free from interference, influence or pressure. For that, it must be separate from the other branches of the State or any other body. As far back as 1599, the Lord President of the Court of Session declared to James VI that the judges were independent of the King " sworn to do justice according to our conscience".

Judicial independence is important for a fair trial, for adjudication of disputes, for respect for decision and because the Judges may have to decide the disputes between the executive and legislature and an individual or the public at large.

Our legal system is based on the principle that an independent, fair and competent judiciary will interpret and apply the laws that govern us. A Judge’s role is to make a decision between parties in a legal dispute, based on the facts of the case and the law that applies to the facts.

Judicial independence is not only a matter of appropriate external and operational arrangements. It is also a matter of independent and impartial decision making by each and every Judge. The Judge’s duty is to apply the law as he or she understands it without fear or favour and without regard to whether the decision is popular or not. This a cornerstone of the rule of law. Judge’s individually and collectively should protect, encourage and defend judicial independence. Judicial independence means that Judges are not subject to pressure and influence, and are free to make good decisions based solely on fact and law.

In taking that oath, the Judge has acknowledged that he or she is primarily accountable to the law

which he or she must administer. Judges themselves have to be vigilant to identify and resist any attack upon that independence, by whomsoever or by whatever means. The oath plainly involves a requirement to be alert to, and wary of, subtle and sometimes not so subtle attempts to influence Judges or to curry favour. Moreover, a Judge should be immune to the effects of publicity, whether favourable or unfavourable.

Regarding the judicial independence remarks of Justice **Breyer Stephen** are as follows:

"Constitutional guarantees of tenure and compensation may well help secure judicial independence, but they can by no means assure it. Ultimately independence is a matter of custom, habit, and institutional expectation. To build those customs, have its and, expectations requires time and support – not only from the bench and bar but from the community where the judges serve. Unfortunately, it may prove easier to dismantle that independence than to attain it. And that, as I have said, is why

I think it is important that we explain, not just to lawyers or other judges, but to your fellow citizens, why that independence, which is so important to us as members of the legal community, should be important to them as well.

It would be easiest for me to begin to explain judicial independence by pointing to the negative, its very opposite. Here, I think of my visit to a Convention of Russian Judges in 1993 when I was a Judge on the Court of Appeals for the First Circuit. This event occurred not long after Boris Yeltsin was elected President of Russia, and I remember him announcing to the assembled Judges that he intended to institute a large judicial pay raise. Not surprisingly, the Russian Judges greeted this announcement with enormous cheers. I also distinctly remember Yeltsin decrying the Russian practice of something that he referred to as "telephone justice." And, loud as the cheers for the pay raise were, the applause that greeted this announcement was absolutely deafening.

Telephone justice, I subsequently learnt, occurred when the party boss called judges and told them how to decide the outcome of a particular case. And the assembled Judges spoke about the practice very frankly. When the Judges were asked why they would pay attention to the wishes of the party boss or even take his call, the Judges explained that they needed apartments and that they wanted to put their kids in good schools. The Russian Judges, in turn, asked me whether telephone justice exists in the United States. When I told them that we do not have such a practice, the Russian Judges looked at me incredulously. What happens, the Judges asked, when the politicians who helped you obtain your judgeship call in a favor regarding a pending case? Again, I told them that no such call would be placed. It eventually became clear that they thought that I was merely being discreet in an effort to protect my supporters. And as I spoke further with the Russian Judges, it became evident that, much as they disdained telephone justice, they had difficulty conceiving of a real-world legal system that operated without telephone justice. I hope, however, that eventually I convinced them that telephone justice plays no part in our legal system.

Alexander Hamilton argued that the Constitution itself would work only if there were some fundamental protections for this fragile entity that we call judicial independence: "The independence of the Judges, once destroyed, the Constitution is gone; it is a dead letter, it is a vapor which the breath of faction in a moment may dissipate. Indeed, Hamilton, who fought for this Nation when it won its independence from Britain, placed judicial independence at the very top of the list of reasons that provoked him to take up arms. "There is no motive which induced me to put my life at hazard through our revolutionary war, that would not now as powerfully operate on me, to put it again in jeopardy in defense of the independence of the judiciary.

Hamilton said. "if the laws are not suffered to control the passions of individuals, through the organs of an extended, firm and independent judiciary, the bayonet must."

Hamilton knew that our Constitution establishes democracy, but it does not establish a pure democracy.

Judicial independence is a part of my life. It is a part of your life. And, most important, it is a part of the life of our friend, the shopper, whom I detained for ten minutes on his way to the grocery

store. Judicial independence does have a profound impact on that shopper's life. It may improve his life materially. It certainly offers protection when he is in the minority. It offers meaningful protection for the fundamental political rights that every American enjoys. And it offers to that shopper, along with the rest of us, the best hope for continued respect for and obedience to law, even when we disagree about the merits of a particular decision.

In a word, judicial independence is an essential component of a rule of law, one that is necessary to tie together our Nation of 300 million people of every race, every religion, and every viewpoint imaginable. That independence is a national treasure. Other generations created it; we benefit from their work. As long as Judges can both meet the demands of independence in our own work and help to teach its value to others, I am confident that our generation shall maintain the independence so necessary for us in our work and for Americans who need independent judicial institutions."

Best democratic principles require that the actions of governments are open to scrutiny by the Courts, to ensure that decisions taken comply with the Constitution, with relevant statutes and other

law, including the law relating to the principles of natural justice.

A competent, independent and impartial judiciary is likewise essential if the Courts are to fulfill their role in upholding constitutionalism and the rule of law. Public Confidence in the judicial system and in the moral authority and integrity of the judiciary is of the utmost importance in a modern democratic society.

Justice Sir Gerard Brennan, Chief Justice of Australia, in his speech in 15th Lawasia Conference express that the judiciary as "an institution of the highest value in every society". The objectives and functions of the judiciary include that (a) all persons are able to live securely under the rule of law; (b) promoting within the proper limits of the judicial function the observance and attainment of human rights; and (c) administering the law impartially among persons and between persons and the State."

The rule of law must be the aim and object of every legal system, else legal power becomes an instrument of oppression and corruption. By extending the jurisdiction of the judiciary, by appointing

competent, incorruptible and independent Judges, by shielding their independence with proper tenure and remuneration, by isolating the judges from the pleasure or displeasure of the Executive branch of government and by providing the Courts with the resources needed to exercise their jurisdiction efficiently, the rule of law is advanced and preserved.

In determining whether a judge, or a judiciary, possesses the requisite stamp of independence, the courts have directed attention to the manner of judicial appointment, duration of the term of office, provisions for removability and the existence of guarantees against outside pressure. There must be an objective appearance of impartiality. Besides, independence is often inconspicuously threatened by a Judge's conscious or unconscious hopes or fears about treatment by the executive. Some recent example are ;

Sri Lanka: In 2013, the government, using its large parliamentary majority, impeached its Chief

Justice, Shirani Bandaranayake, in reprisal for inconveniently declaring unconstitutional part of its legislative agenda. It accused Bandaranayake of misapplying the law (although her decision was constitutionally correct and joined by her other Judges) and of other conduct that did not amount to 'misconduct', and had her tried and found guilty by a Parliamentary Select Committee, which comprised seven government ministers, sitting in secret and denying her the opportunity to cross-examine witnesses or to have the benefit of a presumption of innocence. It celebrated her dismissal with a fireworks display.

Uganda: President Museveni mounted a direct attack on the Constitutional Court for doing its constitutional duty by striking down an inconsistent Act of parliament. Museveni made a televised address accusing the Judges of 'usurping the power of the people' and claimed that 'the major work for the Judges is to settle chicken and goat theft cases but not to determine the country's destiny'. The

government orchestrated a large demonstration against the Court.

Pakistan: corruption amongst low-level Judges continues, unabated, and political bias influences the outcome of politically sensitive cases.

Zimbabwe: Since 2000, President Mugabe has 'purged the judiciary, packed the courts with Zimbabwe African National Union (ZANU-PF) supporters and handed out "gifts" of land and goods to ensure judges' loyalty'. Independent judges have been removed through 'a combination of physical and psychological intimidation and threats of violence'. The President must appoint Judges approved by the Judicial Services Commission, but four of its six members are appointed by the President, and the other two are under the influence of the Executive.

Bolivia: the government has introduced the Ley Corta ('short law'), which permits the executive directly to appoint 'interim' Judges. In February 2011, President Morales directly appointed 15 Judges to

vacancies on the Constitutional Tribunal and the Supreme Court.

Singapore: Section 98(i) of the Singapore Constitution allows Judges to hold office after reaching 'as the President may approve', and the President will only be directed to approve Judges who are approved by the executive – an inducement (if one were needed) to render decisions congenial to the government. The *Wall Street Journal Asia* was held in contempt for reporting that the International Bar Association's Human Rights Institute (IBAHRI) had described 'concerns about the subjective and objective independence' of the Singaporean judiciary.

Gambia: Although the Gambian Constitution (Article 120(3)) guarantees judicial independence, Judges do not in practice have security of tenure. In 2008, three Judges were summarily dismissed by order of the President, without any official reason and without consultation with the Judicial Services Commission. It is understood that the dismissals were in reprisal

for decisions they had taken in politically sensitive cases.

Ukraine: In 2012, Judge Rodion Kireyev was condemned by the European Union for sentencing opposition leader Yulia Tymoshenko to seven years in prison (with an order to pay £120m to the state and a three-year ban on political participation) for making a bad deal with Russian President Putin over gas prices. This would not be classed as a crime in any other democracy, and the sentence was crafted so that she would be unable to participate in the 2014 elections. Kireyev was a 'P-plate' Judge, with his position subject to confirmation by the government, in a state where compliant Judges convict 99.8 per cent of defendants.

Venezuela: The Chávez government frequently dismissed Judges for delivering decisions against it, while Judge María Afiuni was jailed for three years for releasing a political prisoner from lengthy pre-trial detention. In 2012, one fugitive jurist claimed that Chávez officials would telephone Judges to dictate

the decisions on 'sensitive' cases, in particular to direct refusals to release political prisoners.

United Arab Emirates: Two Judges were amongst 94 defendants arrested and held in custody for a year in Abu Dhabi on charges of belonging to 'an illegal political organization that sought to oppose the basic principles of the UAE system of governance and to seize power'. As the proceedings were in secret (all foreign observers and international media were excluded from the court), it was impossible to tell whether their judicial conduct had precipitated their arrest: they appeared to have done no more than to support greater (or some) democracy in the UAE.

Fiji: The Chief Justice was forcibly removed from office by the military government, which has appointed lawyers with questionable credentials from other countries to the Fijian Bench. Several Judges in Fiji have been physically intimidated, with one Judge having his home burned down while on holiday and another having his car sabotaged.

The principle of judicial independence takes on two main dimensions, namely;

- .The adjudicative independence of judges on an individual level; and
- The independence of the Judicial institution through the administration of justice that is separate from the executive and legislative branches.

Adjudicative independence of individual judges are :

1. Impartial decision making;
2. Security of tenure;
3. Financial security: pay, benefits and retirement plan;
4. Continuing education;
5. Ethics and conduct standards;
6. Accountability;

Institutional Independence of the Judiciary are:

1. Administration of Justice by Judges;
2. Management of the Court;
3. Assignment of Judges to cases, determination of sittings and lists of the court and related areas such as the allocation of courtrooms and management of the administrative staff;
4. Conduct review, removal;
5. Administrative and institutional relationships with the legislative and executive government bodies.

Because judicial independence involves judges occupying a privileged position in their community and in society and making unpopular decisions, judicial independence is susceptible to attack uninformed or irresponsible critiques made out of context. It always needs to be appreciated that judicial independence exists for the benefit of the people, and that each dimension of judicial independence is a necessary element that exists to uphold that overall objective. The attack upon anyone of the components of the principle of judicial independence may very well compromise the institution or its members.

The concept of judicial independence is essential to justice for each individual because, as Hamilton also said, " No man can be sure that he may not be tomorrow the victim of a spirit of injustice, by which he may be the gainer today". The citizens must understand that it is ultimately in their self-interest for Judges not to be influenced by their policy preferences because of the possibility that

one day they will be in a position in which their own cherished rights are politically unpopular.

When it is said that judges are, or should be, independent, it is appropriate to ask: Independent of whom or what? Unlimited independence is certainly not what we have in mind. We want to protect Judges against domination by, for example, the executive branch of the government and by political parties and pressure groups, but we do not want them to act independently of law and morals. Nor do we want to eliminate the existing interdependence of Judge. There are many possible sources of influence on judicial behaviour, and a separate consideration of each is required in order to specify which influences Judges should be protected against.

Many different meanings have been attached to the term impartiality. The concept of impartiality is closely connected with the task of solving conflicts. One of the main functions of courts is to contribute to the preservation of social peace and integration by settling disputes and grievances. How much they

can contribute to the realization of this goal depends for one thing on the willingness of conflicting parties to bring their cases before the courts and to submit to court decisions. From this point of view it is not sufficient, and perhaps even not necessary that Judges shall be impartial in any objective sense. What counts is the extent to which people have confidence impartiality. In particular it is important that the public can feel assured that a Judge is influenced neither by his personal interest in the outcome of the case nor by positive or negative attitudes towards a party in the case or towards a group or category of people to which a party belongs.

When matters of political disputes are involved, the courts may be suspected of being engaged in party politics on the opposition side if they go too far in their endeavours to protect private interest against State interference. This may impair public confidence in Judicial impartiality, and feed back from the public or from the other branches of government may

lead to a reduction in the power of the Courts. In this connection it should be taken into account that countermoves such as constitutional amendments, legislative extensions of administrative powers, limitations of the jurisdiction of the Courts, appointments of more cooperative Judges, are carried trough more easily when the prestige of the courts is reduced as a consequence of their decision making practice.

Executive assault on the independence of Judiciary

In Bangladesh the Government's assault on the independence of judiciary started by the Martial Law Proclamation, 1982. The Martial Law Government bifurcated the High Court Division. However, after revival of the Constitution this Division struck down the provision of permanent Benches outside Dhaka in Anwar Hossain Chowdhury case (41 DLR AD 165) popularly known as **8th Amendment case**. In Martial Law Proclamation, it was provided that office of the Chief Justice and other Judges of the Supreme Court may be removed from the office by the Chief Martial

Administrator without assigning any reason. In the said Martial Law Proclamation Order it was further provided that the Chief Justice of Bangladesh whether appointed before or after the proclamation shall unless he sooner at age of 62 years hold office for a term of three years shall retire from his office. By the said Proclamation Order the then Chief Justice Mr. Justice Kemal Uddin Hossain was compelled to retire from his office. Subsequently two other Judges, namely, Mr. Justice Abdur Rahman Chowdhury and Mr. Justice Syed Mohammad Hossain were removed from their office by the Chief Martial Administrator. The Government's second grievous assault on the higher judiciary took place during Jamat BNP Jote Government. At that time the then Government did not confirm 15 Judges of the High Court Division. The alliance Government, subsequent after non-confirmation, appointed 19 Additional Judges. Justice Md. Ruhul Amin, the then Chief Justice, expressed his concern which hit the banner of the national media. "বিচারক নিয়োগে ভুলের কারণে মহাপ্রলয় ঘটেছে"। (Ref: **Shamsul Huda and**

others Vs. Government XVII BLT (AD)62). That was an fatal executive assault on the independence of judiciary. In India Justice O.N. Vohra was not confirmed because he sentenced Sanjay Gandhi and one other in the "*Kissa Kurshikha*" case.

Those are the short pictures of the treatment of the Martial Law government and alliance Government with the Supreme Court.

Judicial Accountability

> You who believe! stand out firmly for justice, as witnesses to Allah, even though it be against yourselves, or your parents, or your kin, be he rich or poor, Allah is a Better Protector to both (than you), so follow not the lusts (of your hearts), lest you avoid justice; and if you distort your witness or refuse to give it, verly, Allah is Ever Well-Acquainted which what you do.(**The Holy Quran 4:135**)

A Judge is accountable to the Almighty Allah, to the laws, to his conscience, to the people, to the appellate authority and to the litigants by

publication of judgment. Reasonings of a judgment are Judge's explanation.

Judicial Accountability is now a catchphrase in many countries. The most common public critism which is currently made of the Judges is that they are socially unaccountable in that they neither reflect nor respond to the needs and interests of the people they serve. Its representation as an 'out of touch' body is probably the judiciary's most widespread and enduring public image today. Judicial means is according to Blacks' Law Dictionary "belonging to the office of a Judge" and the word "accountable" means "responsible". It is thus known that "Judge is responsible for his own judicial act". Accountability is the *sine qua non* of democracy. Judicial accountability is not the same as the accountability of the Executive or the Legislature or any other public institutions. This is because the independence and impartiality expected of the judicial organ is different from other agencies. The three way division of power between the executive,

the legislature and the judiciary like this- " The Executive controls the steering wheel. It decides which way the country will go. The Legislature controls the fuel supply. It votes the money to fund the policies which the executive proposes. The judiciary controls the brakes. Out of control Judges must be held accountable for their over reaching, so that self government and the rule of law can be restored and "judicial dictatorships" can be ended.

Undoubtly Bangladesh judiciary is a credible organ of the State. Judges like Caesar's wife should be above suspicion. A Judge looked upon as an embodiment of justice and thus cited suspicion on his propetuna personal conduct cast an ugly shadow on the whole institution. Independent of judiciary does not mean independent from accountability. The judicial accountability lies primarily to the general people. The judiciary needs the support of the people and that supports must be earned. The best way of earn that support each by making sure the people will understand their decision. The accountability of the

trial Judges is to the appellate Judges then to the apex Court through appeal system. It look at accountability to the public through open excess to justice and the publication of the judicial decision.

Accountability was once seen as part of a command and control relationship. Today, however, the concept is more fluid including a number of practices which explain, justify and open the area in question to public dialogue and scrutiny. The difference is captured by Professor Vernon Bogdanor's distinction between "sacrificial" and "explanatory" accountability.

It is generally accepted that, in England save in accordance with the Act of Settlement 1701, Judges cannot be held accountable either to the Parliament or to the executive in the sacrificial sense that they cannot be externally accountable for their decisions. Such accountability would be incompatible with the principle of the independence of the

judiciary. But, save for the House of Lords, they are held to account by higher courts hearing appeals, and it is open to Parliament to legislate in order to reverse the effect of a decision or body of doctrine. Moreover, the duty to give reasons for decisions is a clear example of "explanatory" accountability which assists transparency and scrutiny by the other branches of the state and the public (as well as facilitating appeals). Some consider that a Judge cannot be both independent and externally accountable, and that even "explanatory" accountability is incompatible with or a danger to judicial independence. Lord Cooke said that judicial accountability has to be mainly a matter of self policing; otherwise, the very purpose of entrusting some decision to Judges is jeopardised.

In relation to the judiciary of England and Wales, it is suggested that the position now is that there are a number of practices which can be understood as forms of accountability in one or other of the senses

of that term. It is suggested that their limits stem from the requirements of the principle of judicial independence. Once there is recognition that some practices which fall within the broad and amorphous meaning now given to the term "accountability" are not incompatible with the independence of individual Judges and the judiciary, the question arises as to what these are and for what the judiciary should be accountable.

Mohamed C. Othman in his article "Legitimacy, Accountability, and Judicial Independence Towards Judicial Effectiveness" has stated, "Accountability requires judicial institutions to be accessible, transparent, affordable, and effective, their proceedings comprehensible and open to the public, and decisions rendered freely and promptly available. It calls for free public access to laws, and to decisions. Accountability is also grounded on the basis that their decisions adversely affect everyone, but most especially the poor. Simply stated,

accountability requires that judicial institutions be held accountable for their acts, decisions, effectiveness, and judicial officials for their conduct and performance. Accountability contributes to transparency and openness, which are both essential for an effective functioning of the administration of justice. It guarantees equality before the law, builds public trust in the institutions of democratic governance, and narrows the credibility gap between the public and law enforcement agencies, like the judiciary and the police. It also promotes their integrity, ensures legal security and guarantees just and equitable outcomes. Accountability to the public, transparency of government activities, and an independent and honest judiciary are essential attributes of a democratic society. Accountability not only requires enforcement of the rule of law but the existence of independent systems for public evaluation of government conduct. The first is that of internal oversight of judicial institutions, and in the case

of the judiciary, appellate review, as its power is not merely to rule on cases, but to decide them, subject to higher referral to superior courts, and having done so, the finally of a judicial decision becomes the last word of the judicial branch in regard to a particular case. The second aspect of judicial accountability is that of subjecting judicial officials and in the case of quasi-judicial institutions, its public officials, to standards of competence, diligent performance, and speedy disposal of matters. it is also about their answerability to standards of effectiveness. Justice delayed, is justice denied. Individual judges are held accountable through the particular manner in which they exercise judicial power and the environment in which they operate. Judges sit in courts open to public; they are subject to appeal; they are subject to judicial review; they are obliged by the law to give reasons for decisions and publish them; they are subject to law of bias and perceived bias; they are subject to the media comment; they are subject to

removal by from office on established legal grounds; and they are accountable to their peers.

Judicial accountability was needed to eradicate a culture of impunity, to restore the rule of law; to facilitate national reconciliation, and construct a new society based on social justice, and respect for the rights of the human person."

Basic Structure

In the case where reliance is placed upon the doctrine of basic structure, in course of an attack upon legislation, whether ordinary or constituent (in the sense that it is an amendment to the Constitution) what is put forward as part of a basic structure must be justified by reference to the provision of the Constitution.

In the Constitutional scheme that has been adopted in Bangladesh, the legislature plays a significant role in pursuit of the goals set before the nation and command the position of grandeur and majesty. The Legislature undoubtedly has plenary

powers but such powers are controlled by the basic structure of the Constitution. It has the plenary legislative authority and discharge of its legislative functions by virtue of the powers conferred on them by the relevant provisions of the Constitution. It is the constitutional obligation of the legislature to protect the judicial independence and separation of judicial power from executive which are part of the common law traditions implicit in a Constitution like ours.

In Fifteenth Amendment of the Constitution the Parliament provided a new provision which is "Article 7B which runs as follows:

Article 7B. Basic provisions of the Constitution are not amendable;

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 provision 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."

Providing the provision of Article 7B in the Constitution the Parliament consciously controlled and limited its constituent legislative power. Article 7B made the following provisions of the Constitution unamendable:

(1) The Preamble;
(2) All Articles of part I;
(3) All Articles of Part II;
(4) All Articles of part III (subject to the provision of Article IXA)
(5) The provision of Articles relating to the basic structure of the Constitution;
(6) Article 150 of Part XI.

From Article 7B of the Constitution it appears that the provisions of Article 7B itself, the other provisions mentioned therein, particularly, the basic structures of the Constitution are not amendable. That is, the validity of constitutional amendment depends upon as to whether such amendment is within Constitutional limitation provided in Article 7B of the Constitution. The Parliament itself restricted

its amending power by the Fifteenth Amendment of the Constitution. The Legislature, in present position of our Constitution, cannot transgress such limitation imposed by the Parliament providing Article 7B. Therefore, constitutional amendment can be declared invalid or unconstitutional if the same is amended violating the provisions mentioned in Article 7B of the Constitution.

The term basic structure has not been defined in the Constitution. In India since the basic structure doctrine took birth, it has been invoked on six occasions to strike down amendments to the Constitution:(1) the last part of Article 31C as inserted by the Twenty-fifth Amendment, (ii) the last part of clause (4) of Article 329A inserted by the Thirty Ninth Amendments, (iii) Articles 368(4) and 368(5) inserted by the Forty Second Amendment, (iv) clause (5)of Article 371D inserted by the Thirty Second Amendment, (v) sub-clause (d) of clause (2) of Article 323A inserted by the Forty Second Amendment and (vi) recent NJAC Case. The Supreme Court of India

recognized the basic structure concept for the first time in the case of **Kesavananda Bharati Vs. State of Kerala** reported in AIR 1973 SC 1461. In the said case validity of 25th Amendment of the Constitution was challenged along with 24th and 29th amendment. By majority overruled **Golaknath case** (AIR 1967 SC) which denied power of Parliament to amend fundamental right of the citizen. The Supreme Court of India declared that the provision of Article 368 did not enable the Parliament to alter the 'basic structure' or frame work of the Constitution and the Parliament could not use its amending powers to 'damage', 'emasculate', 'destroy', 'abrogate', 'change' or 'alter' the 'basic structure' or framework of the Constitution. According to Kesavananda Verdict Judge of the Supreme Court of India led out separately, what he thought were the basic of essential feature of Constitution. **Sikri, C.J.** explained that the concept of basic structure included;

1. Supremacy of the Constitution;

2. Republican and democratic form of government;

3. Secular character of the Constitution;

4.Separation of powers between the legislature, executive and the judiciary;

5.federal character of the Constitution;

Shelat, J. and Grover, J. added two more basic features to this list;

Those are:

1.The mandate to build a welfare state contained in the Directive Principles of State Policy;

2.Unity and integrity of the nation.

Hegde, J. and Mukherjea, J. identified a separate and shorter list of basic features:

1.Sovereignty of India;

2.Democratic character of the policy;

3.Unity of the country;

4.Essential features of the individual freedoms secured to the citizens;

5.Mandate to build a welfare state;

Jaganmohan Reddy, J. stated that element of the basic feature were to be found in the preamble of the Constitution and the provision in two which they translated. He said,

1. Sovereign democratic republic;

2. Justice social economical and politics;

3. Liberty, expression, belief, faith and workship and;

4. Equality, status and opportunity.

The 'basic structure' concept was reaffirmed in the case of **Indira Nehuru Gandhi Vs. Raj Narayan** (AIR 1975 SC 2299). In that case Supreme Court applied the theory of basic structure and struck down of Article 329A which was inserted by the 39th Amendment of the Constitution of India in 1975. On the ground that such amendment was beyond the amending power of the Parliament as it destroyed the basic structure of the Constitution.

In the said case Justice Y.V. Chandrachud listed four basic features which he considered unamendable:

1.Sovereign democratic republic status;

2.Equality of status and opportunity of an individual;

3.Secularism and freedom of conscience and religion;

4.Government of laws and not of men *i.e.* the rule of law.

Justice H.R. Khanna in his opinion observed that democracy is the basic feature of Constitution and included free and fair election. The doctrine of basic structure was reaffirmed in the case of **Minarva Mills Limited Vs. Union of India** (1980 3 SCC 625).

In recent NJAC case, that is , Supreme Court **Advocates-on- Record Association and another V. Union of India** (W.P.(Civil) No.13 of 2015 Supreme Court of India has observed , "The "basic structure" of the Constitution, presently, *inter alia*, includes the supremacy of the Constitution, the republican and democratic form of Government, the "federal character" of distribution of powers, between the legislature; the executive and the Judiciary and " independence of the judiciary". It was further, observed, " Illustratively, we may advert to "independence of the judiciary" which has been chosen because of its having been discussed and debated during present course of consideration. The deduction

of the concept of "independence of the judiciary" emerged from a collective reading of Articles 12, 36 and 50.

In Pakistan, the Lahore and the Baluchistan High Courts have expressly applied the basic structure doctrine, wile the Supreme Court of Pakistan has accepted it. In **Darwesh Arbey V. Federation of Pakistan** (1980 PLD Lahore 203) which dealt with the validity of the Martial Law proclaimed by the Government of Z.A. Bhutto, acting under Article 245, the Lahore High Court held that the Seventh Amendment which had amended Article 245 in 1977 was invalid because it affected the basic structure of the Constitution. In **Suleman V. President Special Military Court** (NLR 1980 Quetta 873), the Baluchistan High Court struck down a constitutional amendment inserted by a Presidential order at the time of President Zia's Martial Law, namely Article 212-A, which empowered the Chief Martial Law Administrator to establish military Courts and barred the ordinary

Courts from interfering in all maters falling within the Jurisdiction of such military Courts. The Court held that the interim government was not entitled to make "basic changes" in the Constitution so as to alter the "fundamental structure of the Constitution. In **Al- Jahed Trust V. Federation of Pakistan** (1996 PLD SC 367) the Pakistan Supreme court invalidated a portion of the Martial Law amendment establishing the Federal Shariyat Court by Article 203-C, which provided for the appointment and tenure of its Judges in a manner which was wholly in conflict with the security of tenure and judicial independence guaranteed in Article 209. Notwithstanding a non obstante clause contained at the beginning of the Chapter in 203-A, the Court resorted to the "interpretation" based on basis features of the Constitution; and the intent and spirit of the Constitution to hold that the original article would prevail over Article 203-C of the Pakistan Constitution.

While making their argument learned Attorney General and Additional Attorney General admitted that independence of judiciary is the basic structure of the Constitution.

What is the basic structure of the Constitution is a question of academic nature which cannot be answered authoritatively with a touch of finality but it can be said that prominent characteristics of the Constitution are amply reflected in the objectives which substantive part of the Constitution. The validity of the Constitution lies in the social fact of its acceptance by the people.

There is a demarcation between an ordinary law made in exercise of the legislative power and constitutional law made in exercise of constituent power. The power to amend the Constitution is different from the power to amend ordinary law. The distinction between the legislative power and the constituent power is vital in a rigid Constitution. When Parliament is engaged in the amending process it

is not legislative, it is exercising a particular power bestowed upon it sui generis by the amending clause in the Constitution.

By the impugned amendment the authority of removal of the Judge has been given to the Parliament on the ground of proved misbehaviour or incapacity. The word, "misbehaviour" or "incapacity" have not been defined in the Constitution. Article 96 Sub Article (3) provides 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.

After declaration of 5th amendment of the Constitution void ab-initio, in 15th amendment, the Parliament provided a constitutional provision that the Chief Justice and the two next senior Judges or in case of absence of a member 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 shall hold inquire into the capacity or conduct of a Judge.

By the impugned amendment, snapping the constitutional guarantee as to formation of inquiry committee by the senior most Judges of the Supreme Court, it is provided that the Parliament may by law regulate the procedure in relation to a resolution under clause (2) of Article 96, of the Constitution, that is, resolution of Parliament to be adopted in respect of misbehaviour or incapacity of a Judge of the Supreme Court. In order to make it more clear the provision provided in Bengali version of the related provision is required to be looked into:

Clause (3) of Article 96 of the Constitution has got two parts;

"(১)এই অনুচ্ছেদের (২) দফার অধীন প্রস্তাব সম্পর্কিত পদ্ধতি;

এবং

(২) কোন বিচারকের অসদাচরণ বা অসামর্থ্য সম্পর্কে তদন্ত ও প্রমাণের পদ্ধতি সংসদ আইনের দ্বারা নিয়ন্ত্রণ করিতে পারিবেন ।"

Analysing clause (3) it appears that the Parliament may make law to regulate procedure in

relation to a resolution, and for investigation and proof of the misbehaviour or incapacity of a Judge.

The said law, if made, shall regulate the procedure, which means the manner and form of enforcing of law, that is, the same would be a procedural law. Withdrawing constitutional provision to hold inquiry regarding proof of the misbehaviour or incapacity of a Judge, who holds constitutional post, the provision for holding investigation has been introduced, by the procedural law which may be amended at anytime, even by an ordinary Ordinance. From 1972 to 1975, that is, the period when the newly introduced provisions were effective in the Constitution, no such law was enacted.

It appears that from the supplementary affidavit-in-opposition filed on behalf of the Writ Respondent No.1 that a draft bill was prepared pursuant to the provision of Article 96(3) of the Constitution in the name of "বাংলাদেশ সুপ্রীম কোর্টের বিচারকগণের অসদাচারণ বা অসামর্থ (তদন্ড় ও প্রমাণ) আইন, ২০১৬।" Wherein it is proposed

that the complaint against any Judge has to be filed addressing the Speaker. Section 4(4) of the proposed law, provides, "স্পীকার, কোন ব্যক্তির নিকট হইতে কোন বিচারকের অসদাচারণ বা অসামর্থ সম্পর্কিত কোন অভিযোগ প্রাপ্তির পর উহার প্রাথমিক সত্যতা নির্ণয়নের জন্য জাতীয় সংসদের সদস্যগণের মধ্য হইতে অনধিক ১০(দশ) সদস্য বিশিষ্ট ১টি কমিটি গঠন করতঃ উক্ত কমিটির নিকট অভিযোগটি প্রেরণ করিবেন।" Section 5 of the said draft bill provides, "(৫) উপধারা ৪ এর অধীন গঠিত কমিটি আনীত অভিযোগ সম্পর্কে ৭(সাত) দিনের মধ্যে গোপনীয়তা রক্ষা করতঃ উহার প্রাথমিক সত্যতা নির্ণয়ন করিবে।"

It further provides in the said draft bill that if the aforesaid inquiry committee, after holding inquiry, find *prima facie* case against the Judge they would submit report to the speaker. Thereafter, Speaker shall form a Committee for holding investigation. Section 5 of the said draft bill provides, "৫. তদন্ড় কমিটি গঠনঃ কোন বিচারকের বিরুদ্ধে আনীত অভিযোগ সম্পর্কে তদন্ড়ের জন্য স্পীকার নিম্নরূপ ৩(তিন) সদস্য বিশিষ্ট তদন্ড় কমিটি গঠন করিবেন যথাঃ-

(ক) বাংলাদেশের ১জন সাবেক প্রধান বিচারপতি অথবা আপীল বিভাগের ১জন সাবেক বিচারপতি যিনি উক্ত কমিটির চেয়ারম্যান হইবেন;

(খ) বাংলাদেশের ১ জন সাবেক এর্টনী জেনারেল এবং

(গ) বাংলাদেশের ১জন সম্ভ্রান্ড় নাগরিক/জুরিষ্ট

তবে শর্ত থাকে যে, সাবেক এর্টনী জেনারেল ব্যতিত তদন্ড় কমিটির অন্যান্য সদস্যদের বয়স ৬৭(সাতষট্টি) বৎসরের কম হইবে না।”

It is true that no such law has yet been regulated but draft bill regarding the law reflected the intention of the executive as well as the legislature.

It is relevant here to quote few lines from the book “ সংবিধানের পঞ্চদশ সংশোধনী -আলোচনা- তর্ক -বিতর্ক ” submitted by both the parties. In the said book it has been stated, “বিচারপতিদের অপসারনে সুপ্রীম জুডিশিয়াল কাউন্সিলের ক্ষেত্রে বিশেষ কমিটি যে সুপারিশ করেছিল, আজকের বৈঠকে সেটিও বাতিল করা হয়। ফলে সুপ্রীম জুডিশিয়াল কাউন্সিলকে সংসদের কাজে জবাবদিহিতা করতে হবে না। আগের মতোই তারা রাষ্ট্রপতির কাছে প্রতিবেদন জমা দেবে। বৈঠকে বিচারপতিদের অভিসংশনের ক্ষমতা জাতীয় সংসদের ওপর ন্যাস্ড় করার প্রস্তাব সরাসরি নাকচ করে দিয়ে প্রধানমন্ত্রি বলেন, বিচারবিভাগ এখন সম্পূর্ণ স্বাধীন। স্বাধীন বিচার বিভাগের ওপর কোন ধরণের হস্ড়ক্ষেপ করা যাবে না। ”. The Writ respondent-appellants did not deny specifically that statement made by the author in the said book was incorrect and had no basis. From that statement it appears that regarding the accountability of Supreme Judicial Council to the Parliament was discussed and the leader of the House

and Prime Minister rejected proposal stating that the same may affect the judicial independence of the Supreme Court.

I do not analise the validity of the draft bill in this judgment because the same is not law but one of the alarming realities is that proposal has been tabled to form a committee for holding inquiry for judging a judge by the members of the Parliament. Similarly, it is proposed that Investigation Committee should be formed by former Attorney General. The alive former Attorneys General for Bangladesh are: (1) Mr. Rafiqul Huq, (2)Mr. Kazi Shahiduddin Nabi(K.A. Nabi), (3) Mr. Abu Foyez Hasan Ariff, (4) Mr. A. J. Mohammad Ali, (5) Mr. Fida Md. Kamal and (6) Mr. Salauddin Ahmed of them, Mr. K.S. Nabi is seriously ill and rest of the Attorneys General are practicing lawyers of this Court who have been regularly appearing before both the Divisions of this Court. Head-to-head bargaining creates the danger of subtle accommodations being made.

All the lawyers appeared in this case, that is, the learned Attorney General, learned Additional Attorney General, learned Counsel for the respondents and Amici curiae admitted that independence of judiciary is basic structure of the Constitution and that has also been established in the judgment by this Division passed in 5th, 8th and 13th amendment cases. That is, fortunately there is no difference of opinion between the parties regarding the proposition that existence of an independent Judiciary is an essential requisite of democracy nor is there any difference of opinion regarding the proposition that an independent Judiciary is one of the basic features of our Constitution.

Introducing the provision of Article 7B in the Constitution in 15th Amendment, Parliament has been made our Constitution more rigid one so far the same relates to amending power of the Parliament. There is no doubt in it. Even as per provision of Article 7B of the Constitution, the said provision itself is

not amendable. In fact, the impugned amendment and the proposed bill switched on an anxiety in the Judiciary that in view of the amendment and draft bill, if the same is made law, the Judges would not be able to discharge their duties in accordance with their oath. The learned Attorney General, while making his submission before in this Court, said that the draft bill is not law. He submits that the legislature may make law, pursuant to Article 96(3) of the Constitution, providing the provision of Investigating Committee for holding investigation by the learned Chief Justice and two senior most Judges of the Appellate Division like Supreme Judicial Council. But we do not find any such statement in the affidavit-in-opposition filed on behalf of the writ respondents. By making such submission, the learned Attorney General impliedly did not deny the cause of anxiety of the Judiciary that the provisions provided in the proposed bill may affect the independence of judiciary. The writ respondents did not make any specific statement in their affidavit-

in-opposition giving assurance that the proposed Act will not be promulgated as per draft bill submitted by them.

Moreover, whether such procedural law, withdrawing constitutional guarantee would protect the independence of judiciary or not is a serious concern. In the 15th amendment of the Constitution, the Legislature substituting Article 96 strictly protected the tenure of the office of Judges of the Supreme Court providing constitutional guarantee adopting the provision of Supreme Judicial Council consisting of the Chief Justice of Bangladesh and the two next Senior Judges. By the 16th amendment such guarantee has been withdrawn.

The learned Attorney General submits that in the proclamation of independence it has been proclaimed that the people of Bangladesh by their heroism, bravery and revolutionary fervor have established effective control over the territories of Bangladesh and that in the preamble of the Constitution it has

been declared that the people of Bangladesh proclaimed independence and that it is our sacred duty to safeguard, protect and defend this Constitution and to maintain its supremacy. He submits that Article 7 of the Constitution provides that all the power in the Republic belonged to the people, and their exercise on behalf of the people shall be effective only under and by the authority of the Constitution. Article 7(2) of the Constitution provides that this Constitution is, as the solemn expression of the will of the people, the Supreme law of the Republic, and, if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void. Article 11 provides that the Republic shall be democracy, so, our judiciary is also accountable to the people. He submits that the removal procedure of the Judges may be done by the Parliament as representative of the people. Thus, the impugned amendment can not be said to be ultra-vires the Constitution.

B.H. Chowdhury, J. in the judgment of 8th Amendment case observed ,

> "All powers in the Republic belong to the people. This is the concept of sovereignty of the people. This echoes the words of the Proclamation " by the mandate given to us by the people of Bangladesh whose will is supreme."

In the said judgment it was further observed by this Division that our constitution is not only a controlled one but the limitation on legislative capacity of the Parliament is enshrined in such a way a removal of any plank will bring down the structure itself.

It was further observed that there is 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 requirement, that it has not been brought about by practicing 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.

As to the constitutional power, that is, power to make a Constitution it belongs to the people alone. It is the original power. People after making a Constitution give the Parliament power to amend it exercising is legislative power strictly following certain special procedures. Constitutions of some countries may be amended like any other statues following the ordinary legislative procedure. Even if the "Constitutional power" is vested in the Parliament the power is a derivative one and the mere fact that an amendment has been made in exercise of the derivative constituent power will not automatically make the amendment immune from

challenge. In that sense there is hardly any difference whether the amendment is a law, for it has to pass through the order of validity test.

In said case it was categorical observed in paragraph 404 that, "Independence of the Judiciary, a basic structure of the Constitution, is also likely to be jeopardised or affected by some of the other provisions in the Constitution. Mode of their appointment and removal, security of tenure particularly, fixed age fore retirement an 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.

In the said judgment it was further observed that amendment is subject to the retention of the basic structures. The Court therefore has power to undo an amendment if it transgress its limit and alters a basic structure of the Constitution.

In the judgment on 5th Amendment of the Constitution A.B.M. Khairul Haque, J., sitting in the High Court Division, has observed, " sovereignty of the people, supremacy of the Constitution, Rule of Law, Democracy, Republican from of Government , Unitary Sate, Separation of Powers, Independence of the Judiciary, Fundamental rights, Secularism, are the basic structures of the Constitution.

In the case in hand, the most important issues are:

(1)Sovereignty of the People;

(2) Supremacy of the Constitution

and

(1) Independence of the Judiciary.

This Division in case of **Kudrat-E- Ehali Panir V. Bangladesh 44 DLR (AD)319** observed that all the powers in the Republic belong to the people. In the case of **Secretary, Ministry of Finance V. Masder Hossain** reported in 52 DLR (AD)82 it was observed that 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 cannot be

demolished, whittled down, curtailed or diminished in any manner whatsoever, except under the existing provisions of the Constitution.

Article 22 of the Constitution provides that the State shall ensure the separation of the Judiciary from the executive organs of the State. Article 94(4) provides that subject to the provisions of this Constitution the Chief Justice and other Judges shall be independent in the exercise of their Judicial functions. To make those provisions more effective and meaningfull security of tenure of the office of Judges is indispensable. In absence of Constitutional guarantee protecting the Judges from easy removal from office will render the provisions of Article 22 and 94(4) meaningless. To protect the independence of judiciary, along with the provision of removal of the Judges as provided in Sixteenth Amendment, which did not provide any constitutional provision to hold inquiry of the complaint to be brought against the judges, a constitutional provision is needed to be

incorporated in the Constitution providing that senior most Judges shall hold inquiry on the complaint. The same may be either in the name of Supreme Judicial Council or Supreme Judicial Inquiry Committee or Independent Tribunal for holding inquiry. It would be repetition to quote **Hamilton** who said that no man can be sure that he may not be the victim of a spirit of injustice, by which he may be gainer today.

Anything that destroys the balance between three organ of the State will ipso facts destroy an essential element of the basic structure of our constitution. All organs of the State derive their authority jurisdiction and powers from the Constitution. This includes this Court which represents the judicial organ. In a democratic country governed by a written Constitution, it is the Constitution which is supreme and sovereign. Our Parliament is a creature of the Constitution and its powers, privileges and obligations are specified and

limited by the Constitution. A legislature, created by a written constitution, must act within the ambit of its power as defined by the Constitution and subject to the limitations prescribed by the Constitution. There is no doubt that the Constitution itself can be amended by Parliament, but it is possible because of Article 142 of the Constitution and that the amendment of the Constitution can be validly made only by following the procedure prescribed by the said article and within the limitation provided in Article 7B of the Constitution because Article 7B started with the non-obstante clause.

Supreme Judicial Council

The provision of Supreme Judiciary Council is not out of criticism which has been reflected in the book "Independence and Accountability of Judiciary" - **A Critical Review by Dr. Sarkar Ali Akkas.** Regarding activities of Supreme Judicial Council he stated,

"The system of discipline of judges of the Supreme Court has some important drawbacks. Firstly, the President may initiate the disciplinary proceedings by directing the SJC to inquire into the capacity or conduct of a judge. Under Art 48 (3) of the Constitution the President is bound to act on the advice of the Prime Minister who is the Chief Executive of the State. Hence initiation of disciplinary proceedings against a Supreme Court Judge depends on the executive and therefore, the political will of the executive may be very crucial to disciplining judges.

The second drawback of the system of disciplining Supreme Court Judges is that there is no specific system for making complaints against a judge. Under the current system the process of making complaints against a judge is not easily accessible and it might be called inappropriate.

The President may receive information about the incapacity or misconduct of a judge from the SJC or from 'any other source'. From the expression 'any other source' it is not clear what sources may be acceptable or may have access to the President to make a complaint against a judge. In the absence of any specific system of making complaint, it may not be possible for an ordinary citizen to inform the President about the incapacity or misconduct of a judge. It might be possible only for those people who are well connected with the executive.

In fact, the main potential source of information about the incapacity or misconduct of a judge is the SJC. However, in this regard the SJC is placed in an impossible position. This is because the SJC is, on the one hand, an important source from which the President receives information about incapacity or misconduct of a judge and on the other hand, it is entrusted with the power of making inquiry

about the alleged incapacity or misconduct. Obviously,the SJC can make a complaint against a judge to the President, but cannot inquire into the matters unless the President directs it to do so.

In addition, the SJC is exclusively composed of judges and therefore, it is likely that in some cases the SJC would hesitate to make a complaint against a fellow judge. In this way, a transgressing judge might escape disciplinary proceedings. It is very likely that the SJC will not act first, but will rely on other sources to complain to the President.

It is alleged that there are some instances of breach of judicial conduct in which the SJC did not make any complaint to the President to initiate disciplinary proceedings. While interviewing the former Chief Justice ATM Afzal Advocate Shahabuddin Ahmed, the editor of the *Dhaka Law Reports* (DLR), asserted:

> "Late Mr. Justice ARM Amirul Islam Chowdhury, sitting in the High Court Division was found deliberately defying the judgment of the Appellate Division. He is not alone instance in respect of committing breach of judicial discipline, but there is no instance of any initiative ever taken by the Supreme Judicial Council on any matter susceptible to their jurisdiction."

In response to this assertion of Mr Shahabuddin Ahmed, Justice ATM Afzal replied, 'indeed, till date not one case has been referred to the Council by the President for inquiry even'. However, the main question is whether the SJC has ever informed the President about the incapacity or misconduct of a judge. In fact, there is no such instance so far though, as stated above, there were instances of misconduct. In this context, the assertion of the Former Chief Justice Latifur Rahman- is worth mentioning here. He says that when Justice ATM Afzal was the Chief Justice and Justice Rahman was the second member of the SJC, the then Attorney General and Law Minister

made a complaint against a Judge. However, as Justice Rahman adds, it was not possible to proceed further with the matter because in this regard there was a lack of strong mentality on the part of the Chief Justice. He emphasises that persons employed in exercising judicial powers, should carry out their all functions transparently and they should be accountable to the constitution and law as well as to their conscience so that public perception in the justice system cannot be jeopardized."

Dr. Sarkar expressed his experience upto 2004 but after publication of the aforesaid paper, at least two Judges of the Supreme Court faced proceedings before the Supreme Judicial Council. The position is changed.

Recently an alarming information was given by International Bar Association (IBA) that there are credible allegations that cases are often decided in favour of the party offering the larger bribe in

Cambodia. It is estimated that 90% of the cases heard by the Courts involve bribes to Judges and clerks, and that when no bribe is offered, judges often give no attention to the case and court staffs will refuse to release information, or give lawyers access to the case files. It has been reported that India's Judicial corruption is a cancer that begin's at the lower levels and inches its way up. In 2010, former Law Minister Shanti Bhuson courted contempt by claiming that eight of the last Chief Justices were corrupt. And in 2015, Justice Markandey Katzu claimed that half the higher judiciary was corrupt. Question is, what is our position?

How the Judges should be removed from the office is not so relevant for the people and litigants. They want that their cases should be disposed of quickly, impartially, fairly and without any extraneous influence. Upright and honest Judges are needed not only to bolster the image of the Judiciary in the eyes of the litigants, but also to sustain the

culture of integrity, virtue and ethics among Judges. The people's perception of the Judiciary matters just as much as its role in dispute resolution. The credibility of the entire Judiciary is often undermined by isolated acts of transgression by a few members of the Bench, and therefore it is imperative to maintain a high benchmark of honesty, accountability and good conduct. Similarly, it is the duty of all the organs of the State to generate confidence upon the Judges and the Judiciary. Question is, what is the formula to generate such confidence in the people and litigants.

Judiciary is the watchdog of the Constitution and its fundamental values. It is also said to be the lifeblood of Constitutionalism in democratic societies. At least since **Murbary V. Madison** the authority of Courts functioning under a written democratic Constitution takes within its sweep the power to declare unconstitutional even laws made by the Legislature. A wise exercise of such power

requires an efficient and independent judicial system. In the recent **NJAC** Case Supreme Court of India has observed;

> "The following are among the most essential safeguards to ensure the independence of the judiciary – Certainty of tenure, protection from removal from office except by a stringent process in the cases of Judges found unfit to continue as members of the judiciary, protection of salaries and other privileges from interference by the executive and the Legislature , immunity from scrutiny either by the Executive or the Legislature of the conduct of Judges with respect to the discharge of judicial functions except in cases of alleged misbehaviour and incapacity. Such safeguards be provided with a fond hope that so protected, a Judge would be absolutely independent and fearless in discharge of his duties". In the said case it was further observed,
>
> > "Unscrupulous litigants constantly keep searching for ways to influence Judges. Attitude of the State or its instrumentalities (largest litigants in modern democracies) would be no different. Such temptation coupled with the fact that the State has the legal authority to make

laws including the laws that determine the process of selection of Judges and their service conditions can pose the greatest threat to the independence of the Judiciary if such law making authority is without any limitations. Therefore, extraordinary safeguards to protect the tenure and service conditions of the members of the Judiciary are provided in the Constitution; with a fond hope that men and women, who hold Judicial offices so protected will be able to discharge their functions with absolute independence and efficiency."

In the Constitution India, there is a Constitutional embargo in Article 121 that no discussion shall take place in Parliament with respect to the conduct of any Judge of the Supreme Court or of a High Court in the discharge of his duties except upon a motion for presenting an address to the President praying for the removal of the Judge. Any such provision is absent in our Constitution.

In India a Judge of the Supreme Court can be removed from his office by an order of the President.

The President can issue the removal order after an address by the Parliament, supported by a special majority of each House of Parliament (that is, a majority of the total membership of that House and 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 of Parliament for such a removal.

The step-wise process is:

1. A removal motion signed by 100 members (in case of Lok Sabha) or 50 members (in case of Rajya Sabha) is to be given to the Speaker/Chairman. (The removal motion can be introduced in any of the two Houses of Parliament).
2. The Speaker/Chairman may admit and reject the motion.
3. If it is admitted, then the Speaker/Chairman is to constitute a three-member Committee to investigate into the charges. The Committee should consist of the Chief Justice or a Judge of the Supreme Court, a Chief Justice of a High Court and a distinguished jurist.

4. If the committee finds the Judge to be guilty of the charges (misbehaviour or incapacity), the House in which the motion was introduced, can take up the consideration of the motion.
5. Once, the House in which removal motion was introduced passes it with special majority, it goes to the second House which also has to pass it with special majority.
6. After the motion is passed by each House of the Parliament by special majority, an address is presented to the President for removal of the judge.

Earlier, I have discussed about the evolution of the provision of removal of Judge as provided in our Constitution. The conclusion, to be arrived at in this case, is whether 16th amendment providing the provision of removal of Judge violates the basic structure of our Constitution or not. The power of amendment under Article 142 read with Article 7B of the Constitution does not enable the Parliament to alter the basic structure of the Constitution. The basic structure of the Constitution consists of constitutional principles that are so fundamental

that they limit the amending power. From the analysis made above it must be concluded that if a constitutional amendment alters the basic structure of the Constitution, it can and should be declared unconstitutional. There is no doubt or dispute that the independence of the Judiciary is a basic structure of the Constitution. The independence of the Judiciary is a concept developed over centuries to benefit the people against arbitrary exercise of power. If the independence of the Judiciary is lost, it is gone forever and cannot be regained. This Court has never abandoned its constitutional function as final Judge of constitutionality of a law purported to be enacted under the authority of Constitution.

Similarly, "whoever we are and whatever we are, we must never waver and relent from this position that Bangladesh is a "Republic" and we must always propound it as a republic and nothing short of a republic it is trust sense" (A.B.M. Khairul Haque, C.J. in **Siddique Ahmed V. Govt. of Bangladesh** 33 BLD

(AD) 129). Similarly, D.C. Bhattacharajya, J. in **Md. Shoaib V. Government of Bangladesh (27 DLR 315)** has observed, "In a Country run under a written Constitution, the Constitution is the source of all powers of the executive organ of the State as well as the of the other organs, the Constitution having manifested the sovereign will of the people. As it has been made clear in Article 7 of the Constitution of the People's Republic of Bangladesh that the Constitution being the solemn expression of the will of the People, is the Supreme Law of the Republic and all powers of the Republic and their exercise shall be effected only under and the by authority of the Constitution. This is a basic concept on which the modern States have been built up". Parliamentary democracy is also a part of the basic structure of democracy.

Chief Justice John Marshal warned, " The people had made the Constitution, and they can unmake it". "We the people" is the final masters and

beneficiaries envisioned by the Constitution. The Constitution inscribes Justice as the first promise of the Republic, which means that State Power will execute the pledge of Justice in favour of the millions who are the Republic. "

In a democratic Republic, will of the people is paramount and all the organs of the State are accountable to the people. Simultaneously, it is duty of all the organs of the State to allow the Judiciary functioning independently, smoothly and free from any influence.

Thus, to protect the independence of judiciary as well as in order to respect the people's sovereignty, accountability to the people, proclamation of independence, historic struggle for national independence and principles of nationalism, democracy and socialism for which our brave martyrs sacrificed their lives, keeping the provision as provided in Article 96(2) of the original constitution the legislature ought to provide the

provision in the Constitution for holding inquiry in respect of misbehavior or incapacity of a Judge by the three Senior most Judges of the Supreme Court. In order to meet the situation, the provision of holding inquiry, in respect of allegation of misbehaviour or incapacity of a Judge by the three most senior Judges of the Supreme Court including Chief Justice is a procedure which may protect the independence of judiciary and, in that case, the provision of Article 7B of the Constitution will not operate as a bar on the way to amend the Constitution. That combination can be provided for the reason that our Constitution is the Nation's foundation document which is not only law but also a "law above the law".

Due to absence of such constitutionally protected provision, independence of Judiciary, which is one of the basic structures of the Constitution, is going to be infringed by the impugned amendment for which the Judiciary will be affected seriously.

In future, our people, may hear the outcry which has been narrated by Justice Brayer regarding some Russian Judges. The people want a legal system to operate for which three million people sacrificed their lives in 1971. It is our sacred duty to strengthen all the organs of the State so that the Judiciary can acquire the capacity, resources and necessary independence to play their roles effectively and in accordance with the Constitution and other laws of the land. An independent and properly functioning Judiciary is a prerequisite for the rule of law which requires a just legal system, the right to a fair hearing and access to Justice. Democracy cannot survive without an independent judiciary.

It is the duty of all organs of the State to allow the Supreme Court functioning as guardian of the Constitution and running the Judiciary smoothly, otherwise, the doomsday will not be far of. The Supreme Court is a " balance wheel" as the "lamp" of

the Constitution. It is a lighthouse whose benignant rays of liberty and Justice illumine the troubled surface of the water.

I find myself unable to agree with the findings and observations made by the learned Chief Justice in respect of the provisions of Article 116 of the Constitution, Acts 06 and 07 of 2013, the laws relating to the ratifications of 81 Laws since those laws have not been challenged in this case and no opportunity was given to explain the position of the Government and no submission was made in that regard.

Lastly, I am quoting Blaise Pascal:

> "Justice without power is inefficient; power without justice is tyranny. Justice without power is opposed, because there are always wicked men. Power without justice is soon questioned. Justice and power must therefore be brought together, so that whatever is just may be powerful, and whatever is powerful may be just."

With the observation made above, the appeal is dismissed.

J.

MIRZA HUSSAIN HAIDER,J: I have gone through the proposed judgment of my Lord, the learned Chief Justice and those of the other learned brothers. I fully concur with the decision arrived at unanimously in dismissing the appeal with observation and expunging some of the observations made in the majority judgment of the High Court Division. But I want to take an opportunity to express my own view in the matter.

The question raised in this appeal is whether the Sixteenth Amendment Act, 2014, amending Article 96 of the Constitution is ultra vires the Constitution as the same is against the principle of "Separation of Power", "Rule of Law" and "Independence of Judiciary" which are the basic structures of the Constitution. When the question of "Separation of Power", "Rule of Law" and "Independence of Judiciary" comes, the matter is to

be looked into from the broad spectrum. To consider this aspect, it is required to see whether only the removal process, as has been done by the Sixteenth Amendment, will be the matter for decision so far the "Independence of Judiciary" is concern, or the connected matters regarding appointment of judges and security of tenure and emolument of the judges in the higher judiciary should also be considered. In my opinion, appointment, security of tenure and emolument and removal, are the three basic requirements for independence of judiciary which is also a basic requirement for Rule of law, as required for a judge for dispensation of justice in a free and fare manner. My Lord, the learned Chief Justice and other learned brothers have taken proper care in their proposed deliberations in dealing with the removal process through the sixteenth amendment. In several other judgments of this Court much care in this respect as well as in respect of security of tenure of service and emolument of judges have also been taken care of, with which I fully agree. But I

intend to give my one opinion on the question of appointment of judges in the higher judiciary, which is one of the basic requirements for "independence of judiciary" to justify that the Judges cannot be independent in discharging their constitutional duties if they are not appointed with due care and in accordance with the provisions of the Constitution, to up hold the object of protecting the Constitution and the basic structures of the Constitution namely democracy, Rule of Law and separation of power etc.

We have a very long and chequered history of our independence. The people of the then East Pakistan had been facing disparity in every respect for more than half a century. The rulers were never attentive to the development and rights of the people of the then East Pakistan(which now comprises Bangladesh). The pain of being treated discriminately as well as economic, social, cultural and political disparities frustrated the people resulting revolution against the Rulers. Out burst of such frustration first

surfaced in 1952 when “Urdu” was arbitrarily imposed as the only National Language of Pakistan ignoring “Bangla”, the mother tongue of the majority people of this part of Pakistan, known as the then East Pakistan. The sons of this soil sacrificed their lives for the cause of Mother Tongue(Mother Language). Then again the oppression of the then Rulers of Pakistan compelled the peace loving Bangalees to again rise to the occasion when the Military Janta started mass killing, rape, torture and atrocities on the general people of the then East Pakistan in March, 1971 forcing them to jump into the war of liberation on the call of Banabandhu Sheikh Mujibur Rahman on the night of 26 March, 1971. After nine months of bloody war the people of this part of the Subcontinent earned liberation and on 16th December 1971 Bangladesh emerged as an independent State in the world. Immediately thereafter, the first Constituent Assembly, under the leadership of Banga Bandhu Sheikh Mujibur Rahman took up the responsibility of drafting the Constitution of the

newly liberated Nation. After tremendous hard work the Constitution Drafting Committee prepared the Constitution of the People's Republic of Bangladesh which was enacted by the Constituent Assembly on the 4th day of November, 1972 recognizing the supreme sacrifice of the martyrs and to achieve their dream of establishing a democratic country free from exploitation, in which Rule of Law, fundamental rights and freedom, equality and justice, political, economic and social would be secured.

While enacting the Constitution, the supreme law of the country, the Legislature, consciously incorporated in the Preamble of the Blood-bath Constitution amongst others as follows:

> "We the people of Bangladesh,.....
>
> Pledging that the high ideals of nationalism, socialism, democracy and secularism, which inspired our heroic people to dedicate themselves to, and our brave martyrs to sacrifice their lives in, the national liberation struggle, shall be the fundamental principles of the Constitution;

Further pledging that it shall be a fundamental aim of the State to realise 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;

.....do hereby adopt, enact and give to ourselves this Constitution."

Again in recognition to such sacrifice the framers in Article 7 also incorporated as follows:

"7.(1) 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.

(2) This Constitution is, as the solemn expression of the will of the people, the supreme law of the Republic, and if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void."

To achieve the goal of removing disparity the framers of the Constitution in Part II (Articles 8 to 25) stipulated the fundamental Principles of State Policy wherein in Article 8 it stipulated:

> "8(I)The principles of nationalism, socialism, democracy and secularism, together with the principles derived from those as set out in this Part, shall constitute the fundamental principles of state policy.
>
> (2) The principles set out in this Part shall be fundamental to the governance of Bangladesh, shall be applied by the State in the making of laws, shall be guide to the interpretation of the Constitution and of the other laws of Bangladesh, and shall form the basis of the work of the State and of its citizen, but shall not be judiciary enforceable."

Under Article 55 the Executive Power of the Republic is to be exercised by the Prime Minister in accordance with the Constitution, under Article 65 Parliament has been vested with the Legislative Power and under Article 94 Supreme Court, with two Divisions, the Appellate Division and the High Court Division, has been established with jurisdiction incorporated in different articles of Chapter I of Part VI of the Constitution. Article 94(4) has provided independence of the Chief Justice and other Judges in the exercise of their judicial functions.

On the other hand Article 22 ensured the separation of judiciary from the executive saying:

> "22. The State shall ensure the separation of the judiciary from the executive organs of the State."

To ensure achieving the goal the framers also rightly thought that unless the three organs of the State, namely, Executive, Legislature and Judiciary are given their independence to perform their respective constitutional duties, as has been spelt out in Part IV, V and VI, without being interfered by any other organ, the Supreme sacrifice of the martyrs would fall aside and would be meaningless.

The original Constitution of 1972, subsequently, has been amended a number of times in last 46 years and many provisions of the Constitution have been amended/repealed/ incorporated. Conscious people and the jurists challenged many of such amendments. Starting from **Mukhlesur Rahman's case** this Court in many other cases like **8th amendment case, Masdar Hossain's case, 10 Judges case, 5th**

amendment case, 13th amendment case etc. methodically declared many of such amendments and laws ultra vires, finding the same to be inconsistent with the Constitution. Relying upon several decisions of the sub-continent and considering the views of many other jurists of other jurisdiction, this Court held that "Sovereignty", "Supremacy of the Constitution" "independence of the Judiciary" and "rule of law", are, amongst others, the basic structures of the Constitution. In **Masdar Hossain's case** this Division specifically observed:

> "*The judiciary must be free specially from the Parliament and the Executive to decide on its own matters of administration bearing directly on the exercise of its judicial functions.*"

So independence of judiciary cannot be obtained unless the judiciary is completely separated from other two organs, otherwise the Judges, appointed under the constitution, will not mentally feel that they are free in discharging their constitutional duties.

For the disposal of this case, basically we are concerned with Articles 94, 95 and 96. By sixteenth amendment Article 96 has been amended which deals with 'tenure of office of the judges'. One thing is required to be mentioned here is that in the original Constitution of 1972 Article 96 as it was, had been amended firstly on 25.1.1975 by 4th amendment wherein the power of the Parliament to remove the judges of the higher judiciary was taken away from the Parliament and given to the President of the Republic who, upon serving show cause notice would exercise such power. However, the power was only given to the President but no rule was ever framed other than the proviso as mentioned above. Thereafter on 01.12.1977 during the Martial Law Regime, the then Chief Martial Law Administrator, by the 2nd Proclamation (Tenth Amendment) Order 1977 again amended Article 96 and thereby introduced the procedure of removal of judges by the President of the Republic on the basis of report, sought for, from the Supreme Judicial Council constituted under Article 96(3) which has been

ratified, confirmed and validated by the 5th amendment Act 1979. This procedure was never disturbed, either by judicial pronouncements or by subsequent amendments of the Constitution, till the impugned 16th amendment. In the meantime in the case of **Khondker Delwar Hossain and others Vs. Bangladesh Italian Marbel works Ltd. and others (2010 BLD (Spl)2=62 DLR(AD)298)** the 5th amendment has been declared ultra vires the Constitution and thereby all acts of the Martial Law Rulers including the laws framed by them were declared illegal by the Apex Court. But the system of removal of the judges by the President through the Supreme Judicial Council was not disturbed rather the same provision was provisionally condoned till 31.12.2012 'in order to avoid disastrous, consciousness to the body politic for enabling the Parliament to make necessary amendment to the Constitution and also for enacting laws, promulgated during the aforesaid period'. In the said decision this Division held:

> "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) to 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. This substituted provision being more transparent procedure than that of the earlier ones and also safeguarding the independence of judiciary, are to be condoned."

Pursuant to 5th amendment case judgment, the 9th Parliament took steps to amend the constitution and accordingly held discussions with cross-sections of people for more than a year, obtained opinions of several eminent jurists, politicians, educationists etc. and then passed the 15th amendment of the Constitution by Act No. 14 of 2011. Interestingly in the said amendment the Parliament incorporated Article 7B prohibiting amendment of the basic structures of the Constitution along with some other

articles specified therein. In the said amendment Chapter I of Part VI, which includes Articles 94, 95 and 96, were consciously kept undisturbed except incorporating Article 95(2)(c), meaning the system of Supreme Judicial Council was not disturbed inspite of the Supreme Court's observation made in the 5th amendment case as to do the needful within 31.12.2012 during the period when the system of Supreme Judicial Council was provisionally condoned. Thereafter more than three years having been passed the 10th Parliament passed the impugned 16th Amendment and thereby in the name of going back to the original Constitution of 1972 amended Article 96 under the authority of Article 142 of the Constitution ignoring the fact that by now the Constitution has been armed with Article 7B which has totally prohibited amendment of the basic structures of the Constitution with non obstante clause. In the 5th amendment case it has been observed that 'The power to amend the Constitution is an onerous task assigned to the Parliament which represents the will of the people

through their chosen representatives. It is to be carried out in accordance with the procedure prescribed in Article 142 of the Constitution and by no other means, in no other manner and by no one else'. But such power of the Parliament has been restricted by Article 7B incorporated by the 15th Amendment. Article 7B reads as follows:

> "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."

Though the term basic structures have not been defined categorically, but in reality the basic structures of a Constitution are clearly identifiable. By now in several judicial pronouncements of our jurisdiction as well as in other jurisdictions it has been held that (i) Sovereignty of the country (II) Supremacy of

Constitution; (III) Democracy (IV) Republican Government (V) Separation of Power; (VI) Independence of Judiciary (VII) Unitary State (VIII) Fundamental rights are the main basic structures/features of Constitution.

Admittedly Sovereignty and the Supremacy of the Constitution are the solemn expression of the will of the people. Similar is the position of Separation of Power, Independence of the Judiciary, Rule of Law and Fundamental rights. There is no dispute about their identity. The principle of separation of powers means that the sovereign authority is equally distributed among the three organs of the State, namely, Executive, Legislature and Judiciary and as such their jurisdiction and authority have been specifically provided for in Part IV, V and VI respectively. One organ cannot overstep into the domain/authority of the other and thereby destroy the other. The Constitution has made such restriction to keep all the three organs separate and independent

and also to keep harmony among the three organs which are actually structural pillars of the Constitution. They stand beyond any change by amendatory process. The Constitution stands on certain fundamental principles which are structural pillars and if these pillars are touched/ demolished/ damaged the whole constitutional edifice will fall down. It is actually by construing the constitutional provisions these pillars are to be identified. Even the parliament cannot amend the basic structures/pillars of the Constitution, which are fundamental in character, by exercising its amending power. To make these pillars strong and to act in accordance with necessary prestige and authority for the purpose of ensuring full democracy, human dignity, rule of law and freedom of the Constitution, the framers of the Constitution gave much emphasis to keep the three pillars specifically identified so that each one of them can exercise their respective duties having exclusive authority and complementary to one another

though they have certain clearly defined functions in their respective fields.

The independence of the judiciary has both an objective component, as an indispensable quality of the judiciary as such; and a subjective component, as the right of an individual to have his/her rights and freedoms determined by an independent judge. Without a judge being independent there can be no correct and lawful implementation of rights and freedoms as well as interpretation of law. Consequently the independence of the judiciary is not an end in itself. It is never a personal privilege of the judge but justified by the need to enable the judge to fulfill his/her role of guardian of the rights and freedoms of the people as a protector of the Constitution. So the independence of the judiciary depends not only on the provisions for removal of a judge but it is also a comprehensive process starting from (a) selection and criteria for evaluation of judges to be selected followed by (b) security of

tenure and (c) providing adequate emolument and providing procedure for removal on proven misconduct with adequate opportunity and participation for the judge to defend his/her position before an independent tribunal duly constituted under a law following international standard. Independence of judiciary thus depends not only on the question of removal of each judge by any particular organ of the state. It must be guaranteed by the state and enshrined in the Constitution or the law of the land so that the judiciary can decide the matters brought before them impartially on the basis of facts and in accordance with law, without any restriction, improper influences, inducements, pressures, threats or interferences, directly and/or indirectly, from any quarter or for any reason. The judiciary shall have jurisdiction in all cases of judicial nature and shall have exclusive authority to decide the issue submitted to it for decision within its competence as defined by law. There shall not be inappropriate or unwarranted interference, threats or fear with the

judicial process, nor shall judicial decisions by the Courts be subjected to revision other than by judicial process.

From the above, it is clear that the independence of the judiciary depends not only on its working system but also on the necessity of selecting impartial personalities and competent persons as judges which is an integral part to uphold the rule of law, endangering the public confidence in dispensation of justice. Though the matter involved in this case is not relating to appointment of judges but when the question of independence of judiciary comes both appointment and removal crops up for discussion as both the processes are *sine qua non* to each other.

Thus the appointment of judge should be on a very fair and impartial process on the basis of quality, defined criteria and publicly declared process and such process should ensure equal opportunity for all who are eligible for appointment

in the judicial office on merit irrespective of gender discrimination or for any such discrimination and appropriate consideration should be given to the need for the progressive attainment. Once a judge is appointed arrangements should be given for appropriate security of tenure and protection of levels of remuneration and adequate resources should be provided in the Judicial system to operate effectively without any undue constrains which may hamper the independence sought for. In our constitution the independence of judiciary has been referred to in Article 94(4) and 116A of the Constitution. This Division in **Masder Hossain's Case** observed as follows:

> "The independence of the judiciary, as affirmed and declared by the 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,..... we find no provision in the Constitution which curtails, diminishes or otherwise abridges this independence."

In the said case this Division upon reflecting the principle laid down by the Supreme Court of Canada in the case of ***Water Valente Vs. Her Majesty the Queen (1985) 2 R.C.S. 673*** held that 'an independent, impartial, competent and ethical judiciary is essential to establish the rule of law. In order to ensure the independence of the judiciary the legal frame work should include:

(I) A system by which the judges are chosen and appointed;

(II) The terms of their tenure; and

(III) an independent and competent body to determine whether any one has committed the said misconduct or about his incompetence after due process of allowing him/her on the facts and independent competent body for determination of any judge's misconduct has been provided by all my brothers in their different judgments with the finding to which they have arrived at.'

One thing is to be kept in mind that 'in the decision making process, the judges should be independent and be able to act without any restriction, improper influence, inducements, pressures, threats or interferences direct or

indirect, whatsoever from any quarter or for any reason. Judges should have unfettered freedom to decide cases impartially, in accordance with their conscience and their interpretation of facts and also in pursuance of the prevailing rules of law. The judges should not be obliged to report on the merit of the cases to anyone outside the judiciary'. This view has been expressed in the report on "*Independent System by the Venice Commission*".

Keeping this view in mind this Division in **Masder Hossain's case** observed:

> " *The Judiciary must be free especially from the Parliament and the Executive to decide on its own matters of administration bearing directly on the exercise of its judicial function. The Judiciary must be free from actual or apparent interference or dependence upon specially the executive arm of the Government. It must be free from powerful non-governmental interference like pressure from corporate giants, business or corporate bodies, pressure groups, media, political pressure etc.*"

The Constitution, in Article 95 dealt with appointment of judges in the Supreme Court. The

original Article 95 as it was in the 1972 Constitution reads as follows:

"৯৫ । (১) প্রধান বিচারপতি রাষ্ট্রপতি কর্তৃক নিযুক্ত হইবেন এবং প্রধান বিচারপতির সহিত পরামর্শ করিয়া রাষ্ট্রপতি অন্যান্য বিচারককে নিয়োগদান করিবেন।
(২) কোন ব্যক্তি বাংলাদেশের নাগরিক না হইলে এবং
(ক) সুপ্রীম কোর্টে অন্যূন দশ বৎসরকাল অ্যাডভোকেট না থাকিয়া থাকিলে, অথবা
(খ) বাংলাদেশের রাষ্ট্রীয় সীমানার মধ্যে অন্যান দশ বৎসর কোন বিচারবিভাগীয় পদে অধিষ্ঠান না করিয়া থাকিলে কিংবা অন্যূন দশ বৎসরকাল অ্যাডভোকেট না থাকিয়া থাকিলে , এবং অন্যূন তিন বৎসর জেলা- বিচারকের ক্ষমতা নির্বাহ না করিয়া থাকিলে তিন বৎসর জেলা- বিচারকের মতা নির্বাহ না করিয়া থাকিলে তিনি বিচারকপদে নিয়োগলাভের যোগ্য হইবে না ।
(৩) এই অনুচ্ছেদে "সুপ্রীম কোর্ট" বলিতে এই সংবিধান- প্রবর্তনের পূর্বে যে কোন সময়ে বাংলাদেশের রাষ্ট্রীয় সীমানার মধ্যে যে আদালত হাইকোর্ট হিসোবে এখতিয়ার প্রয়োগ করিয়াছে, সেই আদালত অনড়র্ভুক্ত হইবে। "

By fifteenth amendment the same has been given the following shape:

"95.(1) The Chief Justice shall be appointed by the President, and the other Judges shall be independent in the exercise of their judicial functions.

(2) A person shall not be qualified for appointment as a Judge unless he is a citizen of Bangladesh and-

(a) has, for not less than ten years, been an advocate of the Supreme Court; or

(b) has, for not less than ten years, held judicial office in the territory of Bangladesh; or

(c) has such qualifications as may be prescribed by law for appointment as a Judge of the Supreme Court.

(3) In this article, "Supreme Court" includes a court which at any time before the commencement of this Constitution exercised jurisdiction as a High Court in the territory of Bangladesh."

From the above it appears that sub-Article (2)(c) was not there in the original Constitution of 1972. It has been newly incorporated by 15th amendment in 2011 which clearly stipulates enacting a law determining the qualification of a person to be appointed as a Judge of the Supreme Court. Interestingly, Article 95(2)(c) being incorporated by the 15th Amendment in 2011, the Parliament without enacting any such law determining the qualification of a person to be appointed as a Judge of the Supreme Court, jumped upon to amend Article 96 which deals with removal of a judge of the Supreme Court. It is not understood as to why it has been done? Unless the appointment process is determined by enacting law as per Constitutional provision how removal process could be enacted? First of all there should be a criteria determined by law for appointment of a person a judge in the higher judiciary and then the question of removal of such judge comes. But interestingly for the reasons best known to the Parliament they have come forward with removal

procedure than to think over the appointment procedure. It is not understood as tom why inspite of the fact that there are existing procedure in the Constitution as to qualification of a person to be appointed as a Judge in the higher judiciary as well as the removal process, the Parliament had been so eager to deal with the process of removal of the judges of the Supreme Court before determining the qualifications for appointment pursuant to Article 95(2)(c)? My Lord, the Chief Justice and my other learned brothers have taken proper care of such enthusiasm in their judgments with which I agree. So I do not require to make any further comment on it.

Once the appointment procedure is determined with due scrutiny by choosing from among the persons having experience and maturity in law with integrity and ethical value, well-versed over the law and language and with determination and courage to do justice there will be hardly any occasion to draw disciplinary action for removal of any such judge.

In the international arena the practice and procedure of appointing the judges have changed with the need of the time. It is no longer limited within the consultation with the Chief Justice and the law Minister, representing the Executive. Rather in course of appointment of a person as a Judge of the Higher Judiciary, objective criteria, transparency, equal opportunity; integrity; moral value and meritocracy should be taken into consideration through objective evaluation, should be the method of choosing and picking up competent persons who can take appropriate role to protect the people's right and the Constitution. In our country, since after liberation, the process of appointing judges in the higher judiciary is encircling consultation with the Chief Justice. In old days the Chief Justice used to consult his brother judges and Senior Advocates for determining the credibility of any particular advocate/ person if he is to be appointed as a Judge of the High Court Division. Then the same would be sent to the President of the Republic for

appointment. But the said system/process is no more in practice now a days. Rather it has become completely different. Now the executive prepares a list of its choice and then sends it to the Chief Justice as a formality, as if the office of the Chief Justice is a post box. This practice will hardly find competent persons for appointment as a judge of the higher judiciary. Because the executive as well as Legislature are generally comprised of Political personalities they cannot chose right person having depth of law. Rather person having political affiliation will get preference over the quality lawyers. The Executive/Legislature being not a regular visitor to the Court arena are not fully acquainted with the quality of lawyers, their knowledge/depth of law and experience. So, knowledgeable personalities will not get preference over others. Unless hard working lawyers with knowledge of laws, integrity and courage are chosen and appointed as judges, the quality of judges are obvious to fall down. Thus quality, impartiality,

honesty and competence are directly related to make the judiciary independent which can only be chosen by the judges, before whom the lawyers appear and practice law, not the outsiders. This is what is required for upholding the rule of law and dispensation of justice.

In 1998 **the Latimer House Guidelines for the Commonwealth** observed that 'There *should be an appropriate independent process for judicial appointments. Where no independent system already exists, appointments should be made by a commission established by the Constitution or by statute.*

The appointment process, whether or not involving an appropriately constituted commission, should be designated to guarantee the quality and independence of mind of those selected for appointment at all levels of judiciary.'

As it has been said earlier that Article 95(2)(c) of the Constitution has already provided for enacting laws in respect of determining the criteria/qualification for appointment of judges in

the higher judiciary so that general people, to whom all powers of the Republic belong, be informed of the characteristics that qualify persons for judicial office and the procedures that are followed when an individual is considered for appointment. The appointment procedure should also reflect equality of opportunity, appointment on merit and gender inequity and other criterions like honesty, technical, moral and ethical values command over the language and last but not the least the capability of understanding and deliberation of judgment are proved. There is a saying that 'justice shall not only be done it shall also seen to have been done'. The selection process should be made from among the most capable persons irrespective of religion, gender or any political affiliation. After taking oath as a judge a person is to keep in mind that the moment he takes oath he starts a new life forgetting whatever he was or he might have been. He is to think, speak and maintain his conduct and behaviour in a dignified manner concentrating himself that he is a judge

meaning he is impartial so that the people can place their confidence upon him to get justice. In this respect I shall also add that mere appointment of a qualified person as a judge, irrespective of higher or lower judiciary, shall not be the end of it. But proper judicial educational training system should also be developed. In that respect systematic and ongoing training should be organized, under the control of an adequately funded judicial body. Judicial training should include teaching of the law, judicial skills and social context including ethnic and gender issues so that knowledge, specially the development in the modern world, judicial skills are updated with the modern development. To justify an old saying 'more rich the Bar is, more rich the judgments are' and vice versa it is very much essential to provide proper training to the learned advocates also under the prevailing context for improving their quality. Otherwise it will be very difficult to run and maintain the smooth justice Administration system.

In a **consultation paper on Superior Judiciary**, chaired by Justice Shri H.R. Khanna (held on 26.9.2001) the Indian National Commission observed:

> *"Our concern has been to effectively deal with and rectify instances of deviant behaviour among members of the super judiciary to safeguard the fair name of judiciary, its independence and its image. A few unworthy elements here and they are sullying the image of judiciary. It has to be checked. For judiciary, its image and its reputation is all important; if that is tarnished, nothing remains. It is equally necessary to create mechanism which serve to enhance the image and effectiveness of Superior Judiciary."*

Since the higher judiciary is the custodian of the Constitution it should also therefore be the founding for practicing judicial norms in dealing with right of litigant to be able to dispense justice in a even handed manner without any fear and favour or under any pressure or threat.

From the above, it is clear that the appointment process should be methodically spelt out consistently with the provision laid down in Article 95. The term "Consultation with the Chief Justice" should be made

more open so that the consultation is not confined only with the Chief Justice and the representative of the Executive but the same should be meaningful and practical one so that when the Chief Justice can discuss the matter with his fellow brothers and senior members of the Bar for evaluation in respect of strength and weakness of candidates.

In the case of ***Supreme Court Advocates-on-Record Association Vs. Union of India, (1993)(4)SCC 441*** the Indian Supreme Court upon overruling the decision in S.P. Gupta's case seven out of nine judges specified a procedure for appointment of judges of the Supreme Court in the interest of "protecting the integrity and guarding the independence the judiciary". It was held that "*the recommendation in that behalf should be made by the Chief Justice of India in consultation with two senior most colleagues and that such recommendation should normally be given effect to by the executive. ..... that selection of judges must be in hands of the judiciary.....*"

In addition to this view, I would like to add for our country, that while taking opinion of two senior most colleagues the Chief Justice may also take the opinion of the High Court Judges as well as the senior members of the Bar since most of the members appear before them and/or with them. Moreover, it is the judiciary who knows best about the depth of knowledge of a particular candidate/lawyer and also about his conduct, behaviour and accountability to justify whether he is capable of being appointed as a judge. Once such extensive practice is adopted with due scrutiny, there will be hardly any necessity to draw disciplinary action for removing a judge other than in exceptional cases. Independence of judiciary being the basic feature as has been held in several decisions, both home and abroad, necessary implications are required so that this concept of independence must be consistent to exclude the executive or other influences in respect of both appointment and removal of the judges.

However, on reading Article 95(2) of the Constitution it appears that the said Article described 3 categories of disqualification for being appointed as a Judge of the higher judiciary. Reading Articles 95 and 96 together it can be found what should be the criterion for appointment as a Judge of the Supreme Court. The Parliament vested with legislative power of the Republic is the authority to enact the law. It is contemplated in Article 95 (2)(c) to enact a law prescribing qualifications for appointing a Judge in the higher judiciary. But no law has yet been enacted in this respect to safe guard and protect the independence of judiciary, and thereby uphold the Rule of law and maintain spirit of the separation of judiciary for keeping the aforesaid basic structures of the constitution untouched. However since, in **Masder Hossain's** case independence of judiciary and the Rule of law have been declared as the basic structures of the Constitution and in 5th amendment case this Division has specifically expressed its view to retain the amended clause of

Article 96 incorporated by the second proclamation (10th amendment order) holding '*this substituted provision (the Supreme Judicial Council) being more transparent procedure then that of the earlier one and safeguarding the independence of judiciary, are to be condoned*' and the said procedure being in operation till 2014, I am of the opinion that the said procedure should not be disturbed. The removal process of a Judge of the higher judiciary as laid down in the impugned 16th amendment will render insecurity in the mind of the judges thereby creating opportunity to undermine the independence of judiciary making this organ vulnerable and jeopardizing the rule of law which will create opportunity for creating political influence and pressure upon them specially when Article 70 of the Constitution is subsisting. So long Article 70 is there the independent wish of a member of the Parliament in respect of casting vote freely does not exist. Justice Badrul Haider Chowdhury in the 8th Amendment case observed:

> *"Removal of judges by the President consequent upon a report of the Supreme Judicial Council is a unique feature because the Judge is tried by his own peers, 'thus there is secured a freedom from political control'."*

Thus the power of appointment and removal of a judge should not be left with the Parliament rather it should be given to the Supreme Judicial Council strengthening the internationally accepted principle of independence of judiciary and rule of law.

The Supreme Court of India in the case of **Sub-committee of Judicial Accountability Vs. Union of India, reported in (1991) 4 SCC 699**, upon considering the procedure and practice in England, Canada, Australia and in United States of America, noted that 'in most of these countries the appropriateness of the process of impeachment of Judges was questioned, mainly on the ground of partisanship or political consideration being injected into the process by which the removal of Judges is adversely affected. The suggestions for change/reform have generally been provided for an independent judicial council or

commission for a quasi-judicial determination, following investigation and evaluation of evidence to determine if the ground for removal is substantiated by an independent judicial commission/council. This invariably implies that such commission or council is required to be composed of judges'.

Lord Steyn of the House of Lords in England in the book **the judge in democracy** said:

> "The threat of impeachment proceedings is subject to exploitation by politicians seeking to influence judges. Removing a judge from office must be done exclusively through a proceeding that guarantees the independence of the judge in his tenure. Such a proceeding should be run by judges, not politicians. It should be run a trial in every way."

It will not be out of place to mention that the disciplinary action of all service holders are taken by the department concerned after holding in-house inquiries by the same department to which he belongs not by any outsider. That is the general principle of law. The Judiciary cannot be an exception.

Thus when the question of removal of any person holding a post of Supreme Court Judges' status arises, that should be and must be dealt with by such council of their own people, of course higher in rank. According to **Lord Denning** "***Someone must be trusted. Let it be the judges.***" Since the Supreme Judicial Council has been recognized by the Supreme Court in 8th amendment and 5th amendment cases and made part of the Constitution because of the fact that the decision of the apex Court is final not only because those are being infallible but also because those decisions are infallible as they are constitutionally final. And the provision of Supreme Judicial Council comprised of the Chief Justice and other two senior Judges of the Appellate Division, the higher persons in the fraternity has been found to be more transparent by the apex court in the 5th Amendment case, and the same having not been repealed or touched rather having been recognized by the 9th Parliament in a democratic process through the 15th amendment I am of the opinion that the decision

arrived at by my other brothers in respect of removal of the judges of the higher judiciary has rightly been vested in the hands of the Supreme Judicial Council instead of the Parliament, as has been done by 16th amendment. On the other hand so long the Legislature has not enacted any law pursuant to the present Article 95(2)(c) in respect of determining the qualification for appointment of a judge in the higher judiciary, the appointment process should be vested upon the said Council headed by the Chief Justice, who can gather information/opinion through other various methods in respect of any candidate and thereby get the final order of appointment/removal by the President of the Republic. Unless these procedures are followed and executive/legislature is given the authority to appointment or remove the judges of the higher judiciary beyond the scope of the Constitutional dictates then there is a possibility of either of the organs of being superior, undermining the authority and independence of any other organ, which will hamper the basic

structure of the Constitution of separation of powers and independence of each of the organs of the State. In that case **Lord Acton's** observation **"All powers tends to corrupt. Absolute power corrupts absolutely"** will come to play and the object as incorporated in the preamble, as well as in Article 8, of our blood-bath Constitution will be frustrated disregarding the supreme sacrifice of the martyrs.

With this view and observations I fully concur with the reasonings of the learned Chief Justice and the unanimous decision arrived at by all my learned brothers. Accordingly this appeal is dismissed with above observations.

J.

Order

Since all but one wrote separate judgments expressing their separate opinions, we unanimously dismiss the appeal, expunge the remarks made by the High Court Division as quoted in the judgment of the

learned Chief Justice and also restore clause (2) (3), (4), (5), (6) and (7) of article 96 and also approve the Code of Conduct formulated in the main judgment.

C.J.

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The 3rd July, 2017

Md. Mahbub Hossain.

APPROVED FOR REPORTING