PREVENTION OF JUDICIAL CORRUPTION IN BANGLADESH: CUTTING THE GORDIAN KNOT BY ENSURING ACCOUNTABILITY

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ABSTRACT

Judicial corruption has eaten away at good governance in Bangladesh for decades, hindering its ambition to attain the United Nations Sustainable Development Goals (“SDGs”) and taking advantage of the absence of any effective accountability mechanism. The magnitude of corruption is so intense that the successive Chief Justices, Attorneys-General, local, and international anti-corruption organizations, and even the Supreme Court of Bangladesh (“SCB”) itself in a judgment have forthrightly admitted the prevalence of judicial corruption. The malpractice does profoundly undermine the rule of law and infringe on the people’s right to fair trial. Corruption is on the rise in the country as pronounced by Transparency International in its Corruption Perception Index 2022 released on February 1, 2023. The existence of the sole accountability body, the Supreme Judicial Council (“SJC”), is now in limbo following the constitutional amendment in 2014 replacing the SJC with the parliamentary empowerment in removing the SCB judges. Meanwhile the SCB has declared the amendment unconstitutional and ordered restoration of the SJC. But the executive has lodged a review petition reinforcing its refusal to return to the SJC consisting of exclusively three designated SCB judges. Consequently, judicial accountability is presently hamstrung by the conflict between the judiciary and the executive. This Article first presents a critical analysis of the entrenched judicial corruption and its consequences and then recommends establishing a new accountability body embracing judge and non-judge members building on the international standards stipulated by the International Commission of Jurists and its successful application in Australia. The Article

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formulates the composition and functions of the new body to be called Judicial Commission of Bangladesh (“JCB”) to bring about a reconciliation between the two apparently irreconcilable organs of the government and operate as a watchdog for the judiciary.

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**I. INTRODUCTION**

Public confidence in the judiciary is propelled by the quality of the administration of justice, which can be promoted by both the
individual accountability of judges and the institutional accountability of courts.\(^1\) We do have utmost respect for the judiciary, thus bastardising Shakespeare, we would say that we have no intention “to bury judges, nor to praise them.”\(^2\) Corruption by judges and other court officers is obviously a crime punishable with imprisonment of a maximum term of three years, with fine, or with both under the Penal Code 1860 (Bangladesh).\(^3\) Alongside the core penal legislation, corruption is also an offense that shall be punished with imprisonment for a term which may extend to seven years, with fine, or with both as well as with confiscation of certain property related to the offense under the Prevention of Corruption Act 1947 (Bangladesh).\(^4\) Despite such legal sanctions and allegations that the judiciary is “extremely corrupt,” action taken against such judicial corruption is inadequate.\(^5\) Sheikh Hasina, the incumbent and the longest-serving Prime Minister of Bangladesh, declared “zero tolerance for corruption” when she addressed the nation for the first time after she was sworn in for her third consecutive term of five years in early 2019.\(^6\) The declaration came about in response to a despicable revelation by Transparency International (“TIG”), a German-based organization, which ranked Bangladesh as the second most corrupt country in South Asia and 146th out of 180 countries in its annual Corruption Perceptions Index.\(^7\) Ironically, the ranking went further down to 147th in 2021.\(^8\) The judiciary has been found to be the second most corrupt public service sector in the country, just

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\(^3\) PENAL CODE, §§ 165, 213–14 (1860) (Bangl.); Anti-corruption Commission Act, §§ 2(e), 17, Schedule (B)–(C) (2004) (Bangl.).

\(^4\) Prevention of Corruption Act, §§ 2–5 (1947) (Bangl.) (stipulating punishment in § 5(2)).


\(^8\) TRANSPARENCY INT’L, CORRUPTION PERCEPTIONS INDEX 2021 3 (2022).
after law enforcement agencies. 9 A survey conducted by Transparency International Bangladesh (“TIB”), a sister organization of TIG, released on August 31, 2022 reveals that 56.8% of surveyed households had become victims of corruption while seeking judicial services.10 Reflecting on the TIB report, an influential editorial comments that there is “no sign of ‘zero tolerance’ for corruption.”11 This is so because, as the TIB report adds, the reality demonstrates an extremely high level of tolerance being shown to corruption by government officials, as about 71% of 15,454 households had to pay bribes while they sought public services in 2021.12

In the wake of massive corruption allegations against the judiciary, Professor Abul Barakat, a distinguished economist in the country,13 publicly raised a complaint in April 2016 to Justice Surendra Kumar Sinha (the then Chief Justice of Bangladesh).14 In a response speech, Justice Sinha admitted the prevalence of corruption in the judiciary, but inappropriately defended by arguing that “corruption prevails all over the place across the country and judiciary is nothing different”; and adding that “when there is corruption at all layers across the country, judiciary is not a separate island where there is no corruption and everyone here is an angel.”15

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12 Id.


Instead of pledging to eradicate corruption as head of the judiciary, Justice Sinha expressed his generosity towards corruption by saying that “we have to accept it and continue to work for the people in such circumstances.” While he professed to continue serving the people in the corruption-ridden workplace, Justice Sinha most likely ignored the actuality that dishonest judges can serve only themselves, because they are engrossed only in what they can materially grab for making their own fortune. Also, he likely attempted to hide his own wrongdoings because Justice Sinha, who served as the twenty-first Chief Justice of Bangladesh from January 2015 to November 2017, has been convicted of graft offenses in November 2021 and sentenced to seven years in prison for money laundering and another four years for embezzlement (breach of trust). He tendered his resignation unusually from overseas on November 11, 2017 amid graft allegations and has been living in the United States ever since.

Following the disputed resignation of Justice Sinha, Justice Syed Mahmud Hossain was sworn in as his successor in February 2018 as the twenty-second Chief Justice of Bangladesh. Mr.

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Mahbubey Alam, the Attorney-General for Bangladesh at that time, missed no opportunity to remind the newly appointed Chief Justice Hossain of his key responsibility to deal with the excruciating judicial corruption. 21 Attorney-General Alam, 22 who was known as a distinctly honest lawyer, publicly asserted at the greeting ceremony organized to welcome the Chief Justice, just days after his appointment to the nation’s top judicial office, that a majority of court officials and employees were engaging in corruption. 23 Mr. Alam warns that “if this situation continues, it will be difficult for those who are still honest to maintain their honesty.” 24 Sharing his prolonged experience as a Supreme Court lawyer, Mr. Alam added that “I did not hear any negative remark even against any bench officer when I entered the court in 1975. But what is discussed now about different High Court benches cannot be expressed in words.” 25 He confidently informed Chief Justice Hossain and the audience that “the most dangerous matter is that some particular courts have turned into courts of particular lawyers. The justice-seekers know by which lawyers at which courts they can win their cases. This is completely contrary to the justice.” 26 He expected Justice Hossain to bring about radical changes during his term as Chief Justice. Unfortunately, Mr. Alam had died keeping the Chief in his office, 27 and the legacy of corruption survives, prompting late Alam’s successor, Mr. A M Amin Uddin—the current Attorney-General for Bangladesh—to make the same appeal to the present Chief Justice Hasan Foez Siddique (the

23 Attorney General: Majority of Court Staff Involved in Corruption, supra note 21.
24 Id.
25 Id.
26 Id.
27 AM Amin Uddin made new Attorney General, supra note 22.
Attorney-General Uddin emphatically called on Chief Justice Siddique on the first day of the latter’s office as the chief judge in early January 2022 to take action against corruption and irregularities in the administration of justice, and pledged his wholehearted support to wipe out corruption prevalent in the judiciary. Mr. Uddin voiced this in his speech at the traditional felicitation event organized to congratulate the newly appointed Chief Justice. Unlike Justice Sinha, Justice Siddique promisingly assured the audience that he would address the corruption menace on a priority basis. Justice Siddique also declared that he would not compromise on this issue and gave a stern warning to all judicial officers and their administrative assistants that if any corruption is discerned, he would immediately suspend the persons involved, irrespective of their positions. Justice Siddique compared corruption with cancer and he warned that “corruption is a cancer-like disease. If any finger is infected with cancer, it is better to cut it off,” and he makes it clear that he would not provide any safeguard to any corrupt officials.

A similar complaint about corruption was echoed by Mr. Ghulam Rahman, a former Chairman of the Anti-Corruption Commission of Bangladesh (“ACC”). Mr. Rahman, in speaking with the journalists while he was still holding the Chair, stated that instead of facilitating trial procedures, courts were thwarting the disposal of corruption cases, and therefore the judiciary has not been helpful in dealing with corruption. Such a claim by a sitting

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28 Corruption is Cancer, I Will Not Compromise, DAILY JANAKANTHA (Bangl.), at 1 (Jan. 3, 2022), https://epaper.dailyjanakantha.com/?d=2022-1-3&p=1
29 Id.
30 Id.
33 Id.
35 Id.
Chairman of ACC reinforces the persistence of judicial corruption at an alarming rate.

Finally, the Supreme Court of Bangladesh ("SCB") itself has formally admitted the pervasiveness of judicial corruption in a very courageous way by incorporating the fact into a judgment on appeal against a decision which was found to be tainted by corruption of the trial judge. A bench of the High Court Division of the Supreme Court of Bangladesh ("HCD") comprised of Justice Md Ashraful Kamal and Justice Razik-Al-Jalil on appeal in Government of Bangladesh v. Chairman, First Court of Settlement and Others in 2019 noted that "the judiciary is the last resort of the people. When it sells a verdict through corruption, the people have nowhere else to go. They get angry and seek an alternative, and that is when they turn to goons, terrorists and mafias seeking justice." The bench of the HCD pronounced that "[t]he time has come to revamp the judiciary . . . and to make it a reliable, credible and an ideal institution by rooting out corruption." The learned bench, referring to the dishonest judges, further suggested that "corrupt judges should be discharged from their duties immediately in order to keep the judiciary free from graft, otherwise they will gradually influence others onto their paths." Furthermore, the HCD judges underscored that "the rule of law and judicial corruption cannot go side-by-side. If judicial officers and court employees remain corrupt, then the rule of law will be confined to the book, and will never be actualised." The HCD was also critical of the mass media for keeping silent about judicial corruption, and noted with dismay that "there has been no specific report, write-up or research on how to throw out corrupt judges (from lower courts to higher courts), although they frequently call for judicial independence". The HCD underlined that now is the time to bring

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37 Government v. Chairman, supra note 36; It is Time to Revamp the Judiciary: HC, supra note 36.
39 Bangladesh v. Chairman (SCB (HC) 2019), supra note 36, at 135.
40 Id. at 135–36.
all corrupt judges and other public employees to justice.\textsuperscript{41} It is obviously appalling for the whole nation when the judges of the country’s highest court make such strong comments with specific suggestions in a formal judgment. Though the remarks have the potential to taint the judiciary’s image further, the HCD bench deserves profound appreciation for its bravery, honesty, and judicious acumen. It has told the truth, which corresponds to the remark of the International Commission of Jurists (“ICJ”), that a “corrupt judiciary lacks the independence and impartiality required to administer justice fairly,”\textsuperscript{42} as the community probably puts more weight on impartiality than any other attributes of judges.\textsuperscript{43} The impartiality broadly implies “to be fair and even-handed, to be patient and attentive, and to avoid stepping into the arena or appearing to take sides.”\textsuperscript{44}

All these high-profile public allegations consistently tend to establish the truth that rampant corruption has perilously afflicted the judiciary of Bangladesh, and all distressingly call for the government to take stern action against the corrupt judicial officers and their administrative hands without further delay. If the judiciary is not filtered first, corruption in other sectors will continue to increase, simply because the perpetrators would foresee no penalties in an environment where they would be able to purchase judicial verdicts depriving their rivals of justice and fuelling the evil nexus to inflame corruption further. Moreover, letting the judiciary run with ill health while vowing to eliminate corruption from other sectors may sound like keeping the door open while guarding the window to prevent theft. Any attempt to combat corruption is bound to fail unless judicial corruption is contained. This is so because “[t]he judiciary is one of the pillars upon which the majestic edifice of Democracy and Rule of Law is built” and it is responsible to guard against excesses of the executive and legislature.\textsuperscript{45} Therefore, judicial corruption must be addressed first to ensure justice for society, achieve the much-desired socio-economic development, and attain the United Nations

\textsuperscript{41} Id. at 140.
\textsuperscript{42} ICJ, supra note 5, at 106–07.
\textsuperscript{43} AUSTR. INST. OF JUD. ADMIN., GUIDE TO JUDICIAL CONDUCT 5 (4th ed. 2017) [hereinafter AIJA]. The Guide has been published by AIJA for The Council of Chief Justices of Australia and New Zealand.
\textsuperscript{44} Id.
\textsuperscript{45} Gurneet Singh Budhiraja, Judicial Accountability and Judicial Independence in India: An Analysis, 26 SUPREMO AMICUS 122, 122 (2021).
Sustainable Development Goals ("SDGs"). TIB observes reproving corruption that “weaknesses and deficits in laws and their applications” are impeding the realization of the SDGs, particularly SDG-16 (Peace, justice and strong institutions or promoting just, peaceful and inclusive societies). To prevent corruption, accountability is a widely accepted mechanism to combat corruption by deterring irregularities in public services including the judiciary. To that end, this article explores an avenue of judicial accountability, although many may disagree with Adebayo that where corruption has engulfed the judiciary “the priests in the temple of justice cannot pontificate again on the ideal of justice.” The judiciary must stay for the indispensable social need for justice, which requires disciplining the judges and their associates (accomplices) in order to regain public confidence, which is the inviolable potency for the judiciary to stand steadfast.

In January 2022, as an appreciable initiative to this end, Chief Justice Siddique assigned eight HCD judges to monitor irregularities in the lower judiciary of all eight administrative divisions of the country, with each HCD judge entrusted with the responsibility for a single division. These inquiries are currently underway; therefore, the outcome is yet be seen. However, the corruption situation appears to be getting gradually worse.

This article is exclusively concerned with financial corruption. Subsequent to providing an introduction and background of the problem in the above Part I, Part II attempts to briefly define the

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49 Monitoring Committee for Subordinate Courts, constituted under The Supreme Court of Bangladesh (High Court Division Rules) 1973, Notification No. 5/2022 (Jan. 27, 2022).

offense of corruption and underlines its implications for the judiciary itself and the nation as a whole, before turning to discuss judicial accountability. Part III explores the mechanisms for judicial accountability from an international perspective with a particular emphasis on a judicial commission as an accountability body to replace the Supreme Judicial Council (“SJC”), which currently seems to be stuck in limbo in Bangladesh. Part IV outlines the principles underpinning the establishment and operations of the new judicial commission to be proposed for Bangladesh, whilst Part V concludes the discourse with a summary of major recommendations drawing on preceding discussions.

II. DEFINITION AND CONSEQUENCE OF CORRUPTION

Financial corruption, as the term is used in the present context, is official misconduct that denotes an act of receiving or asking for monetary benefit by a public servant for providing a certain service, or giving something of value by a client to persuade an office-bearer to do a favour with a corrupt intent. It is a deliberate and intentional wrongdoing, rather than a mistake or negligence. TIG defines corruption simply as being the abuse of the entrusted power by an official for a personal gain.\footnote{What Is Corruption?, Transparency Int’l, https://www.transparency.org/en/what-is-corruption [https://perma.cc/C826-3KGU].} Section 165 of the Penal Code 1860 (Bangladesh) provides a broad definition of the offense by or relating to public servants encompassing corruption which reads:

Whoever, being a public servant, accepts or obtains, or agrees to accept or attempts to obtain, for himself, or for any other person, any valuable thing without consideration, or for a consideration which he knows to be inadequate, from any person whom he knows to have been, or to be, or to be likely to be concerned in any proceeding or business transacted or about to be transacted by such public servant, or having any connection with the official functions of himself or of any public servant to whom he is subordinate, or from any person whom he knows to be interested in or
related to the person so concerned, shall be punished . . . 52

As explained in section 21 of the Penal Code 1860 (Bangladesh), public servants categorically include judges and their assistants or associates.53 Therefore, judges and other court officials

52 Penal Code, supra note 3, § 165. Section 165 reads as follows: “Whoever, being a public servant, accepts or obtains, or agrees to accept or attempts to obtain, for himself, or for any other person, any valuable thing without consideration, or for a consideration which he knows to be inadequate, from any person whom he knows to have been, or to be, or to be likely to be concerned in any proceeding or business transacted or about to be transacted by such public servant, or having any connection with the official functions of himself or of any public servant to whom he is subordinate, or from any person whom he knows to be interested in or related to the person so concerned, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both. Illustrations: (a) A, a Collector, hires a house of Z, who has a settlement case pending before him. It is agreed that A shall pay fifty taka a month, the house being such that, if the bargain were made in good faith, A would be required to pay two hundred taka a month. A has obtained a valuable thing from Z without adequate consideration; (b) A, a Judge, buys of Z, who has a case pending in A’s Court, Government promissory notes at a discount, when they are selling in the market at a premium. A has obtained a valuable thing from Z without adequate consideration; (c) Z’s brother is apprehended and taken before A, a Magistrate, on a charge of perjury. A sells to Z shares in a bank at a premium, when they are selling in the market at a discount. Z pays A for the shares accordingly. The money so obtained by A is a valuable thing obtained by him without adequate consideration.”

53 Id. § 21. Section 21 stipulates: The words “public servant” denote a person falling under any of the descriptions hereinafter following, namely: First. [Omitted by section 2 of the Penal Code (Amendment) Ordinance, 1982 (Ordinance No. X of 1982)]; Second. Every Commissioned Officer in the Military, Naval or Air Forces of Bangladesh . . . ; [Third. Every Judge including any person empowered by any law to perform, whether by himself or as a member of any body of persons, any adjudicatory function;] Fourth. Every officer of a Court of Justice whose duty it is, as such officer, to investigate or report on any matter of law or fact, or to make, authenticate, or keep any document, or to take charge or dispose of any property, or to execute any judicial process, or to administer any oath, or to interpret, or to preserve order in the Court; and every person specially authorized by a Court of Justice to perform any of such duties; Fifth. Every juryman, assessor, or member of a panchayat assisting a Court of Justice or public servant; Sixth. Every arbitrator or other person to whom any cause or matter has been referred for decision or report by any Court of Justice, or by any other competent public authority; Seventh. Every person who holds any office by virtue of which he is empowered to place or keep any person in confinement; Eighth. Every officer of the Government whose duty it is, as such officer, to prevent offences, to give information of offences, to bring offenders to justice, or to protect the public health, safety or convenience; Ninth. Every officer whose duty it is, such officer, to take, receive, keep or expend any property on behalf of the Government, or to make any survey, assessment or contract on behalf of the Government, or to execute any revenue-process, or to investigate, or to report, on any matter affecting the pecuniary interests of the Government, or to make, authenticate or keep any document relating to the pecuniary interest of the Government, or to prevent the infraction of any law for the protection of the pecuniary interests of the Government . . . ; Tenth. Every officer whose duty it is, as such officer, to take, receive, keep
are unequivocally captured by the aforesaid definitions of corruption. Given that inclusion, Stratos Pahis directly compares judicial corruption with the selling and purchasing of legal decisions. Reflecting the truth of such characterization, TIB sources find pertaining to the judicial corruption in Bangladesh that “judges are given to doctoring their decisions in exchange for cash, land, and other benefits.” A Norway Anti-Corruption Research Center went even further in stating judicial corruption in Bangladesh: “judges and magistrates collaborate with other dishonest individuals in the judiciary while lower level court employees and solicitors are involved in extorting or soliciting money from litigants and sharing them with judges.” There are some judges in both lower and higher courts in Bangladesh who are reportedly corrupt, whatever their number could be. Corruption in the lower courts is perceived to be extensive, where judges, magistrates, lawyers and other court officials more often than not demand bribes from litigants. This provides a dismal picture of the lower courts. The higher courts are

57 Kabir et al., *supra* note 9, at 21.
not much different, as the affirmation of corruption in the higher judiciary by the judges and attorneys of the SCB has been noted earlier.\textsuperscript{58} It is thus clearly a toxic nexus between the courts and justice-seekers, and an understanding of judicial corruption effected through bribery entails acquaintance with the incentives that exist for all involved, including parties to a case or their lawyers to purchase judges’ decisions and concurrently the stimuli for judges to sell their verdicts.\textsuperscript{59} Regarding how the mischievous game is played out, one can assume that judges may receive bribes directly from clients or their legal representative, or they may allow supporting court officials such as the registrars, clerks, bailiffs, and so on to get involved in the vicious process.

Concerning the consequences of corruption, it escalates litigation costs, prolongs delays, injures mental health, and inflicts social sufferings on litigants, which eventually feed upon public confidence in the judiciary. TIG stipulates that corruption “erodes trust, weakens democracy, hampers economic development and further exacerbates inequality, poverty, social division and the environmental crisis.”\textsuperscript{60} The US Department of State describes corruption as being one of the most pervasive crimes, which “fuels transnational crime, wastes public resources, destabilizes countries, and impedes good governance.”\textsuperscript{61} Corruption creates economic inequality, lowers public trust, and causes poor government performance.\textsuperscript{62} More strikingly, judicial corruption affects the administration of justice and produces perversion of justice,\textsuperscript{63} caused

\textsuperscript{58} See supra notes 7–45 in Part I and accompanying text (recognizing judicial corruption by the higher judiciary and attorneys).


\textsuperscript{60} What is Corruption?, supra note 51.


\textsuperscript{63} Adebayo, supra note 48, at 3.
by judges’ failure to follow their intuition owing to corrupt or dishonest practices.

The proper application and enforcement of law would be impracticable in the absence of an honest judiciary. Judges have discretion to assess the credibility of any piece of evidence presented by contesting parties and are therefore expected to apply their judicial hunch or intuition in making judicial decisions. Judicial hunches can help deliver justice beyond the evidence relied upon by the parties, but only if judges have both personal and particularly institutional independence. This is so because judges must be impartial to reap the benefit of this discretion, as the Supreme Court of Canada in Walter Valente v. The Queen interpreted the concepts of judicial “independence” and “impartiality” wherein the Court expounded that:

Impartiality refers to a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case. ‘Independence’ reflects or embodies the traditional constitutional value of judicial independence and connotes not only a state of mind but also a status or relationship to others—particularly to the executive branch of government—that rests on objective conditions or guarantees.

Judicial independence essentially implies decisional independence and accountability. However, when the judges are influenced by unfair financial gains, there are reasons to believe that their hunches are likely to be misapplied or impaired. An obvious

64 Id. at 7; Daniel Kahneman & Gary Klein, Conditions for Intuitive Expertise: A Failure to Disagree, 64 AM. PSYCH. 515, 525 (2009); Joseph C. Hutcheson Jr., Judgment Intuitive The Function of the Hunch in Judicial Decision, 14 CORNELL L. Q. 274, 278 (1929).
65 See M. Rafiqul Islam & S.M. Solaiman, Public Confidence Crisis in the Judiciary and Judicial Accountability in Bangladesh, 13(1) J. JUDIC. ADM. 29 (2003) (demonstrating that the lack of constitutional checks on judicial accountability contributes to a “public confidence crisis”); M. Rafiqul Islam, Judicial Independence Amid a Powerful Executive in Bangladesh: A Constitutional Paradox?, 18(4) J. JUDIC. ADM. 237 (2009) (arguing that the 2007 establishment of an independent judiciary was crucial to maintain a check on the executive).
66 Valente v. The Queen [1985], 2 S.C.R. 673 (Can.).
67 Id. at 674.
68 JUD. COMM’N OF NSW, HANDBOOK FOR JUDICIAL OFFICERS, 284 n.6 (2021) quoting Mary Arden, A Matter of Style? The Form of Judgments in Common Law Jurisdictions: A Comparison, Presentation at the Conference in Honour of Lord Bingham, Oxford, United Kingdom (June 20, 2008) [hereinafter JCNSW].
question may then arise as to what hunch would work inside the judge if s/he is not honest. A reasonable response would be that the truly intuitive judgement will be overpowered by the money-power. Whilst we are unable to disregard the prophetic assertion of Justice William Rehnquist, a former Chief Justice of the US Supreme Court, that “[i]f experience demands a presumption that a judge will seize every opportunity presented to him in the course of his official conduct to line his pockets, no canon of ethics or statute regarding disqualification can save our judicial system,” our contemplation nonetheless seeks a fairer judiciary by ensuring accountability, as navigated below.

III. JUDICIAL ACCOUNTABILITY—CONCEPT AND MECHANISM

Judicial independence is a popular theme, whilst judges’ accountability is still a rarely discussed issue in Bangladesh, although it is now generally accepted, as observed by Justice Nicholson, that the former cannot be meaningful without the latter. Accountability is the first and foremost need of good governance, and a cornerstone of democracy and the rule of law. The enhancement of the quality of administration of justice requires the accountability of judges as individuals and of courts as an institution; this article is predominantly focused on the former. It is worth noting that sometimes the appellate or review process is said to be the primary method of judicial accountability, as mentioned by Justice Gleeson,

72 Martin, supra note 1, at 279.
a former Chief Justice of Australia.\footnote{See Hon. Murray Gleeson, \textit{Judging the Judges}, 53 AUST. L.J. 330, 343 (1979) ("The most obvious means of review of judicial performance is to be found within the court structure itself, in the ordinary appellate processes.").} While appeal is justified when a justice-seeker suffers harm following a judicial decision which was erroneous owing essentially to the judge’s honest mistake,\footnote{ICJ, \textit{supra} note 5, at 34.} this article is exclusively concerned with financial corruption. The appeal process is unlikely to be a satisfactory response to a complaint involving a judge’s misconduct,\footnote{Gabrielle Appleby \\& Suzanne Le Mire, \textit{Judicial Conduct: Crafting a System That Enhances Institutional Integrity}, 38(1) MELB. UNIV. L. REV. 1, 7–8 (2014).} whilst review by the same court would perceptibly be less helpful. Hence a separate institutional mechanism is needed to deal with such conduct, which could provide protection to the public, safeguard the integrity of the courts, promote judicial impartiality, and retain public confidence in the judiciary.\footnote{See \textit{AUSTL. L. REFORM COMM’N, WITHOUT FEAR OR FAVOUR: JUDICIAL IMPARTIALITY AND THE LAW ON BIAS} 304 (2021) [hereinafter ALRC] (detailing such a mechanism).}

The judiciary of Bangladesh is made up of two tiers of courts, namely the SCB\footnote{\textit{CONST.} art. 94. (1972) (Bangl.).} and the subordinate courts.\footnote{\textit{Id.} art. 114. \textit{See also} Mohammad Abdul Hannan \\& Md. Arifuzzaman, \textit{Separation of Judiciary and Judicial Independence in Bangladesh: An Appraisal}, 8(4) OPEN ACCESS LIBR. J. 1, 11–12 (2021) (providing an overview of the Bangladesh court system).} The SCB consists of the Appellate Division ("AD"), the highest seat of the judiciary, and the HCD, which is its lower division.\footnote{Article 94 of the Bangladeshi Constitution provides: 
(1) There shall be a Supreme Court for Bangladesh (to be known as the Supreme Court of Bangladesh) comprising the Appellate Division and the High Court Division. (2) The Supreme Court shall consist of the Chief Justice, to be known as the Chief Justice of Bangladesh, and such number of other Judges as the President may deem it necessary to appoint to each division. (3) The Chief Justice, and the Judges appointed to the Appellate Division, shall sit only in that division, and the other Judges shall sit only in the High Court Division. (4) Subject to the provisions of this Constitution the Chief Justice and the other Judges shall be independent in the exercise of their judicial functions.” \textit{CONST.} art. 94 (1972) (Bangl.).} As of August 2022, there were seven judges including the Chief Justice in the AD and ninety-five judges in the HCD.\footnote{Judges’ List, \textit{SUPREME COURT OF BANGLADESH} (Aug. 15, 2022), https://web.archive.org/web/20220815074834/http://www.supremecourt.gov.bd/web/?page =judges.php&menu=11&div_id=1 [https://perma.cc/P6C3-J6VF]; \textit{see also} \textit{SUPREME COURT OF BANGLADESH, ANNUAL REPORT} 2018, https://web.archive.org/web/20220720175038/http://www.supremecourt.gov.bd/resources/ contents/Annual_Report_2018.pdf [https://perma.cc/NQ5Z-468Y] (demonstrating that the numbers of judges of both the HCD and AD were the same in 2019).} Article 116 of the Constitution of Bangladesh 1972 (hereinafter referred to as “Constitution”) 
empowers the country’s President to control (including the power of posting, promotion, and grant of leave) and discipline persons employed in the judicial service and magistrates exercising judicial functions. 81 However, the President is constitutionally required to exercise this power in consultation with the SCB. 82

Fairness is the nucleus of the administration of justice. The High Court of Australia (“HCA”) in Dietrich v. The Queen declared that the requirement of fairness is a central pillar of the country’s criminal justice system, 83 and that “courts are duty bound to ensure that trials are conducted fairly.” 84 This duty is “cast in stone.” 85 When the judges deliberately depart from the essential sense of fairness for a financial gain, they must be held accountable for such a departure.

The concept of accountability simply implies the obligation to give reasons or an explanation for one’s decision or conduct. 86 Accountability generally denotes a state of being responsible or accountable for one’s own conduct by providing justification or facing legal liability if the actor fails to substantiate his/her disputed behaviour. 87 Reinforcing its significance, the Supreme Court of India in Manohar v. State of Maharashtra held that provisions for holding a person accountable for his/her acts reduce the potential of committing wrong. 88 Conversely, a lack of accountability of judges contributes to erosion of public confidence as is evident in Bangladesh. 89 Public confidence entails the effective enforcement of

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81 Article 116 of the Bangladeshi Constitution provides: “The control (including the power of posting, promotion and grant of leave) and discipline of 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.” Const. art. 116 (1972) (Bangl.).
82 Id.
83 Dietrich v. The Queen (1992) 177 CLR 292, 298, 328 (Austl.).
84 Id. at 366.
85 JCNSW, supra note 68, at 72.
86 Graham Gee et al., The politics of judicial independence and accountability, in The politics of judicial independence in the UK’s changing constitution 17 (Graham Gee et al. eds., 2015).
89 See generally M. Ehteshamul Bari, The independence of the judiciary in Bangladesh—Exploring the gap between theory and practice 16, 107, 138–39 (Springer, 2022) (reviewing the confidence crisis); M. Rafiqul Islam & S. M. Solaiman, Public confidence crisis in the judiciary and judicial accountability in Bangladesh, 13(1)

https://scholarship.law.upenn.edu/alr/vol19/iss1/2
DOI: https://doi.org/10.58112/alr.19-1.2
strict accountability provisions. While human frailty cannot be gainsaid, the operation of a strong mechanism to hold actors accountable for serving the public has the potential to prevent unfair exercises of their powers from happening. Hence, the accountability of judges and other court officials must be ensured through a useful mechanism.

We admit that judges are not generally expected to be accountable to any external bodies simply because of the dignity of their positions. Therefore a proper internal system of judicial accountability is critical to enhance public confidence in the judiciary and improve its performance. To limit the length of this endeavour, discussions that follow concentrate on judicial accountability through a separate body, as suggested by the ICJ in its updated and expanded current guide of 2016 called Practitioners Guide No. 13 on Judicial Accountability ("ICJ Guide"). The guide is crafted to cater to the needs of all countries regardless of any socio-economic differences in order to ensure effective judicial accountability. It is aimed at ensuring judicial accountability for gross misconduct like corruption or complicity in human rights violations, while keeping the judicial
independence unharmed.94 The people’s right to a fair hearing before an independent and impartial court is a recognized fundamental human right and is a salient feature of the rule of law.95 Apart from accountability to the public, the ICJ mechanisms include several bodies having different roles in promoting judicial accountability. These bodies include judicial councils, parliaments, ad hoc tribunals, anti-corruption bodies, national human rights institutions, and professional associations.96 However, the present article explores only judicial councils and commissions. Notably, Australia largely follows the ICJ model that improves judicial accountability.97 Hence, alongside the ICJ Guide, discussions will also be informed by the Judicial Commission of New South Wales (“JCNSW”), the first and most successful one of its kind in Australia. The process is also underway to establish a similar body at the federal level in Australia,98 as will be discussed shortly.

A. Judicial Council as an Accountability Body in Bangladesh—Its Performance and Demise

Entrusting a body fully comprised of judges for judicial accountability can be called the judicialization of judges’ accountability.99 The concept of judicial council for judges’ accountability has long been known in Bangladesh since the inclusion of the “Supreme Judicial Council” (“SJC”) in the Constitution on November 27, 1977 through a martial law proclamation called the Second Proclamation (Tenth Amendment) Order 1977.100 The

95 Bathurst, supra note 2, at 25.
96 ICJ, supra note 5, at 33–34.
97 See HON. ROSLYN G. ATKINSON, JUDICIAL ACCOUNTABILITY: AN AUSTRALIAN PERSPECTIVE 1 (2016) (noting that the principles raised by the ICJ Guide have been given due attention by Australian judges and legal academic).
98 See ALRC, supra note 76, at 13 (recommending that Australian courts implement accountability mechanisms).
99 See generally Chintan Chandrachud, Judicialization of Judicial Appointments? A Response from the United Kingdom, in APPOINTMENT OF JUDGES TO THE SUPREME COURT OF INDIA: TRANSPARENCY, ACCOUNTABILITY, AND INDEPENDENCE 208 (Arghya Sengupta & Ritwika Sharma eds., 2018) (arguing that a merit-based rather than a political judicial appointment system can be considered a judicialized appointment process).
100 CONST. art. 96(3), amended by the Second Proclamation (Tenth Amendment) Order (1977), (1972) (Bangl.).
Parliament subsequently legitimized the proclamation through the Constitution (Fifth Amendment) Act 1979 (Bangladesh) by incorporating it into Article 96 of the Constitution.\textsuperscript{101} However, the SJC no longer exists in the Constitution, or at best its existence is presently obscure, as shown below.

According to the original Article 96 of the Constitution, the SJC is comprised of the Chief Justice of Bangladesh and two senior most judges of the AD (after the chief justice).\textsuperscript{102} The Constitution also provided for an alternative for investigating particular allegations about any judge’s incapacity to work or his/her misconduct by the SJC, if any of its ex-officio three members had become unable to conduct that inquiry.\textsuperscript{103} The alternative provision prescribed that the third next senior judge of the AD after the chief justice should be included in the SJC for that given task only.\textsuperscript{104} The functions of the SJC were also stipulated in Article 96.\textsuperscript{105} The most critical functions were to prescribe a Code of Conduct to be observed by the judges of the SCB and “to inquire into the capacity or conduct of a Judge.”\textsuperscript{106} Article 96 clarified the words “capacity” and “conduct” to be investigated and spelt out that:

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.\textsuperscript{107}

Article 96(6) further elucidated the removal process by stating that “[i]f, after making the inquiry, the Council reports to the

\begin{footnotes}
\item[101] BARI, \textit{supra} note 89, at 13, 137.
\item[102] \textit{CONST.} art. 96, \textit{amended by} the Second Proclamation (Tenth Amendment) Order (1977), (1972) (Bangl.).
\item[103] Id.
\item[104] Id.
\item[105] Id. art. 96(4)–(6).
\item[106] Id. art. 96(4)(b).
\item[107] The relevant “capacity” refers to both physical and mental incapacity and the “conduct” that may trigger investigation denotes “gross misconduct.” \textit{Id.} art. 96(5).
\end{footnotes}
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.”

Therefore, the President, as Head of the State, had, and still has, the authority to remove a judge from his/her office. Importantly, the Constitution did not proffer any interpretation of the terms “gross misconduct” and “physical or mental incapacity” used in the previous Article 96. However, exercising its authority, the SJC prescribed a Code of Conduct 2000 (“COC2000”) containing fourteen provisions with effect from May 7, 2000, which among other things, defined “misconduct.” The COC2000 mandated SCB judges to maintain “a degree of aloofness consistent with the dignity of his or her office.”

It prohibited a judge from accepting gifts or hospitality except from his or her family, close relatives and friends, and obligated judges to disclose his or her assets and liabilities if

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108 The SJC is a recommending body rather than a decision-making authority because the ultimate removal power lies with the President as Head of the State. However, such a removal shall take place based on the fact-finding report of the SJC. Id. art. 96(6).

109 Article 96 contains all provisions pertaining to the removal of judges. It mentions the terms “gross misconduct” and “physical or mental incapacity” but does not provide any meanings thereof. The full content of the previous version of Article 96 reads as follows:

Tenure of offices of Judges: (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 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 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. (5) Where, upon any information received from the Council or from any other source, the President has reason to apprehend that a Judge—(a) may have ceased to be capable of properly performing the functions of his office by reason of physical or mental incapacity, or (b) may have been guilty of gross misconduct, the President may direct the Council to inquire into the matter and report its finding. (6) If, after making the inquiry, the Council reports to the President that in its opinion the Judge has ceased to be capable of properly performing the functions of his office or has been guilty of gross misconduct, the President shall, by order, remove the Judge from office. (7) For the purpose of an inquiry under this article, the Council shall regulate its procedure and shall have, in respect of issue and execution of processes, the same power as the Supreme Court. (8) A Judge may resign his office by writing under his hand addressed to the President. Id. art. 96.

110 BARI, supra note 89, at 141.
asked for by the chief justice. Further, it required a judge to avoid impropriety and the appearance of impropriety in all activities, and obligated judges to uphold the integrity and independence of the judiciary. Although “bribes” or “corruption” are not directly mentioned anywhere in the COC2000, the issues of bribery and corruption are implicitly addressed in the provisions stated above. However, the absence of either of these words seems to be a flaw in the COC2000 in that each of them separately constitutes misconduct. As judicially interpreted in the United States, misconduct includes a wide range of behaviours such as scandalous and newsworthy activities, sexual advances, soliciting bribes, ethical lapses, behaving abusively, biasness, etc.

The SJC was in place for over three decades until its replacement by the Constitution (Sixteenth Amendment) Act 2014 (Bangladesh). During that time prior to its replacement, the SJC handled only three allegations—all about misconduct. The first one ended in removal of a judge (Justice Syed Shahidur Rahman was removed by the President based on the recommendation of the SJC in 2004 for receiving bribe. Justice Rahman challenged his removal and won in the HCD, however the AD upheld the removal in September 2015), the second led to the resignation of a judge (Justice Faisal Mahmud Faizee in 2007 about forgery of his own LLB certificate and tampering academic transcript) before being fired.

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111 These are the provisions of the Code of Conduct 2000 (“COC2000”) drafted by the SJC for the judges of the SCB. See Md. Shah Abid Hossain, Ethics and Codes of Conduct for Judges, Prosecutors and Law Enforcement Officials: Bangladesh Perspective, in 143RD INTERNATIONAL TRAINING COURSE PARTICIPANTS’ PAPERS—RESOURCE MATERIAL SERIES NO. 80, 290 (providing COC2000 text). Arguably, this definition of “misconduct” might be relied upon in removing a judge.

112 Id.

113 Id.


117 Bari, supra note 89, at 139–40.
and the third resulted in requiring no presidential action since the SJC’s found no merit in the allegation (Justice Mizanur Rahman Bhuian in 2013 about distributing photocopies of a contentious news report amongst his colleagues). The success of the SJC is debatable given the mismatch between the extent of allegations of corruption as stated above and the number of investigations into misconduct carried out in its life span of around thirty-seven years.

Article 96(5) impliedly required, if not obligated, the SJC to inform the President and seek an order for inquiry into any credible allegations of gross misconduct that include bribery or financial corruption pursuant to the provisions of the COC2000. The SJC had not investigated any complaints other than the above three, of which only the first one was about corruption. It is hard to believe that the aforesaid substantial allegations of extensive corruption came to light suddenly; rather, one can reasonably accept that the offensive conduct has been in place for a long time, as can be premised from the words of two former attorneys general and the formal remarks of a HCD bench as alluded to earlier.

The existence of the SJC is now, however, questionable amid serious disagreement between the judiciary and the executive over the validity of the sixteenth amendment to the Constitution, which effectively shifted the removal power from the SJC to the

118 Id. at 138–42.
119 See M. Ehteshamul Bari, The Recent Changes Introduced to the Method of Removal of Judges of the Supreme Court of Bangladesh & the Consequent Triumph of an All-Powerful Executive Over the Judiciary: Judicial Independence in Peril, 42 CARDozo INT’L & COMPAR. L. REV. 653, 669 (2021) (highlighting an instance where the SJC was directed by the President to investigate a bribery investigation against a justice).
120 BARI, supra note 98, at 138–40.
The amendment empowered the Parliament to impeach Supreme Court judges as stated in Article 96(2) of the Constitution. However, the amendment was invalidated and declared unconstitutional by the AD in Government of Bangladesh and others v Advocate Asaduzzaman Siddiqui on the ground that it “will hamper the basic structure of the Constitution of separation of powers and independence of each of the organs of the State.” The AD also ordered replacement and restoration of the pre-amendment provisions of Article 96 in the same verdict meaning the revival of the SJC, but the executive has not yet acted upon the verdict. Consequently, the Constitution still contains the amended provisions for the judges’ impeachment by the Parliament as shown shortly below. Instead of implementing the verdict of the highest court, the executive has lodged a petition for its review by the same Court (AD) on December 24, 2017. However, the review is yet to be heard or resolved. In the backdrop of such a scenario, the SJC is effectively invisible or at least inactive. It is worth mentioning that alongside the nonexistence or inactivity of the SJC, its major creation, the COC2000 has also automatically disappeared. The current amended version of Article 96 reads as follows:

Article 96: (1) Subject to the other provisions of this article, a Judge shall hold office until he attains the age of sixty-seven years.

(2) A Judge shall not be removed from his office except by an order of the President passed pursuant to a resolution of Parliament supported by a majority of not less than two-thirds of the total number of members of Parliament [CONST. art. 96(2)].

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122 CONST. art. 2, amended by the Constitution (Sixteenth Amendment) Act, Sept. 22, 2014 (Bangl.); CONST. art. 96, amended by the Constitution (Seventeenth Amendment) Act, July 8, 2018 (Bangl.).

123 Article 96(2) provides that: “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.” Id. art. 96(2).

124 Bangladesh v. Siddiqui (SCB AD, 2017), 797–98 (Bangl.).

125 Id. at 799.


127 BARI, supra note 89, at 138 n.4 (citation omitted).
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.128

The disagreement between the SCB and the executive is chiefly about removal of SCB judges.129 The guarantee of tenure of office of any position is a critical issue with respect to accountability in every sector of public services. The popular view is that permanency in the position and difficulty in the dismissal process are helpful for honest and improved service.130 This view may not always match with the reality. We think the security of tenure can go either way—it may stimulate actors to work fairly by ignoring any extraneous factors such as political pressures or it can energize public servants to indulge in egregious conduct like corruption by ignoring their legal and ethical responsibilities in discharging their duties. This can be easily discerned if the qualities of regular performance of public and private sector employees are closely compared.131 If such

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128 Clauses 2–4 of Article 96 of the Constitution were inserted by the sixteenth Amendment which replaced the previous provisions. The Amendment repealed Articles 96(5)(b) and 96(6) that allowed for the removal of judges for gross misconduct following an SJC inquiry. The Bangladesh Penal Code (1860) criminalizes corruption by public servants, including judges as stated in Articles 21(3) and 165; ICJ, supra note 5, at 115.

129 See Bangladesh v. Siddiqui (SCB (AD), 2017) (Bangl.) (discussing the judgment of the SCB on the constitutional amendment empowering the Parliament to remove judges).

130 See ELLIOT BULMER, JUDICIAL TENURE, REMOVAL, IMMUNITY AND ACCOUNTABILITY 3, 6, 7 (2017) (analyzing standards and advantages of judicial removal methods); Tenure, 41(4) COMMONWEALTH L. BULL. 503, 503 (2015) (“Legal guarantees of security of tenure and appropriate remuneration serve to lessen the risks that judges face in holding powerful individuals and government bodies to account.”).

131 To find the truth in the significant difference between public and private sectors in Bangladesh, the performance of university teachers, who are expected to be one of the most responsible employees in any country, can be taken into consideration. As posted on the official website of the University Grants Commission of Bangladesh (“UGC”), the financial and academic oversight government body for Bangladesh’s universities, there are a total of 54 public and 112 private universities in Bangladesh as of August 29, 2023. UGC, List of Public Universities, http://www.uge-universities.gov.bd/public-universities [https://perma.cc/F5QF-6GWK] (last visited Aug. 29, 2023). The job of public universities
a comparison is conducted objectively, one can hardly differ on the proposition that private sector employees are more sincere about discharging their duties properly and honestly compared to their public sector counterparts. Generally, jobs in the private sector are not well secured in contrast to those in the public sector. Given this distinction, it is absolutely true at least in Bangladesh where, as popularly perceived, private sector employees are much more sincere, industrious, honest, and dedicated in providing their services, whereas the public sectors typically witness the opposite—predominantly because of the status of their tenured employment. From this point of view, permanency with a cumbersome process to remove an official from the office without having a proper accountability mechanism in place would be unhelpful in most cases, barring a few exceptions who are governed by their own conscience, sense of fairness, moral principles, or any other constructive means such as true religious dicta and unassailable judiciousness.

Regarding the judicialization of judicial accountability in the context of the US federal judiciary, it has been argued that any self-regulatory system is vulnerable to pathologies of self-interest, and the
dangers of such vulnerabilities are likely to be worsened in the context of the judiciary.\textsuperscript{134} Self-regulation of the judiciary by a Code of Conduct promulgated by the judiciary itself is inherently corrupting as underscored in recent research.\textsuperscript{135} Hence, for the maintenance of judicial integrity, ensuring judges’ proper conduct, and promoting judicial legitimacy to retain public confidence, critics argue in favour of the regulation of the judiciary by a third party.\textsuperscript{136} Congress is said to be an obvious choice as that third party in the US context.\textsuperscript{137} However, such a view of deviation from self-regulation can be debatable,\textsuperscript{138} which may not provide any single solution to the problem in question. Moreover, it is now largely accepted that the accountability of the judiciary should be vested in authorities beyond the judiciary itself.\textsuperscript{139} Two prominent accountability bodies are an


\textsuperscript{136} See Sarah M. R. Cravens, \textit{Regulating Judges in the United States: Concerns for Public Confidence}, in \textit{REGULATING JUDGES: BEYOND INDEPENDENCE AND ACCOUNTABILITY} 390, 404 (Richard Devlin & Adam Dodek eds., 2016) (“More regulation at the US Supreme Court might have the potential to enhance both trust and understanding of that body’s work.”).

\textsuperscript{137} Olivia Gotham, \textit{Avoiding Institutional Corruption Through a Self-Regulating Federal Judiciary}, 33 GEO. J. LEGAL ETHICS 517, 517 (2020).

\textsuperscript{138} See \textit{id.} at 519–21 (discussing arguments for and against self-regulation).

\textsuperscript{139} See ICJ, \textit{supra} note 5, at 115 (2016). For example, judges in Australia and the United States at the federal level can be removed by the legislature: Section 72(ii) of the Constitution of Australia provides that Justices of the High Court and other courts created by the Commonwealth Parliament shall not be removed from office “except by the Governor-General in Council, on an address from both Houses of the Parliament in the same session, praying for such removal on the ground of proved misbehaviour or incapacity.” The Hon Geoffrey Nettle, \textit{Removal of Judges from Office}, 45(1) MELB. U. L. REV. 241, 242 (2021). Likewise, federal judges can only be removed by the Congress in the U.S. Also, Article III of the U.S. Constitution provides that federal judges who have secured tenure are protected from removal without following the impeachment process. See Aziz Z. Huq, \textit{Why Judicial Independence Fails}, 115 NW. U. L. REV. 1055, 1099 (2021); The White House, \textit{The Judicial Branch}, WHITE HOUSE GOV., https://www.whitehouse.gov/about-the-white-house/our-government/the-judicial-branch/#:~:text=Federal%20judges%20can%20only%20be%20impeached%20by%20the%20Senate [https://perma.cc/FT4V-8TT8].
independent judicial commission and the legislature.\textsuperscript{140} As the central concern of this article, the ensuing discussion demonstrates the acceptability of an independent commission as an accountability body and explores its potential to be an alternative to the SJC in Bangladesh.

\textbf{B. Independent Judicial Commission—Its International Acceptability and Prospect for Bangladesh}

As mentioned in the ICJ Guide, a judicial commission should have the primary role in holding judges accountable.\textsuperscript{141} A question may arise about the “independence” of the SJC in Bangladesh. When we are trying to answer who will judge the judges, the composition of the SJC tends to respond that only the judges themselves will do, which is no longer the favourite riposte. Although the ICJ does not explicitly consider that persons other than judges must be included in the judicial council, it (ICJ) however mentions that the members other than judges can inject valuable perspectives from different other stakeholders, and assist in reassuring the public of the independence and impartiality of the accountability process of the judiciary.\textsuperscript{142} Fairly similarly, the Consultative Council of European Judges (“CCJE”) recognizes the benefit of non-judge members and recommends the inclusion of persons who are not judges; provided, however, they be chosen and appointed independently by non-

\textsuperscript{140} The parliamentary accountability and removal procedures are followed in many countries, including: Australia (at the federal level), Canada, India, Kiribati, Malawi, Malta, Maldives, Nauru, New Zealand, Samoa, Sierra Leone, South Africa, Sri Lanka, Tuvalu, and the United Kingdom. An independent accountability body that is separate from both the executive and the legislature is in place in many other countries, including: 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, Zambia, and some Australian states jurisdictions. \textit{See Bangladesh v. Siddiqui}, (SCB (AD), 2017) at 163–64 (Bangl.) (listing accountability models and the national adherents of each model).

\textsuperscript{141} ICJ, \textit{supra} note 5, at 35.

political authorities and must not be by the executive. For the maintenance of fairness in, and political independence of, the members’ appointment process, the CCJE further clarifies that the Parliament may elect those members who are not judges, but the election should require a qualified majority needing significant support of the opposition, and the overall membership should encompass a diverse representation of the members of society. Impartiality in the selection process is a means and not an end in itself. Hence, it might not be sufficient to ensure fairness in the operation of the judicial council at issue; for its operational independence and impartiality, the council should have the authority to manage its own budget and should be supported by both human and financial resources adequate for its fruitful operations. Likewise, this view of establishing an independent body is also supported by the Bangalore Principles of Judicial Conduct 2002 (“Bangalore Principles”). The Preamble of the Bangalore Principles instructs that the judiciary should be accountable to appropriate institutions to be established to maintain judicial standards, and it states that those institutions themselves shall be independent and impartial. Similarly, several other international bodies also support this view of ensuring judges’ accountability through an independent body. About the composition of such a body with the judges of the highest court as members from the judiciary, the ICJ suggests inclusion of younger

143 CCJE, supra note 142, at III.C.2.32.
144 Id.
146 The Preamble of the revised version of The Bangalore Draft Code of Judicial Conduct of 2002 provides that “These principles presuppose that judges are accountable for their conduct to appropriate institutions established to maintain judicial standards, which are themselves independent and impartial, and are intended to supplement and not to derogate from existing rules of law and conduct which bind the judge.” BANGALORE DRAFT CODE OF JUDICIAL CONDUCT OF 2002, pmbl. (2002).
judicial officers who can bring fresh perspectives to the functions of the accountability body, and their inclusions will “promote a sense of engagement with and relevance of the mechanism throughout all levels of the judiciary.” 148 The judicial council will be a recommending authority, and the ICJ Guide accepts the decisional authority of the head of state, however it expects that the highest authority will actually implement or execute the recommendations to be submitted by the disciplinary body and will have no discretion to do otherwise.149

In Australia, there are judicial commissions or equivalent bodies at state and territory levels,150 but not yet at the federal level.151 The composition, functions, and powers of these state- and territory-level independent bodies (Australian Capital Territory, New South Wales, the Northern Territory, South Australia, and Victoria) are substantially similar, and their responsibilities are to receive, deal with, and manage complaints about judicial officers.152 To deal with those issues at the federal level, the Law Reform Commission of Australia (“ALRC”) in December 2021 recommended, amongst other things, to establish a Federal Judicial Commission (“FJC”) by the Federal Government of Australia153 as an additional and accessible oversight body to support justice-seekers and maintain public confidence in judicial impartiality. 154 Meanwhile, the attorney general of Australia presented the ALRC report to the national Parliament on August 2, 2022 for consideration,155 and the

149 Id. at 40.
150 ALRC, supra note 76, at 317.
151 Federal judicial accountability in Australia is implemented solely via a procedure for removal from office by the Governor-General in Council based on recommendation by the Parliament, as stipulated in section 72 of the Commonwealth of Australia Constitution Act 1900, which provides: “[t]he Justices of the High Court and of the other courts created by the Parliament: (i) shall be appointed by the Governor-General in Council; (ii) shall not be removed except by the Governor-General in Council, on an address from both Houses of the Parliament in the same session, praying for such removal on the ground of proved misbehaviour or incapacity.” Commonwealth of Australia Constitution Act 1900 (9th) § 72.
152 ALRC, supra note 76, at 322.
153 Id. at 310–37.
154 Id.
government has already received submissions from the public on a discussion paper on the establishment of a FJC in February 2023. The Law Council of Australia argues that it is essential for Australia to establish a FJC to promote rule of law in order to ensure that a strong, independent, and transparent judiciary exists in the country. ALRC correspondingly points out that such an independent body tasked with complaint handling authority could play a pivotal role in supporting courts as an institution and simultaneously in protecting the public in general. The ALRC’s 2021 report contains fourteen recommendations aimed at promoting and protecting judicial impartiality and public confidence in the federal judiciary. The ALRC finds that stakeholders strongly support that a FJC is a necessary complement to the present court procedures concerning judicial bias and states that such a body “could provide a transparent and independent mechanism to consider litigants’ and lawyers’ concerns about judicial behaviour or impairment, including those that give rise to an apprehension of bias.” The judicial corruption in question directly relates to judge’s bias towards the party which has paid bribes. This is evident in the remarks of the ALRC which explains judge’s bias refers to an incident where a judge falls short of expected standards of conduct that may trigger concerns about judicial integrity and impartiality of the institution and the entire administration of justice. This could occur in some instances; for example, a judge’s failure to disclose an obvious interest in a given

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158 ALRC, supra note 76, at 333.

159 Id. at 13–14.

160 Id. at 4–5.

161 Id. at 303.
case, \(^{162}\) which certainly happens in Bangladesh in the cases of bribery.\(^{163}\) The ICJ prescription itself reflects international standards drawn from international standards on judicial accountability and judicial involvement in human rights violations\(^{164}\) in different nations, and Australian jurisdictions are examples of such an international practice. Hence, a separate body for judicial accountability is a well-accepted mechanism, and stakeholders in Bangladesh should reasonably welcome this mechanism. Now the issue is the model of this type of judicial commission.

C. Model of an Independent Judicial Commission

The ALRC in its 2021 report does not propose a particular model of judicial commission; however, it does emphasize why the establishment of a FJC is crucial to maintain public confidence in the judiciary in view of the inexorable limitations of laws and procedures concerning impartiality and bias.\(^{165}\) The ALRC refers to an earlier federal Senate Inquiry report of 2009 which recommended the establishment of a FJC in the model of the JCNSW, which has been successfully working ever since its commencement in 1987.\(^{166}\) Consistently, the Australian Bar Association, following a broad

\(^{162}\) Id.


\(^{164}\) ICJ, *supra* note 5, at 3.

\(^{165}\) ALRC, *supra* note 76, at 310.

\(^{166}\) Id. at 311, *citing A JUDICIAL COMPLAINTS COMMISSION?, PARLIAMENT OF AUSTL. SEN. STANDING COMM. ON LEGAL AND CONST. AFF’S 7.82–7.84 (2009).*
consultation, has also suggested replication of the JCNSW model at a federal level. Further, the Law Society of New South Wales has expressed a similar view about the model of the FJC: that the JCNSW has been offering a suitable system to deal with complaints about judiciary and that it would be desirable for the Australian Government to establish a similar system at the federal level. As noted earlier, the JCNSW was the first of its kind in Australia, and it was a highly contentious issue between the judiciary and the executive at the time of its inception. However, as has been assessed by Sir Anthony Mason—a former chief justice of Australia—the JCNSW has meanwhile earned itself much appreciation by its commendable performance records and has now “established a reputation as one of the leading institutions of its kind in the world.” Commenting on the JCNSW’s success, Justice James Jacob Spigelman, a former chief justice of the New South Wales Supreme Court (1998–2011), has noted that the “fact that the same institution provides assistance to judges in a form and at a level of quality that has been universally regarded as exceptional, has had a lot to do with the acceptance by the judiciary of the complaints handling function by the Commission.”

The JCNSW finds every year a small number of substantiated complaints and it has considered some of them sufficiently serious to warrant consideration by the state parliament for removal of a judge from his/her office. This demonstrates that the JCNSW has been playing a critical role in protecting both the integrity of judicial institutions and the interests of litigants. It is appreciable to note that Chief Justice Spigelman stated in 2002 after 15 years of JCNSW’s successful operations that he was “not aware that any New South Wales judge is critical of the System.” Therefore, the initial

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167 ALRC, supra note 76, at 336.
168 PARLIAMENT OF AUSTL., supra note 166 at 7.10.
171 A JUDICIAL COMPLAINTS COMMISSION?, supra note 166, at 7.11.
172 Id. at 7.13.
174 ALRC, supra note 76, at 328.
175 Id. (quoting Hon J. J. Spigelman, Dealing with Judicial Misconduct, 6(3) JUD. REV. 241, 249 (2003)).
concerns about harassing and pressuring judges has also not come true.\textsuperscript{176}

Establishing a JCNSW-like body in Bangladesh will raise a question of constitutional limitation, firstly because a provision for such a body does not exist in the Constitution, and secondly because the Constitution is presently concerned with the misconduct or incapacity leading to removal of judges whilst it is silent about other complaints not warranting removal. Moreover, a question of interfering with judicial independence may also arise. In this context, Article 96(2) of the Constitution is similar to section 72(ii) of the Constitution of Australia.\textsuperscript{177} While recommending to establish FJC, ALRC addresses such a constitutional silence or omission. ALRC states that if the FJC consisting of a significant proportion of judicial members is established as a truly independent body to receive and investigate complaints without the power to order removal or disciplining judges,\textsuperscript{178} a strong argument can be made that this would not improperly impinge on judicial independence; rather, some types of disciplining may be consistent with the constitutional guarantee of the independence of judiciary.\textsuperscript{179} This would apply to Bangladesh as well. Now it would be justified drawing on the above discourse to choose a JCNSW model commission for Bangladesh. Hence, it would be worth considering the composition and functions of the JCNSW.

\footnotesize{\textsuperscript{176} Id. at 328.}

\footnotesize{\textsuperscript{177} Article 96(2) of the Constitution of Bangladesh provides that “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 \textit{proved misbehaviour or incapacity}” [italics added]; whilst section 72(ii) of the Constitution of Australia prescribes that “The Justices of the High Court and of the other courts created by the Parliament . . . shall not be removed except by the Governor-General in Council, on an address from both Houses of the Parliament in the same session, praying for such removal on the ground of \textit{proved misbehaviour or incapacity}” [italics added]. Const. art. 96(2), amended by the Second Proclamation (Tenth Amendment) Order (1977), (1972) (Bangl.).}

\footnotesize{\textsuperscript{178} Some types of discipline may in fact be compatible with the constitutional guarantees of judicial independence. See Appleby & Le Mire, supra note 75, at 35–36 (disputing arguments that a judicial discipline body would undermine the integrity of Australian federal courts).}

\footnotesize{\textsuperscript{179} ALRC, supra note 76, at 334.}
D. Composition of the Judicial Commission of New South Wales

The JCNSW is an independent statutory body corporate established under the Judicial Officers Act 1986 of NSW ("JOA1986"). It reports to the Parliament of NSW. It is comprised of six official (ex-officio) members including its president and five appointed members. The president is the chief justice of NSW. The other five official members are: (i) President of the Court of Appeal of NSW; (ii) Chief Judge of the Land and Environment Court of NSW; (iii) Chief Judge of the District Court of NSW; (iv) Chief Magistrate of the Local Court of NSW; and, (v) Chief Commissioner of Industrial Relations Commission of NSW.

Apart from those six, the governor of NSW appoints four members, nominated by the attorney general of NSW from those who have high standing in the community. One is a practicing lawyer who is chosen following consultations between the attorney general and the presidents of the Law Society of NSW and the Bar Association of NSW. As of August 26, 2022, there were four appointees: Dr Judith Cashmore, who has been reappointed five times for a stipulated term of three years since her first appointment.

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183 Id. ("The six official members are the heads of the State’s five courts as well as the President of the Court of Appeal. Of the four appointed members, the Governor of NSW appoints three people who, in the Attorney General’s opinion, have high standing in the community.").
184 Id. ("The fourth is a legal practitioner appointed following consultations between the Attorney General and the Presidents of the Law Society of NSW and Bar Association of NSW.").
185 Id.
186 Dr Judith Cashmore holds BA (Hons) Dip Ed, M Ed, PhD and a Professor of Socio-Legal Research and Policy, Faculty of Law, The University of Sydney. She is also an AO which stands for “Officer of the Order” that confers recognition for outstanding achievement and service. It’s an Honour, AUSTL. GOV., https://www.algwa.org.au/docs/Medal_of_the_Order_of_Australia.pdf [https://perma.cc/44YE-4PZ2].
in December 2004;\textsuperscript{187} Mr David Giddy, who is an experienced criminal law practitioner at the Supreme Court of NSW,\textsuperscript{188} and who joined the JCNSW in 2012 and has received reappointments thrice ever since;\textsuperscript{189} Mr. Yair Miller, who has been working in the present capacity since 2015 with reappointments twice;\textsuperscript{190} and, Associate Professor Dr. Elizabeth Kate Marles, who took up the membership on August 16, 2023\textsuperscript{191} and is a physician (general practitioner) by profession and Director of the Hornsby General Practice Unit.\textsuperscript{192}

Alongside the above-listed members, the JCNSW has a strong executive team which plays a significant role in its efficient operations and in ensuring that it achieves its statutory goals.\textsuperscript{193} Details about the executive team and their individual responsibilities available from the annual report of the JCNSW would be worthwhile to consider by respective authorities in relation to a similar body to be proposed for Bangladesh below.\textsuperscript{194}

\textbf{E. Recommended Judicial Accountability Body for Bangladesh}

The composition of the JCNSW provides clear evidence that unlike the SJC in Bangladesh, a functional oversight body whose service can be utilized for the benefit of the country should include members representing diverse stakeholders, instead of simply choosing the top three judges of the country. Given the success of the JCNSW and the reversal of the NSW judiciary’s view from resistance to facilitation of the body as alluded to earlier, we recommend that a statutory body equivalent to the JCNSW be established in Bangladesh with a constitutional mandate, which may require amendment to Article 96 of the Constitution. Its detailed functions and operations should be provided by a statute akin to one of the NSW (i.e., the JOA1986). This might not be a cumbersome

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\textsuperscript{187} About Us—Our Members, supra note 182.
\textsuperscript{188} Mr. David Giddy is a BA LLB. Id.
\textsuperscript{189} Id.
\textsuperscript{190} Id. Mr. Yair Miller is an OAM, BA. OAM stands for Medal of the Order. It’s an Honour, supra note 186.
\textsuperscript{191} Professor Marles is also an Honorary Clinical Associate Professor at Macquarie University.
\textsuperscript{192} About Us—Our Members, supra note 182. Professor Marles is a Fellow of the Australian Institute of Company Directors and currently a Director of Therapeutic Guidelines Ltd.
\textsuperscript{193} Id.
\textsuperscript{194} ANNUAL REPORT 2020–2021, supra note 181, at 21–22.
\end{flushleft}
task for the present government, which has the required majority in the unicameral legislature of Bangladesh.\(^{195}\) Hence, amending the Constitution would require just the political will of the government. The proposed body can be called the Judicial Commission of Bangladesh ("JCB"), and it may consist of six ex-officio members and five appointed members, as specified as below.

The recommended six ex-officio members are:

i) the Chief Justice of Bangladesh, President of the JCB;

ii) the senior-most justice of the AD after the chief justice;

iii) the senior-most judge of the HCD (who must have a clean service record, otherwise the next senior);

iv) the senior-most District and Sessions Judge in Bangladesh;

v) the senior-most Judicial Magistrate in Bangladesh; and,

vi) the senior-most Judge of Women and Children Court in Bangladesh (as the most prominent amongst the different special courts/tribunals across the country).

Five other members should be appointed by the President of Bangladesh based the nominations by the attorney general in consultation with the Ministry of Law, the elected President of the Supreme Court Bar Association, and the elected Vice-Chairman of

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\(^{195}\) The Parliament of Bangladesh is comprised of 350 members. A constitutional amendment requires a two-third majority of the total number of members of Parliament under Article 142 of the Constitution of Bangladesh. The Bangladesh Awami League is the party currently in power and holds 305 seats out of 350, which is more than the required majority. Hence, the government can conveniently amend the Constitution. For the list of party-wise breakdown of members of the current Parliament, see List of 11th Parliament Members Party Wise, BANGL. PARLIAMENT. http://www.parliament.gov.bd/index.php/en/mps/members-of-parliament/current-mp-s/list-of-11th-parliament-members-party-wise-bangla [https://perma.cc/H6QM-8W3M].
the Bangladesh Bar Council (a statutory body to regulate legal profession/professional lawyers, and the attorney general is its ex-officio Chairman). This broad consultation is recommended in order to ensure that the most competent person from each category is nominated. They can be appointed initially for a term of three years with the possibility of renewals at the discretion of the President of Bangladesh.

Recommended appointed members should be selected from the categories mentioned below, and due consideration must be given to their past service records and their current assets, including bank balances with a view to selecting the most honest and diligent persons for the exceptional responsibilities that they will have to discharge properly against all adversities.

The recommended categories for appointed members are:

i) a legal academic from a recognized university with outstanding research outputs and widely honoured by the broader community;

ii) a senior practicing lawyer from the SCB;

iii) an experienced professional from a profession other than law, such as a doctor, engineer or an accountant with outstanding professional reputation;

iv) an executive from the private sector enterprise, preferably someone from a non-profit organization; and

v) an executive from a human rights-oriented non-government organization (“NGO”) that has earned a reputation for providing exceptionally beneficial social services, such as TIB, Bangladesh Environmental Lawyers Association (“BELA”), Ain o Salish Kendra/Law and Arbitration Center (“ASK”), and Odhikar (“Rights”).
We recommend that these categories go slightly beyond the structure of the JCNSW because there are many NGOs in Bangladesh which have long served the people and worked as development partners in the country. Their representation can bring a valuable perspective to the functions of the proposed JCB.

F. Functions of the Proposed Judicial Commission of Bangladesh

As the functions of the JCNSW are well-appreciated by all stakeholder groups, as alluded to earlier, and because the ALRC recommends the functions for the FJC be those of the JCNSW, which is endowed with complaints-handling and educative functions, we would like to recommend similar functions to be carried out by the JCB.

As the key to the fruitful functioning of the judiciary is enhancing and maintaining public confidence, the work of the JCNSW is “designed to enhance public confidence in the judiciary by promoting the highest standards of judicial behaviour and decision making.” The functions of the JCNSW are of paramount importance in almost every respect of its functionality, as will be pinpointed shortly. The JCNSW’s functions are aligned with its vision, mission, and goals, as it vows that “[t]hrough good governance and effective policies and processes, we realise our vision, carry out our mission, hold to our values and achieve our goals.” Its vision is that the people of NSW “will have confidence in the exceptional ability and performance of judicial officers,” whilst promoting “the highest standards of judicial behaviour and decision making” as its mission. The most crucial function in the present context would be handling complaints against judicial officers. The JCNSW does have the authority to deal with complaints concerning judicial corruption as well as incapacity of judges, and the laws governing this power are provided in sections 13–43AA of the

196 ALRC, supra note 76, at 311, citing A JUDICIAL COMPLAINTS COMMISSION?, supra note 166, at 7.82–7.84.
197 About Us—What We Do, supra note 182.
198 ANNUAL REPORT 2020–2021, supra note 181, at 78.
199 About Us—What We Do, supra note 182.
200 The process for dealing with “impairment” is described in sections 39A–39G of the JOA1986, which falls beyond the scope of this article.
Anyone can lodge a complaint with the JCNSW against a judicial officer in writing by identifying the complainant and the judicial officer concerned under section 17. Upon receipt of a complaint, the JCNSW conducts a preliminary examination, and to draw a conclusion, it may initiate such inquiries as it deems appropriate, with the process taking place in private so far as practicable. The JCNSW, based on the nature and merits of a particular complaint, may summarily dismiss the complaint, otherwise it would refer the complaint to its Conduct Division. Alternatively the JCNSW may refer it to the relevant head of jurisdiction with recommendations as to what steps might be taken to deal with the complaint if the JCNSW thinks that the complaint has some merits but not to the extent to justify the involvement of the Conduct Division. If the matter is referred by the Minister under section 16, the JCNSW may, under section 21A, notify the Minister as to whether it has been summarily dismissed or referred to the Conduct Division or to the head of jurisdiction. The Conduct Division will carry out the necessary investigations into the matter through a three-member panel (sections 22–28) and report to the State Governor under section 29(1), which provides that if “the Conduct Division decides that a complaint is wholly or partly substantiated and forms an opinion that the matter could justify parliamentary consideration of the removal of the judicial officer from office, it must present to the Governor a report setting out the Division’s findings of fact and that opinion.” The copy of the report must be given forthwith to the Minister and the JCNSW. The complainant

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202 Section 17 provides the complaint submission process: “(1) A complaint shall be made in accordance with the regulations. (2) A complaint must be in writing and must identify the complainant and the judicial officer concerned.” Id. § 17. Hence, there is no restriction on the eligibility of potential complainants.
203 Id. § 18.
204 Id. § 20.
205 Id. § 21(1). The Conduct Division and its functions are described in sections 13–14 of the Act.
206 Id. §§ 21(2)–(3).
207 Section 21A stipulates that “After dealing with a matter referred to it under section 16, the Commission must notify the Minister as to whether the matter has been summarily dismissed under section 20 (1), referred to the Conduct Division under section 21 (1) or referred to the relevant head of jurisdiction under section 21 (2).” Id. § 21A.
208 For further details about the required procedure to be followed, see Id. §§ 22–29.
209 Id. § 29(2A).
will get the copy only after the report has been laid before each House of Parliament by the Minister.\footnote{Id. \textsection 29(6).}

\textbf{G. Suspension or Removal of Judicial Officers}

Justice Spigelman has duly emphasized that establishing the rule of law warrants administering laws fairly, rationally, predictably, consistently, and impartially, and that judicial misconduct and incompetence are inconsistent separately with each of these objectives.\footnote{Spigelman, \textit{supra} note 175, at 241.} Per section 53 of the Constitution of NSW, a judicial officer can be removed by the Governor on an address from both Houses of Parliament in the same session on grounds of proved misbehaviour or incapacity.\footnote{Section 53 of the Constitution Act 1902 (NSW) contains the provisions governing removal of judges in NSW. It stipulates that “(1) No holder of a judicial office can be removed from the office, except as provided by this Part. (2) The holder of a judicial office can be removed from the office by the Governor, on an address from both Houses of Parliament in the same session, seeking removal on the ground of proved misbehaviour or incapacity. (3) Legislation may lay down additional procedures and requirements to be complied with before a judicial officer may be removed from office. (4) This section extends to term appointments to a judicial office, but does not apply to the holder of the office at the expiry of such a term. (5) This section extends to acting appointments to a judicial office, whether made with or without a specific term.” Constitution Act 1902 (NSW), \textsection 53.} However, legislation may lay down additional procedures and requirements to be complied with before a judicial officer may be removed from office under section 53(3).\footnote{Section 53(3) of the Constitution of NSW provides: “Legislation may lay down additional procedures and requirements to be complied with before a judicial officer may be removed from office.” \textit{Id.} \textsection 53(3).}

The JOA1986 prescribes this additional procedure. Following a complaint or a report of the Conduct Division of the JCNSW, the appropriate authorities, as specified in section 43 of the JOA1986 being the relevant head of jurisdiction or the Governor,\footnote{Section 43 of the JOA1986 states that: “the appropriate authority is the relevant head of jurisdiction, but, in relation to a member of the Commission, the President of the Children’s Court or the President of the Civil and Administrative Tribunal, the appropriate authority is the Governor acting on the recommendation of the Commission.” JOA1986, \textit{supra} note 201, \textsection 43.} may suspend the judicial officer under section 40(1)(a) if “a complaint is made about a judicial officer or a report is made by the Conduct Division setting out its opinion that a matter could justify parliamentary consideration of the removal of a judicial officer from office.”
office.”215 However, removal of a judicial officer by the Governor of NSW essentially requires a report of the Conduct Division to the Governor that contains the Division’s opinion that the matters referred to in the report could justify parliamentary consideration of the removal of the judicial officer on the ground of proved misbehaviour or incapacity.216 The Governor will then refer the case to the Parliament and wait for a parliamentary recommendation to order removal. Thus, only a Governor may only order suspension without Parliament’s involvement.217 As noted in section 41(2) of the JOA1986, this removal process is supplementary to the corresponding provisions specified in section 53 of the Constitution of NSW.218 Regarding corruption allegations, the Independent Commission Against Corruption Act 1988 of NSW applies to both judicial duties and other functions of judicial officers, and the

215 Section 40 of the JOA1986 prescribes that “(1) If—(a) a complaint is made about a judicial officer or a report is made by the Conduct Division setting out its opinion that a matter could justify parliamentary consideration of the removal of a judicial officer from office, or (b) a judicial officer is (i) charged in New South Wales with an offence that is punishable by imprisonment for 12 months or upwards or charged elsewhere than in New South Wales with an offence that if committed in New South Wales would be an offence so punishable, or (ii) convicted in New South Wales or elsewhere of such an offence, or (c) a formal request, within the meaning of Part 6A, has been made in respect of a judicial officer, the appropriate authority may suspend the officer. (2) The appropriate authority may lift the suspension at any time.” Id. § 40.

216 Section 41 of the JOA1986 concerns itself with the removal of judicial officers. Id. § 41. (“(1) A judicial officer may not be removed from office in the absence of a report of the Conduct Division to the Governor under this Act that sets out the Division’s opinion that the matters referred to in the report could justify parliamentary consideration of the removal of the judicial officer on the ground of proved misbehaviour or incapacity. (2) The provisions of this section are additional to those of section 53 of the Constitution Act, 1902.”)

217 Id. at §§ 40–41; Constitution Act 1902 (NSW), supra note 212, § 53 (providing the legal framework for removing a judicial officer).

218 Section 41(2) of the JOA1986 states that “The provisions of this section are additional to those of section 53 of the Constitution Act 1902.” JOA1986, supra note 201, § 41. Hence, section 41 does not affect the Constitution Act 1902 (NSW), section 53, which declares that a judge cannot be removed from his or her office by the Governor alone without the resolution of the Parliament. The Constitution Act 1902 (NSW), section 53 pronounces that “(1) No holder of a judicial office can be removed from the office, except as provided by this Part. (2) The holder of a judicial office can be removed from the office by the Governor, on an address from both Houses of Parliament in the same session, seeking removal on the ground of proved misbehaviour or incapacity. (3) Legislation may lay down additional procedures and requirements to be complied with before a judicial officer may be removed from office. (4) This section extends to term appointments to a judicial office, but does not apply to the holder of the office at the expiry of such a term. (5) This section extends to acting appointments to a judicial office, whether made with or without a specific term.” Constitution Act 1902 (NSW), supra note 212, § 53.
JCNSW has the binding responsibility under this legislation to report to the Independent Commission Against Corruption (“ICAC”) about any matter suspected on reasonable grounds to be corrupt conduct.219 The ICAC lacks enforcement powers against judges; however, it can pass its findings to the JCNSW,220 which will report to the Governor for a parliamentary recommendation. 221 This means that the corruption allegations can be investigated by the JCNSW or ICAC. We propose that the JCB must have the authority to investigate allegations of misconduct, including judicial corruption and incapacity at all levels, and to recommend appropriate actions to be taken by the President in the absence of parliamentary role. However, if the amended constitutional provision of the parliamentary involvement (Article 96) eventually survives after the currently pending review by the AD,222 then the JCB should submit its report to the Parliament in the same way as it is done by the JCNSW. If so, the Parliament will forward its recommendation to the President for final action.

H. Addressing Inordinate Delays in the Disposal of Cases

The functions of the JCB should not be confined to the removal or suspension of judges for incapacity or gross misconduct. Rather, they should be extended to the chronic problem of inordinate delay in the disposal of cases in Bangladesh as misconduct or incapacity.223 For example, the JCNSW is empowered to conduct investigations into complaints against judges concerning incompetence or unjustified delay.224 The protracted delay in the

220 See id. § 53 (providing the Commission’s referral power).
223 Constitution Act 1902 (NSW), supra note 212, § 53; JOA1986, supra note 201, § 41.
224 JOA1986, supra note 201, § 39B. See also Complaints about New South Wales judicial officers, JUD. COMM’N OF NEW SOUTH WALES,
disposal of cases has been a grave concern in Bangladesh. As of December 31, 2020, Bangladesh has a total of 3,933,186 pending cases, with 3,464,998 pending in subordinate courts, 452,963 pending in the HCD (for currently 95 judges), and 15,225 pending in the AD of the SCB (for seven judges). Amid such a dim scenario, we submit this recommendation having due regard for the importance of the expeditious justice and the consequence of denial of justice by inordinate delays.

To increase the disposal of cases, more judges should be appointed. Simultaneously, to hold the judges accountable, statistics of disposal by each judge from assistant judges to the judges of the HCD should be made public on an annual basis via the websites of the SCB and the district judges. While such statistics should not be the sole decisive factor for evaluating a judge’s performance, which would entail a consideration of the quality of delivered judgements, the benefit of such publications in increasing a sense of efficiency in judges’ minds and instinctively discipline judges in a quiet manner particularly to avoid unreasonable delay is not beyond doubt. We are conscious that Justice Thomas Frederick Bathurst, former Chief Justice of NSW (2011-2022), does not subscribe to the concept of quantitative analysis of output of judges in the Australian context, where judicial corruption and unjustified long delays in the disposal of cases are probably non-existent or negligible. We can infer this from the statement describing the context triggering the inquiry by the ALRC resulting in its aforesaid 2021 report. The statement reads:

The Australian judiciary is highly respected internationally for its integrity and its impartiality. Public confidence in judges and the courts in Australia is generally high. There has been no crisis of
confidence in the Commonwealth courts in Australia. The impetus for this Inquiry was a particular decision of a Full Court of the Family Court of Australia [in Charisteas v Charisteas\(^\text{230}\)] that considered the issue of personal contact between the trial judge and counsel for one of the parties.\(^\text{231}\)

However, the situation in Bangladesh is different in terms of both corruption and delays, which warrants quantitative appraisal alongside qualitative appreciation. If a single incident of a judge’s biased conduct in Australia could trigger a fastidious inquiry that resulted in the ALRC Report 138, the criminal conviction of former Bangladeshi Chief Justice Sinha in 2021 and the pellucid comments by the HCD Bench in a judgment in 2019\(^\text{232}\) should influence the authorities in Bangladesh to do more—particularly because those incidents were sharply backed by the public statements of attorneys general appealing to the top judges to take action against corruption.\(^\text{233}\) Hence, we argue for the publication of annual judicial performance records in Bangladesh through the official websites of the SCB and the respective district courts, given the persistence of both corruption and procrastination in the disposal of cases.\(^\text{234}\) It is worth noting that the quality of judgments should still be emphasized for the sake of justice, as the “denigration in the ‘quality of justice’ is not something that can neatly be measured or even observed.”\(^\text{235}\)

I. PROVIDING SENTENCING GUIDELINES

Determining the appropriate sentence is a complicated process which requires a judge to take many factors into account that

\(^{230}\) Charisteas v. Charisteas (2020) 60 Fam. L.R. 483 (Austl.).

\(^{231}\) ALRC, supra note 76, at 3.

\(^{232}\) See Bangladesh v. Chairman (SCB (HC) 2019) (Bangl.), supra note 36.


\(^{234}\) See generally Asrafuzzaman & Hasan, supra note 225, at 135–60 (describing Bangladesh case backlogs).

\(^{235}\) Bathurst, supra note 2, at para. 36.
include aggravating and mitigating factors. 236 Providing sentencing guidelines is another important task of the JCNSW under section 10 of the JOA1986. Different from the practice in Bangladesh, where generally no separate sentencing hearing is held and no legislation exists to deal with the difficult task, NSW has separate legislation, the Crimes (Sentencing Procedure) Act 1999 (NSW), which governs sentencing. 237 The legislation limits a judge’s discretion to choose a particular sentence for a given offender. 238

Consistency in sentencing is warranted to demonstrate that like cases are treated alike and different cases are considered differently through the application of settled principles, 239 and which will foster public confidence. 240 Public confidence in the justice system is enhanced through a fair application of the system that involves reasonable consistency and predictability. 241 The JCNSW designs and runs sentencing programs to help judges make informed decisions in sentencing a convict, promoting a consistent approach to sentencing across NSW. 242 The JCNSW aims to achieve this by providing guidance on the sentences given by others, information on sentencing principles and practice, and information on sentencing trends and patterns. 243 To do so, it uses the online Judicial

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237 Crimes (Sentencing Procedure) Act 1999 (NSW) § 21A. This legislation is critical to the determination of appropriate sentence for every convict, as it requires judicial consideration of mitigating and aggravating factors of a particular offender surrounding the offence being committed. Id. The significance of this Act can also be found in the purposes of sentencing enunciated in its section 3A: “The purposes for which a court may impose a sentence on an offender are as follows—(a) to ensure that the offender is adequately punished for the offence, (b) to prevent crime by deterring the offender and other persons from committing similar offences, (c) to protect the community from the offender, (d) to promote the rehabilitation of the offender, (e) to make the offender accountable for his or her actions, (f) to denounce the conduct of the offender, (g) to recognise the harm done to the victim of the crime and the community. The legislation is crafted to attain all these purposes.” Id. § 3A.
238 JUDGE FOR YOURSELF—A GUIDE TO SENTENCING IN AUSTRALIA, 13 (2019), JUD. CONF. OF AUSTL.
240 SENTENCING BENCH BOOK, supra note 236, at 5653.
241 Wong v. The Queen (2001) 207 CLR 584, 591 (Austl.).
242 See generally SENTENCING BENCH BOOK, supra note 236 (explaining the prevailing sentencing approaches adopted by the judiciary and detailing best practices).
243 Id.
Information Research System (“JIRS”) and the Sentencing Bench Book. 244

The concept of a sentencing hearing is practically absent in Bangladesh, as is sentencing guidance.245 Given the paramount importance of consistency and propriety in sentencing, the JCB must be tasked with the responsibility of developing sentencing guidelines by undertaking adequate research.

J. Other Important Educative and Investigative Functions

Unlike the SJC of Bangladesh, the JCNSW does have some other statutory functions stipulated in sections 9–11 of the JOA1986. These functions include publishing information about criminal law to assist the courts in achieving consistency in imposing sentences and more generally in the conduct of criminal proceedings, providing a continuing education and training program for NSW judicial officers, examining complaints about judicial officers’ ability or behaviour that may not eventuate in dismissal, offering judicial education, conducting sentencing research, and sharing its knowledge and experience with the global network of judiciaries and judicial education providers.246 These broad functions are reasonably expected to be beneficial for both the judiciary itself and its stakeholders. Its judicial educational programs are very rich; Bangladesh could learn from the details of this scheme available from the online sources.247 These vital services of the JCNSW remain largely ignored in Bangladesh as no agency is entrusted with these functions.248

244 Id.
246 About Us—What We Do, supra note 182.
248 See CONST. art. 96(4) (Bangl.) (demonstrating that no statutory or constitutional body in Bangladesh is entrusted with the responsibility to carry out functions similar to those of the JCNSW). The provisions regarding the SJC have been removed pursuant to the 16th Amendment to the Constitution in 2014 which has been declared invalid and unconstitutional by the highest court. See Bangladesh v. Siddiqui (SCB AD, 2017) (Bangl.) (invalidating the Amendment). However, the Parliament has not yet restored the SJC provisions, instead, the government is waiting for review by the same Court of the annulment of the sixteenth
The SJC of Bangladesh does not have any of the above-stated responsibilities besides that of investigations leading to the removal of judges.\textsuperscript{249} We recommend that the proposed JCB have all the functions of the JCNSW, including the authority to investigate corruption. Instead of referring the corruption allegations to ACC, we prefer such investigations to be carried out by the JCB, to avoid harming the reputation of the judiciary. The JCB’s active role in this sensitive task can provide confidentiality and thereby lessen the potential of reputational damage for the implicated judge and the judiciary as a whole.\textsuperscript{250} However, where essential, the JCB may seek ACC’s assistance in conducting such investigations in confidence.

IV. UNDERPINNING PRINCIPLES OF THE JUDICIAL COMMISSION OF BANGLADESH

The system of judge-controlled administration of courts is not a panacea itself, because it has problems of its own.\textsuperscript{251} Having accepted that ensuring judicial accountability is a complex task because it involves detailed consideration of a dispute and the interplay among judicial administration, independence, transparency, accountability, efficiency, and the quality of justice,\textsuperscript{252} we have proposed to effectuate judges’ internal and external accountability through a combined mechanism. To make the proposed JCB a useful watchdog, it must be allowed to have certain essential principles. Some of the major principles underpinning the proposed JCB could be similar to those recommended for the Australian FJC that include: functional independence, providing judges with a fair opportunity to defend themselves, conducting investigation process confidentially (though certain parts of its outcomes may be made public), protecting the public in dealing with complaints, and keeping accessible to all.

\textsuperscript{249} CONST. art. 96 (Bangl.).
\textsuperscript{250} See e.g., Vince Morabito, The Judicial Officers Act 1986 (NSW): A Dangerous Precedent or a Model to Be Followed?, 16(2) UNSW L.J. 481, 496 (1993).
\textsuperscript{251} Tin Bunjevac, From Individual Judge to Judicial Bureaucracy: The Emergence of Judicial Councils and the Changing Nature of Judicial Accountability in Court Administration, 40(2) UNSW L.J. 806, 840 (2017).
\textsuperscript{252} Id. at 841.
members of the public.\textsuperscript{253} Perhaps above all, appointed members must be picked from selected categories with utmost diligence and fairness so that they can discharge their duties through polemical yet reasonable deliberations.

\section*{V. Conclusion}

Corruption hinders the attainment of SDG 16. Any judicial officer found pursuing a dishonest benefit should be judged corrupt and incompetent to administer justice, and therefore, should be brought to justice.\textsuperscript{254} Amid the ongoing disagreement between the judiciary and the other two organs of the government in Bangladesh concerning the judges’ removal authority of the SJC and the Parliament, this article explores the possibility of a third body to be called JCB. We leave the merits of the controversy between the organs of the government for a separate painstaking research. We have chosen the proposed new body relying on multiple factors including the international standards suggested by the ICJ, the practical successful experience of NSW, the most recent recommendations of the ALRC on addressing “judicial impartiality and the law on bias,” a brief review of the performance of the SJC during the past thirty-seven years in Bangladesh, and a stalemate on the judges’ removal process whilst alarming allegations of judicial corruption prevail in the country. We have worked out the composition and functions of the JCB in line with its much-appreciated existing counterpart, the JCNSW, though we have added some new threads regarding memberships and functions.

\subsection*{A. Composition of the JCB}

We recommended that the JCB includes a majority of judges from all tiers of judicial administration in Bangladesh and a minority of non-judicial members to represent other stakeholders. The composition of judges should include six official or ex-officio members and five other appointed members hired by the President of the country based on recommendations to be made by the attorney

\begin{footnotesize}
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\item \textsuperscript{253} ALRC, \textit{supra} note 76, at 334–35.
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general following useful consultation with other specified stakeholders. Official members should include: the Chief Justice of Bangladesh as its president, the senior-most justice of the AD, the senior-most judge of the HCD, the senior-most District and Sessions judge, the senior-most Judicial Magistrate, and the senior-most judge of Women and Children Court from the category of special courts and tribunals. Appointed members should be selected from different categories: a legal academic, a senior practicing lawyer, an experienced professional, an executive from the private sector, and an executive from a human rights-oriented NGO.

Here, we have largely followed the structure of the JCNSW while adding a new category of membership: the representation of NGOs. Many NGOs have worked undeniably as development partners and quite a few of them are engaged in promoting and protecting human rights in the country. We have previously argued that corruption violates human rights.255 We have therefore recommended inclusion of an executive of a human rights-oriented NGO as a member.

B. Functions of the JCB

The scope and performance of mandated functions of an agency signify its efficiency and effectiveness. The scope of the SJC’s functions was strictly limited to the investigation of incapacity and misconduct that may eventuate in the dismissal of an SCB judge and the submission of a recommendation to the President of Bangladesh. The scope was too narrow to provide effective services to the nation. We recommend a wider scope for the JCB encompassing educational, promotional, and investigative works in parallel with that of the JCNSW to oversee all judges in Bangladesh. All activities aim to enhance and maintain public confidence in the judiciary by promoting the highest standards of judicial behaviour in


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the decision-making process. These are: dealing with complaints against judicial officers that may lead to removal, suspension, or other disciplinary actions, publishing information about the criminal law to assist the courts to achieve consistency in awarding sentences, and more generally in the conduct of criminal proceedings, imparting continuing education and training to judicial officers, carrying out sentencing research and providing sentencing guidelines, and sharing its knowledge and experience with the global network of judiciaries and judicial education providers. We recommend that the JCB take full control of investigations into judicial corruption and seek assistance from the ACC only when essential.

C. Underpinning Principles of the Judicial Commission of Bangladesh

We accept that complexities that underlie judicial accountability involve intricate chemistry between judicial administration, independence, transparency, accountability, efficiency, and the quality of justice. For an effective dealing with all these critical territories of the administration of justice, the proposed JCB needs to be able to hold and exercise certain principles. Some prominent ones are: functional independence, ensuring the judge’s right to self-defense, conducting investigations confidentially, safeguarding public protection in dealing with complaints, and keeping its services accessible to all members of the public. These are also applicable to the JCNSW. We have further added the maintenance of utmost fairness in selecting the appointed members.

We have due respect for the view that judicial accountability is to be conceived in conformity with the principles of judicial independence. At the same time, we also hold steadfastly that judges’ probity cannot be compromised in any circumstances, and it is deplorable when their honesty and integrity is sold for financial gain in cash or kind. We have attempted to liberalize judicial accountability from judicialization by striking a balance between

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256 About Us—What We Do, supra note 182.
257 ALRC, supra note 76, at 334–35.
conflicting stances on the judges’ removal process between the judiciary and the other two government organs.

The extent of corruption allegations in Bangladesh implies that corrupt judges have been effectively enjoying impunity. Impunity is a major cause of corruption, because judges feel safe in taking bribes when they know they will not be punished due to the ineffective accountability mechanism and the authority’s lack of will to bring the wrongdoers to justice.\textsuperscript{259} No judge should be immune from liability for misconduct in their judicial capacity.\textsuperscript{260} We admit that judges have long been held in high esteem, but a few harmful incidents can erode public confidence in the judiciary as an institution, tempting the public to take the law into their own hands.\textsuperscript{261} Corruption diminishes public confidence, which is hard to be rebuilt once it is gone.\textsuperscript{262} The integrity of the judiciary as a whole and the reputation of individual judges are inseparably interlinked, so a bad apple can spoil the bunch. Judicial independence requires public satisfaction with the high quality and total integrity of the judiciary,\textsuperscript{263} which is tainted by corruption. To prevent this stain from polluting the administration of justice, judicial accountability must be designed and enforced through a competent authority which could be the JCB. Whilst this article attempts to provide for an alternative to the SJC in Bangladesh, future research should endeavour to critically examine the conflicting positions of the judiciary and the other two organs of the government in order to ease their contention and effectuate judicial accountability through the JCB in a more effective manner.

\textbf{Postscript:} Between the writing and publications of this article, Justice Hasan Foez Siddique, former Chief Justice of Bangladesh, has been retried and Justice Obaidul Hassan has commenced his role as the new Chief Justice of Bangladesh on September 26, 2023. Like his predecessors, Chief Justice Hassan also recognizes that the judiciary is not corruption-free, and has expressed his firm commitment to “try his best to ensure a graft-free judiciary for the country.” No other changes have taken place requiring any revision of this article following the appointment of the new chief justice.

\textsuperscript{259} ICJ, \textit{supra} note 5, at 112.
\textsuperscript{260} Cyrus Das & K. Chandra, \textit{Judges and Judicial Accountability} 90 (2005); Budhiraja, \textit{supra} note 45, at 123–24.
\textsuperscript{261} Budhiraja, \textit{supra} note 45, at 128.
\textsuperscript{262} Bathurst, \textit{supra} note 2, at para. 36.
\textsuperscript{263} Morabito, \textit{supra} note 241, at 490 (citations omitted); ALCR, \textit{supra} note 69, at 307.