INTERNATIONAL REVIEW OF LAW

OPEN ACCESS

Research article

# The natural death of the Supreme Judicial Commission of Bangladesh and the consequent patronage appointments to the Bench: Advocating the establishment of an Independent Judicial Commission

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**ABSTRACT**

In order to strengthen the constitutional process of appointment of judges in Superior Courts, Bangladesh established a Supreme Judicial Commission in 2008 by promulgating an Ordinance. This Ordinance was neither promulgated in pursuance of any provisions of the Constitution nor by introducing any amendment to the provisions of the Constitution. The recommendations of the Commission were not given binding force on the executive. The power of the executive to accept or reject the candidates recommended by the Supreme Judicial Commission at his pleasure defeated the very objective of establishing the Commission for appointing the most competent and suitable persons as judges of the superior courts in Bangladesh. However, following the general elections held on 29 December 2008, the newly elected Government of Bangladesh Awami League dispensed with the Supreme Judicial Commission by not placing the Supreme Judicial Commission Ordinance before the parliament for its approval. This resulted in restoring the previous system of appointing judges on the satisfaction of the executive, which has resulted in patronage appointments. Thus, the establishment of an independent judicial commission in Bangladesh is an imperative necessity for strengthening the independence and impartiality of the judiciary.

*Keywords:* substantive independence of the judiciary, Supreme Judicial Commission of Bangladesh, patronage appointments

http://dx.doi.org/10.5339/irl.2014.1

Submitted: 21 February 2013
Accepted: 13 May 2013


QSCIENCE.com
Member of Qatar Foundation

Cite this article as: Ehteshamul Bari M. The natural death of the Supreme Judicial Commission of Bangladesh and the consequent patronage appointments to the Bench: Advocating the establishment of an Independent Judicial Commission, *International Review of Law* 2014:1 http://dx.doi.org/10.5339/irl.2014.1

## INTRODUCTION

Despite the fact that the question of judges performing judicial functions independently comes after their appointment, the method of appointment of judges is the crucial and dominant factor to ensure judges' substantive independence, the independence which greatly depends upon the independent character, integrity, equanimity, legal knowledge, and keen intellect of the persons who would hold the office of judges. For the appointment of a judge on account of political allegiance in utter disregard of his qualifications, merit, ability, competency, integrity and earlier performance as an advocate or judicial officer may bring in, to use the words of United States President Franklin D. Roosevelt "spineless puppets" who can hardly be expected to dispense justice independently according to law and their own sense of justice without regard to the wishes and desires of the government of the day.[1] There is a great possibility that such a judge may remain "indebted to those responsible for his designation . . . the beneficiary is exposed to the human temptation to repay his debt by a pliable conduct of his office,"[2] especially when the executive itself is a litigant. As H. J. Laski aptly said, "It is not necessary to suggest that there will be conscious unfairness; but it is . . . possible that such judges will, particularly in cases where the liberty of the subject is concerned, find themselves unconsciously biased through over-appreciation of executive difficulty."[3] Therefore,

> [i]n appointing judges, a government owes a duty to the people . . . to ensure appointees of the highest calibre. Judicial independence can also be subverted by the appointment of persons who do not possess an outstanding level of professional ability, intellectual capacity and experience and integrity, and who cannot shake off a sense of gratitude to the appointing authority. It is . . . in the interests of the . . . people [not] to have their judicial tribunals reduced to timorous institutions.[4]

The confidence of the public in judges, who administer law, can be retained and preserved only if the judges are seen to be not only qualified to perform their functions, but also as courageous, independent, impartial, and of integrity—integrity of judges being, in the words of Francis Bacon, who as early as 1612 said, "above all things . . . their portion and proper virtue."[5] Thus, the appointment of the right kind of judges having the requisite qualities of professional skill, ability and integrity will go a long way in applying, interpreting and enforcing the law without fear or favour. If "the judiciary should be really independent," rightly observed Justice Venkataramiah in *Gupta v. India*,[6] "something more is necessary and that we have to seek in the judge himself and not outside . . . . It is the inner of strength of judges alone that can save the judiciary."[7] In the same case, Justice Bhagwati also eloquently said, "Judges should be of stern stuff and tough fibre, unbending before power, economic or political, and they must uphold the core principle of the rule of law which says 'Be you ever so high, the law is above you.'"[8] For this reason, some of the national constitutions of the world provide for qualities that a person should possess in order to be considered for appointment as a judge of the superior court. For example, the Constitution of the Islamic Federal Republic of the Comoros, 1978, provided that the members of the Supreme Court shall be chosen on the basis of their competence, their integrity, and their knowledge of law.[9]

The international standards as laid down in the Universal Declaration on the Independence of Justice, 1983 and the Beijing Statement of Principles of the Independence of the Judiciary in the Law Asia Region, 1995 (as amended in Manila on 28 August 1997) also provide for certain criteria for the selection of judges. The Universal Declaration enjoins that candidates for judicial officer shall be

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[1]Pres. Franklin Roosevelt, *Fireside Chat* (Mar. 9, 1937) (transcr. available at http://www.presidency.ucsb.edu/ws/?pid=15381).

[2]Karl Loewenstein, Political Power and the Governmental Process, 231 (2d ed., U. Chi. Press1965).

[3]H. J. Laski, *Studies in Law and Politics* 170 (Transaction Publishers. 2009).

[4]Enid Campbell & H. P. Lee, *The Australian Judiciary* 95 (Cambridge U. Press 2001).

[5]Francis Bacon, *Of Judicature* (available at http://www.bartleby.com/3/1/56.html).

[6]*Gupta v. India,* All India Rptr. 1982 SC 149, 1981 Supp (1) SCC 87, 1982 2 SCR (1981) (link to pdf available at http://www.indiankanoon.org/doc/1294854/). [Hereinafter, all pinpoint cites will be to page numbers in the original pdf version of the decision.]

[7]*Id.* at 488.

[8]*Id.* at 21.

[9]Const. Islam. Fed. Rep. Comoros 1978 art. 32. However, this provision has been dispensed with in the 2001 Constitution of Comoros (available with automatic translation at http://www.wipo.int/wipolex/en/text.jsp?file_id=208361).

individuals of integrity, ability, and "well-trained in the law."[10] More or less in a similar manner, the Beijing Statement calls for judges "chosen on the basis of proven competence, integrity and independence."[11]

Therefore, in order to select persons who are best qualified in terms of legal acumen, ability, and knowledge of law for judicial office/appointment, a suitable and appropriate method of appointment is required as the just means to ensure substantive independence of the judiciary. The Latimer House Guidelines on Parliamentary Supremacy and Judicial Independence that were drafted in 1998 by the Commonwealth countries, emphasize, "The appointment process . . . should be designed to guarantee the quality and independence of mind of those selected for appointment at all lives of the judiciary."[12] However, judicial appointments around the world usually are made using one of the following four methods:

a. **Appointment by the head of the state** either unilaterally (as in Sri Lanka[13]), on recommendation of, or in consultation with, the Chief Justice of the Supreme Court (as in South Korea[14] and India[15]), after obtaining the agreement of the Leader of the Opposition (as in the Republic of Guyana[16]), after selection by a standing committee or commission consisting of representatives of the higher judiciary, the legislature, the executive and the bar (as in Israel[17]), on the recommendation of a Judicial Council (as in Nigeria[18]), from a panel of nominees proposed by the Supreme Court (as in the Republic of Chile[19]), or upon approval of the upper chamber of the legislature (as in the appointment of federal judges in the United States[20]);
b. **Election by the legislature** (as in Switzerland[21]);
c. **Election by the people** (as in the election of state judges in 38 different U.S. states);[22] and
d. **Appointment by a judicial service commission** (such as the Superior Council of the Judiciary in Italy[23] and the National Judicial Council in Croatia[24]).

Of the four methods of appointing judges, appointment by the head of the state is followed in most of the countries of the world, particularly in most of the common law countries. However, there are striking variations in consulting, recommending, and confirming entities within those countries. As a common law country, Bangladesh has adopted the method of having its Head of State appoint judges of the superior courts, which allows scope for the intrusion of politics into the selection process.

This article examines as to what extent the establishment of the Supreme Judicial Commission in Bangladesh via promulgation of an Ordinance had strengthened the constitutional process of appointing superior court judges. The constitutionality of the relevant Ordinance is also examined.

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[10] Int'l Ass'n Jud. Indep. & World Peace, *Universal Decl. on the Indep. of Just.*, 1983, art 2.11 (available at http://www.jiwp.org/#!montreal-declaration/c1bue) [hereinafter *Universal Decl.*].

[11] Beijing State. of Principles of the Indep. of the Jud. in the LawAsia Region, art. 11 (amend.1997), (available at http://lawasia.asn.au/objectlibrary/147?filename=Beijing%20Statement.pdf) [hereinafter Beijing State].

[12] Commw. Parliamentary Ass'n, *Parliamentary Supremacy and Judicial Independence*, *Latimer House Guidelines* (June 19, 1998) [hereinafter *Latimer House Principles*].

[13] Const. Sri Lanka, 1978, art 107 (available at http://www.priu.gov.lk/Cons/1978Constitution/1978ConstitutionWithoutAmendments.pdf).

[14] Const. Rep. S. Kor. art. 104(2).(available at http://www.icrc.org/ihl-nat.nsf/162d151af444ded44125673e00508141/aba339f342ad7493c1256bc8004c2772/$FILE/Constitution%20-%20Korea%20-%20EN.pdf).

[15] Const. India ch. IV, art.124(2) (available in English at http://lawmin.nic.in/olwing/coi/coi-english/Const.Pock%202Pg.Rom8Fsss%289%29.pdf).

[16] Const.Coop. Rep. Guy. ch. XI, art. 127(1) (available at http://pdba.georgetown.edu/Constitutions/Guyana/guyana96.html).

[17] Basic Law—Judicature §4(a). (available at http://www.servat.unibe.ch/icl/is03000_.html). The Judicial Committee of Israel, which is chaired by the Minister of Justice, is comprised of nine members: three judges of the Supreme Court, two lawyers, two members of Parliament, and two cabinet ministers.

[18] Const. Fed. Rep. Nig. ch. VII, pt. 1(A)(231) (available at http://www.nigeria-law.org/ConstitutionOfTheFederalRepublicOfNigeria.htm#Chapter_7).

[19] Polit. Const. Rep. Chile art. 75 (available at http://confinder.richmond.edu/admin/docs/Chile.pdf).

[20] U.S. Const. art II, § 2.

[21] Anreas Lienhard, *The Swiss Federal Supreme Court: A Constitutional Assessment of Control and Management Mechanisms*, 1 Int. J. Ct. Admin. 2 (2008) (available at http://www.iaca.ws/ijca-vol.-1-no.-2.html, *scroll down to* article title and select link to article) (last accessed Sept. 17, 2013). Federal Supreme Court Act 2005, art 5 para 1., art 1(11).

[22] *See* American Judicature Society at http://www.judicialselection.com/ (providing information on the judicial selection processes in all 50 states).

[23] Const. Ital. Rep. tit. IV, §1, art. 105 (available at http://legislationline.org/download/action/download/id/1613/file/b4371e43dc8cf675b67904284951.htm/preview).

[24] Croat. Const. pt. 4, art.123.

Furthermore, it will be demonstrated that the Government of Bangladesh Awami League decided against placing this Ordinance before the Parliament for ratification in order to stock the bench largely with patronage appointments. In conclusion, the importance of establishing an independent, effective, and meaningful judicial commission in Bangladesh to select and appoint persons with requisite qualifications and qualities as judges will be stressed.

## CONSTITUTIONAL PROCESS OF APPOINTMENT OF JUDGES OF THE SUPERIOR COURTS IN BANGLADESH

Part VI, Chapter I of the Constitution of the People's Republic of Bangladesh, 1972 titled "THE JUDICIARY" having pyramidal structure, contains provisions concerning composition, jurisdiction, appointment, and removal of judges of the Supreme Court, the highest court of law in Bangladesh. As to the composition of this apex court, the Constitution states that "[t]here 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."[25] Although under the one compendious name of the "Supreme Court of Bangladesh," there are two divisions of the Court, namely the Appellate Division and the High Court Division. They are erroneously called two separate and independent courts: the High Court and the Supreme Court. The Supreme Court of Bangladesh is indeed a single Court having two Divisions: the High Court Division of the Supreme Court and the Appellate Division of the Supreme Court.

The High Court Division has been given original and appellate jurisdictions and powers by the Constitution,[26] while the Appellate Division has been provided with the authority "to hear and determine appeals from judgments, decrees, orders or sentences of the High Court Division."[27]

The 1972 Constitution of Bangladesh originally provided that the judges of the Supreme Court "shall be appointed by the President, in consultation with the Chief Justice" for the Chief Justice of Bangladesh was in a better position to know about the competence, legal practice, seniority, and integrity of the members of the bar and bench.[28] The consultation with the Chief Justice in the selection of other judges was, indeed, a major safeguard against political and expedient appointments. The Chief Justice could reasonably be expected not to be guided by any parochial considerations and, as such, would objectively nominate names of advocates or judicial officers who would be most suitable for appointment as judges of the Supreme Court.

Following the British method of appointing the judges of the higher judiciary prevalent until the enactment of the Constitutional Reform Act, 2005, it was the 1949 Indian Constitution that, for the first time in the Subcontinent, empowered the President under Articles 124(2) and 217(1) to appoint judges of the Supreme Court and the High Courts after consultation with designated constitutional authorities, including the Chief Justice of India. The Supreme Court of India interpreted consultation in the three cases of *S.P. Gupta v. India*,[29] *The Supreme Court Advocates-on-Record Association v. Union of India*,[30] and *Special Reference No. 1 of 1998*.[31]

In *Gupta's Case*,[32] which is popularly known as *The First Judges' Case,* Justice Bhagwati, while delivering the majority judgment, gave a literal interpretation to the word "consultation" as contained in Articles 124(2) and 217(1) of the 1949 Indian Constitution. He observed that "consultation" with the Chief Justice of India could not be interpreted to mean "concurrence" and neither Article 124(2) nor Article 217(2) gave any indication of primacy between the Chief Justice and other broad bands of consultees, namely, a) the Chief Justice of India, b) Governor of the State concerned, and c) the relevant Chief Justice of the High Court, regarding the appointment of judges to the superior courts.[33] Although Justice Bhagwati maintained that all the three constitutional functionaries were on the same pedestal so far as the process of consultation was concerned and did not accord any superiority to the opinion of one over another, he observed that "the opinion of the Chief Justice of India . . . is entitled to great weight as the opinion of the head of the Indian Judiciary."[34]

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[25] Const. P. Rep. Bangl. Pt. VI, ch. 1, art 94(1).
[26] *Id.* at art. 101.
[27] *Id.* at art. 103.
[28] Const. P. Rep. Bangl. Pt. VI, ch.1, art. 95(1).
[29] *S.P. Gupta v. Union of India*, All India Rptr. 1981 Supp (1) SCC 87.
[30] *The Sup. Ct. Advocates-on-Record Ass'n v. Union of India*, 4 SCC 441 (1993) [hereinafter *Advocates-on-Record*].
[31] *Spec. Ref. Case No. 1 of 1998* (1998) [hereinafter *The Third Judges' Case*].
[32] *S.P. Gupta*, All India Rptr. at 87.
[33] *Id.* at 227-228.
[34] *Id.* at 230.

But in 1993, the Supreme Court of India overruled the majority view in *S.P. Gupta's Case* in *Supreme Court Advocates-on-Record Association* (*The Second Judges' Case*).[35] In *The Second Judges' Case*, the word "consultation," as used in Articles 124(2) and 217(1) of the Indian Constitution, was interpreted to mean "concurrence" by observing that the opinion of the Chief Justice would get primacy among the constitutional consultees in the matter of appointment of judges,[36] something that was categorically rejected by the Indian Constituent Assembly because that would have bestowed a right of veto on the Chief Justice regarding the appointment of judges. The Supreme Court further held in *The Second Judges' Case* that to eliminate political influence, the opinion of the Chief Justice was to be formed by stifling his individual voice after consulting two senior-most puisne judges of the Supreme Court[37] despite the fact Articles 124(2) and 217(1) of the Constitution does not place any such obligation on the Chief Justice.

Despite the fact that these two Articles do not speak of any collegium in the context of appointment of judges of the superior courts, the Indian Supreme Court in the *Special Reference No. 1 of 1998*[38] (*The Third Judges' Case*) held that the sole individual opinion of the Chief Justice did not constitute consultation and, as such, he was required to form his opinion after consulting the collegium consisting of the "four senior-most puisne Judges of the Supreme Court."[39]

Thus the Supreme Court of India did not keep itself confined to the four corners of the Constitution in the S*econd and Third Judges' Cases*, and virtually re-wrote the provisions of Articles 124(1) and 217(1) of the Constitution by a stroke of adjudicatory self-enthronement with a view to wrest the authority of appointing judges of the superior courts from the President to themselves, allegedly to safeguard the cherished and over-arching concept of judicial independence.

Following the 1949 Indian Constitution, the 1956, 1962, and 1973 Constitutions of Pakistan also provided for the appointment of Supreme Court judges by the President after consultation with the Chief Justice, with the modification that the Chief Justice had discretion whether to consult the judges of the Supreme Court and of the High Courts in the States.[40] In 1996, the Supreme Court of Pakistan examined the meaning and scope of "consultation" by the President in *Al-Jehad Trust & Others v. Federation of Pakistan*.[41] Sajjad Ali Shah CJ, in delivering the majority judgment, observed that although consultation is different from consent, the expert opinions of the Chief Justices of the High Courts about the advocates who appeared before their courts, regularly must be given due weight as to the fitness and suitability of those advocates for appointment as judges.[42] He held that these opinions were entitled to be accepted in the absence of very sound reasons to be recorded in writing by the President. He further held that consultation as envisaged in the 1973 Constitution of Pakistan was supposed to be "effective, meaningful, purposive, consensus-oriented," having no room for complaint of arbitrariness or unfair play.[43] Thus, the Supreme Court of Pakistan, without making any attempt to rewrite the provisions of the Constitution, gave a realistic and sensible interpretation to the word "consultation" to serve the constitutional purpose of selecting and appointing the most suitable and meritorious candidates as judges of the superior courts.

But as long the phrase "consultation with the Chief Justice by the President" was mentioned in Article 95(1) of the Constitution of Bangladesh, 1972, the Supreme Court of Bangladesh did not have any occasion to interpret this phrase in connection with the appointment of puisne judges of the Supreme Court.

The Constitution (Fourth Amendment) Act, passed on 25 January 1975, dispensed with the President's obligation to consult the Chief Justice in appointing puisne judges of the Supreme Court. This left the door wide open for the President to measure fitness in terms of political eminence rather than judicial quality. But on 28 May 1976, the first Martial Law Regime of Bangladesh restored the Constitutional provision of consultation with the Chief Justice by the President when appointing judges to the Supreme Court. The President's obligation to consult the Chief Justice in appointing the judges of the Supreme Court was again dispensed with on 27 November 1977 by the new President and Chief Martial Law Administrator, Major General Ziaur Rahman. However, it was claimed by Justice Kemal Uddin

[35] *Advocates-on-Record*, 4SCC 441 at 441.
[36] *Id.* at 693.
[37] *Id.* at 701-702.
[38] *Third Judges' Case* at 739.
[39] *Id.* at 744.
[40] Const. Pak.1956, art. 149(1); Const. Pak. 1962, art. 50; Const. Pak. 1973, art. 177 read with art. 175A.
[41] PLD 1996 SC 324.
[42] *Id.* at 329.
[43] *Id.* at 364-365.

Hossain, who was the Chief Justice in 1977, that President Zia himself developed in 1978 the convention of consulting the Chief Justice of Bangladesh in appointing the puisne judges of the Supreme Court.[44]

The nature, scope and binding force of the conventional consultation with the Chief Justice was examined by the High Court Division of the Supreme Court in June 2001 in *S.N. Goswami, Advocate v. Bangladesh;*[45] in 2002 in a Criminal Miscellaneous Contempt Case, *State v. Chief Editor, Manabjamin*;[46] and in 2007 in *Md. Idrisur Rahman Advocate and others v. Secretary, Ministry of Law, Justice and Parliamentary Affairs, Government of the People's Republic of Bangladesh*.[47] On the other hand, Justice Syed examined the matter for the Appellate Division of the Supreme Court of Bangladesh in *Md. Dastagir Hossain and Others v. Md. Idrisur Rahman, Advocate and Others*[48] in 2008.

Although in 2001, in *S.N. Goswami's Case,* Judge Syed Amirul Islam held that the conventional consultation did not have any binding force as it was not a rule of law and could not have primacy,[49] next year in the *State v. Chief Editor, Manabjamin*[50] *Case,* Judge Islam had a complete change of heart. In *Chief Editor,* Syed Amirul Islam J observed that the Chief Justice was required to form his opinion in the matter of appointment of judges in the Full Court meeting of the Supreme Court. Furthermore, like the majority view, as pointed out earlier, in the *Supreme Court Advocates-on- Record,*[51] he held that the opinion of the Chief Justice formed in the meeting of the Supreme Court must have a primacy and be binding on the executive.[52] Syed Amirul Islam J did not keep in mind the fact that, unlike in the Indian Constitution, consultation with the Chief Justice was no longer a star in the Constitution of Bangladesh and conventional consultation could not be interpreted in the same manner as that of constitutional consultation. Contrary to the decision of the Appellate Division of the Supreme Court in *Kudrat-E-Elahi v. Bangladesh*[53] and the opinion of jurist Thomas M. Cooley,[54] Syed Amirul Islam J entered into an uncalled-for academic discussion of an important constitutional issue like consultation with the Chief Justice in appointing judges of the Supreme Court as that was very *lis mota* for the case. However, ultimately in March 2009, the Appellate Division of the Supreme Court in Bangladesh and Justice Syed Md. Dastagir Hossain[55] set aside the observation of Justice Syed Amirul Islam that in the matter of

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[44]Justice Kemal Uddin Hossain, *Independent Judiciary in Developing Countries* (Speech delivered at the Justice Ibrahim Memorial Lecture Series, U. Dhaka 1986), 45 cited in M. Ehteshamul Bari, *The Substantive Independence of Judiciary Under the Constitutions of Malaysia and Bangladesh: A Comparative Study* (LLM Thesis, University of Malaya, 2011) 141 (available at < http://studentsrepo.um.edu.my/3239/5/CHAPTER3.pdf>).

[45]*S.N. Goswami, Advocate v. Bangladesh*, 55 DLR 332 (2003).

[46]*State v. Chief Editor, Manabjamin*, 31 Ch. L. Chron. (HCD) (2002) [Hereinafter *Manabjamin*].

[47]37 Ch. L. Chron. (HCD) (2008).

[48]*Md. Dastagir Hossain and Others v. Md. Idrisur Rahman, Advocate and Others*, 38 C. L. CHRON. (AD) (2009) [Hereinafter *Rahman*].

[49]*Goswami,* 55 DLR at 345.

[50]*Manabjamin*, at 247-248.

[51]*Advocates-on-the-Record*, 4SCC 441 at 693

[52]*Manabjamin*, at ¶ ¶ 247-248.

[53](1992) 44 DLR (AD) 319. The Appellate Division of the Supreme Court in this case observed,

> the … decision … made on hypothetical facts … as a rule, the Courts always abhor. The Court does not answer merely academic question but confines itself only to the point/points which are strictly necessary to be decided for the disposal of the matter before it. This should be more so when Constitutional questions are involved and the Court should be ever discreet in such matters. Unlike a civil suit, the practice in Constitutional cases has always been that if the matter can be decided by deciding one issue only no other point need be decided. (quoting *Rahman*, at ¶ 107).

[54]Thomas M. Cooley forcefully remarked that

> "the courts … will not go out of their way to find such topics [i.e. constitutional questions]. They will not seek to draw in such weighty matters collaterally nor on trivial occasions. It is both more proper and more respectable to a coordinate department to discuss constitutional questions only when that is very lis mota. Thus presented and determined, the decision carries a weight …. In any case, therefore, where a constitutional question is raised, though it may be legitimately presented by the record, yet if the record also presents some other and clear ground upon which the court may rest its judgment, and thereby render the constitutional question immaterial to the case,"

the court will take that course and leave the question of constitutional power to be passed upon "until a case arises which cannot be [otherwise] disposed of and which consequently renders a decision upon such question necessary." Thomas M. Cooley, *A Teatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* 198-199 (Brown Little 1878).

[55]*Rahman*, 38 C. L. CHRON. (AD).

appointment of judges to the superior judiciary, the opinion of the judiciary expressed through the Chief Justice of Bangladesh had primacy, calling the decision "not . . . a sound proposition of law."[56]

Unlike the Indian Supreme Court's decisions in the Sec*ond and Third Judges' Cases*, Judge Md. Abdur Rashid of the three-member Special Bench of the High Court Division of the Supreme Court of Bangladesh in *Md. Idrisur Rahman, Advocate and Others*,[57] while laying down 12 norms as to consultation with the Chief Justice and appointment or non-appointment of additional judges, observed that the Chief Justice was required to form his opinion for the appointment of judges to the High Court Division by consulting not only two senior-most judges of each of the two Divisions of the Supreme Court, but also the Attorney-General and one or more members of the "broad band" of the Supreme Court Bar.[58] While the Chief Justice was required to stretch out the zone of consultees beyond the fellow judges of the Supreme Court in the formation of his opinion as to the appointment to High Court Division judges, he was required to constitute his opinion for the appointment of judges to the Appellate Division of the Supreme Court by only consulting three senior-most judges of the Appellate Division to stifle his individual voice.[59] It should be stressed here that unlike the Indian Supreme Court, which interpreted consultation with the Chief Justice as mentioned in Articles 124(2) and 217(1) of the Constitution of India, the Supreme Court of Bangladesh interpreted consultation with the Chief Justice, a requirement which has been deliberately deleted twice from Articles 95(1) and 98 of the Constitution of Bangladesh—first on 25 January 1975; and after its restoration on 28 May 1976, again on 27 November 1977. Thus, there was hardly any scope for giving such a wide connotation to *ex gratia* or conventional consultation with the Chief Justice of Bangladesh by the President as developed in 1978.

But in Bangladesh and in Justice Syed *Md. Dastagir Hossain's Case*,[60] although Joynul Abedin J of the Appellate Division of the Supreme Court rightly struck down those 12 norms or guidelines as they had not been construed by the provisions of Article 95 and 98 of the Constitution,[61] Abdul Matin J who delivered the main judgment of the court disapproved of 10 out of 12 norms.[62] Abdul Matin J disapproved of norm iii, which provided that the Chief Justice was to form his opinion on the appointment of judges to the Appellate Division in consultation with a collegium of judges, and was to form his opinion on the appointment of judges to the High Court Division in consultation with a collegium including not only judges,[63] but also the Attorney General and one or two members of the Supreme Court Bar.[64] Like S.P. Bharucha J of the Indian Supreme Court, who in *The Third Judges' Case* for the first time used the word "collegium" consisting of four senior-most puisne judges of the Supreme Court with which the Chief Justice was required to consult in the formation of his opinion, Abdul Matin J of the Appellate Division of the Supreme Court of Bangladesh for the first time described the system of formation of opinion by the Chief Justice, as described in norm iii, a collegium of judges.[65] But he disapproved of the concept of collegium by making reference to its non-existence in the Constitution or convention and to the non-satisfactory functioning of the collegium system in India[66]

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[56] *Id.* at ¶ 75.
[57] *Supra* n 49.
[58] *Id.* at ¶152.
[59] *Id.*
[60] *Rahman*, 38 Ch. L. Chron. (AD).
[61] *Id.* at ¶ 92.
[62] *Id.* at ¶¶ 232-239.
[63] *Id* at 50.
[64] *Id.* at ¶ 235.
[65] *Id.* at ¶ 235.
[66] *Id.* Initially the Collegium system, as mandated by the Supreme Court of India in the Second and Third Judges' Cases of 1993 and 1998 respectively, gained wide popularity as it kept executive's influence regarding judicial appointment to the minimal, contrary to the earlier practice. But the working of the Collegium system for about 19 years, following the decision of *the Second Judges' Case* in 1993, has manifested serious flaws, e.g. secret deliberations, lack of transparency, "too much ad-hocism," absence of any secretariat to shoulder the burden of selecting judges, or any intelligence bureau to make appropriate inquiries into the competence, character and integrity of proposed candidates for appointment as judges of the Supreme Court and the High Courts. Accordingly, after the abortive attempt made in 2003 to replace the system of the Collegium with a National Judicial Commission, the Government has recently placed before the Parliament a Bill to set up National Judicial Commissions for the appointment of judges of the Supreme Court and the High Court. T.R.Andhyarujina, *Appointment of Judges by Collegiums of Judges*, The Hindu (online) (Dec. 18, 2009) (available at http://www.hindu.com/2009/12/18/stories/2009121855530900.htm); Ashish Tripathi, *Has the collegium system of Judges' Appointment Outlived its Utility*, Deccan Herald (online) (May 11, 2012) (available at http://www.deccanherald.com/content/155018/has-collegium-system-judges-appointment.html); *Key Change Made in Draft National Judicial Commission*, Zee News (online) (July 20, 2012) (available at <http://zeenews.india.com/news/nation/key-change-made-in-draft-national-judicial-commiss_788751.html>).

(which is evident from the report of the Law Commission of India, Report No. 214 dated 21 November 2008). It was held that the opinion of the Chief Justice should be given due weightage in the area of legal acumen and suitability of the candidates for appointment as judges to the Supreme Court, while the opinion of the President should be dominant in the area of antecedents of the candidates. Thus, a consensus-oriented decision is to be arrived at, to "find out the most suitable (candidates) available for appointment."[67] This interpretation of consultation by the Appellate Division of the Supreme Court of Bangladesh to the effect that, the opinion of the Chief Justice with regard to higher judicial appointments shall not be binding on the President following the decision of the Supreme Court of Pakistan in *Al-Jehad Trust's Case*[68] seems to be a fair, appropriate, and a balanced interpretation of the word consultation.

## RESTORATION OF "CONSULTATION WITH THE CHIEF JUSTICE" IN THE CONSTITUTION OF BANGLADESH IN JULY 2011

The present Government of the Awami League (2008 – to date), which in January 1975 for the first time omitted from the Constitution of Bangladesh the phrase "consultation with the Chief Justice" in connection with the appointment of judges of the Supreme Court by the President, restored the original provisions of presidential consultation with the Chief Justice in appointing only regular judges of the apex court of the country, i.e., the Supreme Court, through the Constitution (Fifteenth Amendment) Act in July 2011.[69] But, the requirement of consultation with the Chief Justice by the President when appointing additional judges has deliberately not been restored in Article 98 of the Constitution so that the initial appointment of additional judges to two-year terms in the High Court Division of the Supreme Court, used as a gateway to enter into the cadre of permanent judgeship, can be made by the President entirely on the advice of the Prime Minister, which allows for possibility of political bias or personal favouritism in the appointment process.

## THE SUPREME JUDICIAL COMMISSION OF BANGLADESH

### A. Background

Since the number of judges to be appointed in the High Court Division and Appellate Division of the Supreme Court of Bangladesh has been kept indeterminate,[70] it is to be determined by the President on the advice of the Prime Minister. Although the Appellate Division of the Supreme Court has the strength of judges determined by the President from time to time, there is no such strength for the High Court Division, which is fixed by the President. Thus, the number of judges varies at the pleasure of the executive. If the President is satisfied that the number of judges of a Division should be increased for the time being, then, under Article 98 of the Constitution, the President may appoint additional judges to that Division for a period of two years. Successive governments have taken advantage of this lacuna to pack the Supreme Court with judges with political allegiance on the hope that these judges would support the government's actions, omissions, and legislation, if challenged.

When the Government of the Awami League succeeded the Bangladesh Nationalist Party (BNP) Government in 1996, there were 37 judges in the High Court Division and five judges in the Appellate Division, including the Chief Justice of Bangladesh. During their five-year rule, the number of judges in the High Court Division was increased from 37 to 56, although the number of judges in the Appellate Division remained the same. The Awami League Government appointed 40 additional judges to the High Court Division.[71] In October 2001, the Bangladesh Nationalist Party came to power and the next year it raised the number of judges in the Appellate Division from five to seven.[72] On 9 July 2009, President Zillur Rahman raised the number of posts of judges in the Appellate Division of the Supreme

[67] *Id.* at ¶ 256 (parenthesis in original).

[68] *Supra* n 43.

[69] Bangl. Const. art. 95, amend. 15 (available at http://bdlaws.minlaw.gov.bd/sections_detail.php?id=367&sections_id = 24652).

[70] Bangl. Const. pt. VI, ch. 1, art. 94(2) provides that "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."

[71] Asian Hum. Rights Comm'n, Bangladesh, *Government Contests the Reappointment of Judges in Supreme Court* (available at http://www.humanrights.asia/news/ahrc-news/AHRC-STM-201-2008/?searchterm=).

[72] U.S. Dept. State,Bureau of Democracy, Human Rights, and Labor, *Country Reports on Human Rights Practices: Bangladesh*,¶ 29 Mar. 31, 2003 (available at pards.org/bangladeshcro2.doc).

Court from seven to eleven.[73] When the BNP Government relinquished power in October 2006, the number of judges in the High Court Division was 72 and it had appointed a total of 45 judges.[74] In order to prevent the politically-motivated appointments that took place allegedly during the previous two regimes and "to select and recommend competent persons for appointment as judges of the Supreme Court,"[75] on 16 March 2008, President Iajuddin Ahmad issued the Supreme Judicial Commission Ordinance providing for the establishment of a Supreme Judicial Commission for selection and recommendation of names to the President for appointment as additional judges and regular judges of the High Court Division and judges of the Appellate Division of the Supreme Court.[76] The Ordinance was issued during the regime of the non-party caretaker government (consisting of the Chief Advisor and ten other nominated advisors), which was an interim government established within 15 days of dissolution of the parliament[77] having the mandate to carry on ordinary routine functions of the government and to "give to Election Commission all possible aid and assistance that may be required for holding the general elections of members of parliament peacefully, fairly and impartially."[78]

### B. Composition of the Supreme Judicial Commission

The original Supreme Judicial Commission Ordinance, 2008, issued in March 2008, provided that the Commission would consist of nine members with the Chief Justice as its Chairman and the Minister of Law, Justice and Parliamentary Affairs, two senior-most judges of the Appellate Division, Attorney General, two members of parliament (one should be nominated by the Leader of the House and the other by the Leader of the Opposition in parliament), President of the Supreme Court Bar Association, and Secretary, Ministry of Law, Justice and Parliamentary Affairs, as the members of the Commission.[79] Thus among the members of the Commission, the six non-judicial members constituted the majority. Since the Commission was established to guarantee a cautious, professional, and non-political search for the best persons for judgeships of the Supreme Court, based on first-hand knowledge about each of the candidate's keen intellect, legal acumen, integrity, suitability of character, and temperament as an advocate and a judicial officer, the provisions for inclusion into it two members of a political body like the parliament, and a minister (a politician) and the secretary (a loyal civil servant) of the Ministry of Law, Justice and Parliamentary Affairs as its members, could hardly serve the purpose of selecting and recommending the best candidate for appointment as judges of the Supreme Court with a view to maintain the quality of the Bench. Although both the President of the Supreme Court Bar Association and the Attorney General (as principal and Constitutional Law Officer of the Government) are pre-eminently suited to evaluate the advocates of the Supreme Court for appointment as judges, their inclusion into the Commission could not be said to be conducive to checking patronage appointments, for they are under the distressing influence of either the party in power or opposition political parties and, as such, are highly politically charged. Furthermore, out of the nine members of the Commission, only three were judges of the Supreme Court— the Chief Justice and two senior-most judges of the Appellate Division of the Supreme Court—which evinced the domination of the six non-judicial members in the selection process. Since the composition of the Supreme Judicial Commission was diluted, the purpose of establishing the Commission for selecting and recommending the most qualified and appropriate persons for appointment as judges of the Supreme Court was destined to be frustrated.

But on 16 June 2008, only three months after the promulgation of the Ordinance, the Supreme Judicial Commission (Amendment) Ordinance, 2008, was issued to introduce changes in the composition of the Commission: the provision appointing two members of parliament

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[73]Ashutosh Sarkar, Appellate Division: Number of Posts of Judges Raised to 11 The Daily Star (July 10, 2009), (available at http://archive.thedailystar.net/newDesign/news-details.php?nid=96265).

[74]*10 New HC judges to be Appointed*, The Daily Star (Oct. 31, 2008) (available at http://www.thedailystar.net/newDesign/news-details.php?nid=61184). After 2004, the B.N.P Government did not appoint any additional judges to the High Court Division; M. Ehteshamul Bari, *The Substantive Independence of Judiciary Under the Constitutions of Malaysia and Bangladesh* (LLM Thesis, University of Malaya, 2011), 189 (available at http://studentsrepo.um.edu.my/3239/)

[75]The Supreme Judicial Commission Ordinance, preamble (2008) (available at http://bdlaws.minlaw.gov.bd/bangla_all_sections.php?id=970) (translation on file with author).

[76]*Id.*

[77]Bangl. Const. art. Ch. IIA, former art. 58C(2). The caretaker government system was abolished from the Constitution of Bangladesh by Section 21 of the Constitution (Fifteenth Amendment) Act, 2011 (available at http://bdlaws.minlaw.gov.bd/sections_detail.php?id=367&sections_id = 41507).

[78]*Id.* former art. 58D(2).

[79]The Supreme Judicial Commission Ordinance, 2008, Section 3(2) (available at http://bdlaws.minlaw.gov.bd/bangla_all_sections.php?id=970) (translation on file with author).

(one from the ruling party and the other from the opposition) and the Secretary of the Ministry of Law as Commission members were deleted, and a provision was added to include two senior-most judges of the High Court Division of the Supreme Court as the members of the Commission. Thus, under the new arrangement, the Commission would consist of the Chief Justice as its ex-officio Chairman, the Minister of Law, three senior-most judges of the Appellate Division (previously it was two), two senior-most judges of the High Court Division, the Attorney General, and the President of the Supreme Court Bar Association, altogether eight, as the ex-officio members.[80]

Thus, the President of Bangladesh was not given any authority to appoint any eminent person, jurist or judge of the Supreme Court-who were perceived as being close to the regime-as a member of the Commission. It is noticeable that the majority of the members of the Commission—six out of nine—were now ex-officio members from the Judges of the High Court Division and Appellate Division of the Supreme Court. Thus, the majority of judicial members who had expert knowledge of candidates' acumen and suitability dominated the selection process for appointment to the highest judicial office. The other three members – the Law Minister, the Attorney General, and the President of the Supreme Court Bar Association (if the Bar President has political allegiance to the party in power) – could make an abortive attempt in the meeting of the Commission in deference to the wishes of the Prime Minister/President for filling the vacancies in the Supreme Court. However, the inclusion of the two senior-most judges of the High Court Division to the Supreme Judicial Commission may be considered a positive development in the sense that a large number of lawyers appear before them, and only a small fraction of them have a good length of practice and reputation standing before the Appellate Division of the Supreme Court.

### C. Selection process

The Supreme Judicial Commission of Bangladesh was not given any discretion to advertise on the Commission's website or in any other medium to fill any vacancies in the Supreme Court. Thus, any citizen having the experience of practising before the Supreme Court for a period not less than ten years or any judicial officer having not less than ten years experience could not apply directly for selection as a judge of the High Court Division of the Supreme Court. The Commission was required to consider the names of the candidates proposed by the Law, Justice, and Parliamentary Affairs Ministry (Law Ministry).[81] The Law Ministry could propose a minimum of three and a maximum of five names for each judicial vacancy to the Commission for its consideration.[82] It is obvious that candidates sharing ideological views of the party in power would have better prospects of getting nominated by the Law, Justice and Parliamentary Affairs Ministry. However, if the Commission considered it necessary to take into account the names of the additional candidates, it could make such a request to the Law Ministry or, it could select any competent person outside the names proposed by the Law Ministry.[83] Of course, such a candidate, if selected and recommended, would have the least chance of getting appointed because he or she would lack political patronage.

Thus, lack of plurality of sources for proposing candidates from outside the Law Ministry for judicial appointment was a serious drawback of the system. However, the Supreme Judicial Commission was allowed to follow a transparent process in selecting the candidates by conducting interviews of the candidates at its discretion,[84] as opposed to the previous system of appointing judges of the Supreme Court, which had been cloaked with secrecy and devoid of any transparency. In spite of these changes, the Supreme Judicial Commission Ordinance of Bangladesh did not contain any provision regarding screening of the antecedents of the candidates by the Independent Anti-Corruption Commission, Police Forces, or Tax Ombudsman of Bangladesh with respect to candidates' educational qualifications, tax payment records, credit, history as to arrest and conviction, or integrity.

### D. Functions and selection criteria

The authority of the Commission was confined only to selecting and recommending candidates for appointment as regular and additional judges of the High Court Division and of regular judges to the Appellate Division of the Supreme Court. But, the Commission was not given the jurisdiction to

[80] The Supreme Judicial Commission (Amendment) Ordinance, 2008, Section 2.
[81] Sup. Jud. Commn. Ord., *supra* n. 79 §6(1).
[82] *Id.* at § 6(2).
[83] *Id.* at § 6(3).
[84] *Id.* at § 5(7).

recommend candidates for appointment as the Chief Justice of Bangladesh. It was also not given any authority to discuss anything about the disposal of cases and improving the performance of the Supreme Court Judges. The Supreme Judicial Commission Ordinance provided for different sets of criteria for the Commission to consider when appointing additional judges in the High Court Division and the Appellate Division of the Supreme Court. The Commission was required to consider the candidates' educational qualifications, professional skills, efficiency, seniority, honesty, and reputation, along with other ancillary matters, when recommending candidates for appointment as additional judges of the High Court Division.[85] On the other hand, for recommending any judge of the High Court Division of the Supreme Court for appointment to the Appellate Division, his seniority, judicial skills, integrity and reputation, and other subsidiary matters were to be taken into account by the Commission.[86]

### E. Selection meeting of the Commission

The Supreme Judicial Commission of Bangladesh was required to sit at least once every six months.[87] But the Chairman of the Supreme Judicial Commission, the Chief Justice, would immediately convene a meeting of the Commission if he was requested to consider candidates for appointment as judges of the Supreme Court by the competent authority (i.e. the Law Ministry under the Rules of Business).[88] It was stressed in the Supreme Judicial Commission Ordinance that the Commission would first strive to make a unanimous decision, perhaps taking into account the importance of appointing the most qualified and suitable persons as judges to maintain the quality of the Bench. If that was not possible, the decision was to be the decision of a majority of the members present.[89] The presence of five members would constitute a quorum, and a decision to recommend names for appointment could be made by a majority of the members present, which means that a decision of the Commission might be based on the support of three members if only five members attended the meeting.[90] However, the Ordinance did not mention that the quorum would include the Chairman. Rather, it was provided that when there was an equality of votes, the Chairman of the Commission or the person presiding over the meeting could exercise a casting vote.[91] It is to be stressed here that the three non-judicial members of the Commission (the Law Minister, Attorney General and President of the Supreme Court Bar Association) were allowed to attend its meeting as members of the Commission for selecting and recommending the High Court Division judges for appointment to the vacant posts in the Appellate Division. But the senior-most judges of the High Court Division who were Members of the Commission were precluded from taking part in its meeting without assigning any reason whatsoever (for example, if they were being considered for selection and, as such, were being precluded from participation in the meeting to avoid any conflict of interest).[92] The Commission was required to select and recommend two candidates for each vacancy in the Supreme Court without the requirement of any mention of the order of preference,[93] perhaps to give a free hand to the appointing authority in selecting either of the two candidates proposed.

### F. Consideration of report by the President

The Supreme Judicial Commission of Bangladesh was required to send its recommendation for whom to appoint to judicial vacancies to the Law Ministry for forwarding to the President.[94] Ordinarily the President would appoint the judges of the Supreme Court in accordance with the recommendation of the Commission.[95] In case the President did not agree with the recommendation of the Commission, the President would send the recommendation back for its reconsideration.[96] After receipt of any request from the President for reviewing any recommendation, the Commission would promptly

[85] *Id.* at § 5(6).
[86] *Id.* at § 5(5).
[87] *Id.* at § 4(5).
[88] *Id.* at § 4(6).
[89] *Id.* at § 4(7).
[90] *Id.* at proviso to § 4(4).
[91] *Id.* at § 4(6).
[92] *Id.* at § 4(9) (as amended by the Sup. Jud. Comm. (Amend.) Ord. 2008).
[93] *Id.* at § 5(2).
[94] *Id.* at § 7.
[95] *Id.* at § 9(1).
[96] *Id.* at § 9(2).

reconsider the recommendation and would send either its modified recommendation or its earlier recommendation with recorded reasonable grounds to the President.[97] The President was given the right to ignore and reject the recommendation of the Commission by recording appropriate reasons.[98]

Thus, the power of the President to accept or reject the candidates recommended by the Commission at his pleasure defeated the very objective of establishing the Commission for appointing persons of the highest calibre, character, professional skill and integrity as judges (i.e., the right type of judges) to the Supreme Court.

## VALIDITY OF THE SUPREME JUDICIAL COMMISSION ORDINANCE

The ordinance-making power of the President of Bangladesh—conferred on him by Article 93 of the Constitution, which gives him power to carry out legislative functions—is a relic of the Government of India Act, 1935[99] and is of the nature of an emergency power to meet "circumstances" that "render it necessary to take immediate action" when "the Parliament is not in session"[100] to secure the enactment of necessary legislation instantly. Apart from the time and circumstances, there are other limitations on the ordinance-making power of the President, who is the sole judge of the necessity of issuing an ordinance (as Article 93 contains the words "if the President is satisfied"); he cannot promulgate an ordinance making any provision "which could not lawfully be made under [the Bangladesh] Constitution by Act of Parliament" or "which alter[s] or repeal[s] any provision of [the Bangladesh] Constitution."[101] Although the ordinance-making power of the President should be exercised sparingly, there has always been a tendency on the part of the successive governments to resort to such a power more frequently than seems necessary and desirable. However, the Supreme Judicial Commission Ordinance was issued in March 2008 during the regime of the third non-party caretaker government, which was established in 2006 after the dissolution of the parliament for holding free and fair general elections. This government was required to discharge its function as an interim government and, as such, to carry on routine day-to-day works of the government in addition to its main function of assisting and aiding the Election Commission. Hence, it could not make any policy decision except in the case of necessity for the discharge of such routine functions.[102]

The promulgation of the Supreme Judicial Commission Ordinance cannot be accepted as a valid piece of legislation within the framework of the Constitution due to the following grounds:

Unlike Article 115 of the Constitution of Bangladesh, which empowers the President to make rules that he is required to follow when exercising his power to appoint subordinate judicial officers and magistrates exercising judicial functions, Articles 95(1) and 98 (which deal with appointment of regular and additional judges of the Supreme Court respectively) do not provide for the enactment of any mechanism, such as the Supreme Judicial Commission, for selecting candidates for appointment to judicial vacancies in the Supreme Court by the President. Unlike the Constitutions of Algeria, France, Italy, Namibia and Rwanda,[103] the Constitution of Bangladesh does not even empower the legislative authorities to enact laws or promulgate ordinances regulating the organization, powers, and functioning of the Commission. Article 95(2)(c) of the Constitution of Bangladesh empowers the parliament only to pass laws providing for an alternative requisite qualification for judges appointed to the Supreme Court (e.g. a distinguished jurist), and, an ordinance could only be promulgated in this regard. Instead, the Supreme Judicial Commission Ordinance laid down different selection criteria (educational qualification, professional skill, seniority, honesty and reputation for High Court Division judgeship and seniority, judicial skill, integrity and reputation for Appellate Division judgeship) for appointment of judges to the High Court Division as well as to the Appellate Division. Therefore, it can be argued that the Supreme Judicial Commission Ordinance, 2008, was not promulgated within the

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[97] *Id.* at § 9(3).
[98] *Id.* at § 9(4).
[99] Government of India Act, ch. IV, § 42(1) (available at http://www.legislation.gov.uk/ukpga/Geo5and1Edw8/26/2/enacted).
[100] Bangl. Const. ch. 3, art. 93(1).
[101] *Id.*
[102] *Id.* ch. 2, former art. 58D (1).
[103] Const. Dem. Rep. Alg. pt. 2, ch. III, art. 155 (available at http://confinder.richmond.edu/admin/docs/local_algeria.pdf); Fr. Const. tit. VIII, art. 65 (available at http://www.wipo.int/wipolex/en/text.jsp?file_id=179092); Const. Ital. Rep. art. 105 (available at http://legislationline.org/download/action/download/id/1613/file/b4371e43dc8cf675b67904284951.htm/preview); Const. Rep. Rwa.tit. IV, ch. 5, § 3, art. 158 (available at http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---ilo_aids/documents/legaldocument/wcms_127576.pdf).

parameters of Articles 95, 98 and 65[104] of the Constitution of Bangladesh and, as such, is *ultra vires* of the Constitution of Bangladesh.

In 2008, the constitutional validity of the Supreme Judicial Ordinance, 2008, was challenged in *Idrisur Rahman v. Bangladesh*[105] on the following grounds: a) that the Constitution of Bangladesh has not empowered the President to promulgate an ordinance prescribing a mode of selection and recommendation of persons for the appointment of judges of the Supreme Court, b) that there existed no circumstances that required immediate action by the President to promulgate the Ordinance, and c) that during the period of non-party caretaker government, which had the mandate as an interim government to carry on routine functions, the President cannot promulgate an Ordinance involving a policy decision not urgently necessary for the discharge of routine functions of the caretaker government. The majority decisions of Nazmin Ara Sultana J and Md. Ashfaqul Islam J found only the provisions of Section 9(4) of the Supreme Judicial Commission Ordinance, which empowered the President to reject the amended or the earlier recommendations of the Commission after recording the reasons therefore, unconstitutional[106] because the provisions of Section 9(4) of the Ordinance were inconsistent with the provision of the Constitution and convention concerning the appointment of the judges of the Supreme Court.[107] Furthermore, such a provision was very much inconsistent with the very objective of promulgating the Ordinance and, as such, rendered the entire exercise of the Supreme Judicial Commission meaningless, futile, and ineffective. They were of the opinion that several judicial appointments to the Supreme Court by the previous regime were based on political considerations, which rendered the promulgation of the impugned Ordinance urgently necessary for the formation of the Supreme Judicial Commission to select the most suitable persons for appointment as Supreme Court Judges and for making these appointments fair, beyond any controversy, and acceptable to all in order to maintain the confidence of the people in the Supreme Court.[108]

On the other hand, the minority view of Md. Abdur Rashid J held that any law prescribing the mode or procedure for appointment of judges to the higher court cannot be independent of the Constitution. The President, therefore, cannot arrogate a power to make an Ordinance for selection of persons for appointment of judges to the Supreme Court on the fallacy of complementing and supplementing the constitutional provisions or conventions when that power is not conferred upon him by the Constitution. Such a law, if felt necessary, could only be incorporated into the Constitution by the parliament by promulgating an amendment to the supreme law, i.e. the Constitution of Bangladesh, as it has been done in the United Kingdom in 2005. Abdur Rashid J, therefore, held that the entire Supreme Judicial Commission Ordinance was *ultra vires* to the scheme and spirit of the Constitution and, as such, unconstitutional.[109]

It appears that the minority view of Md. Abdur Rashid J is more convincing in view of the following facts: a) since 1978, the President has established the convention of consulting the Chief Justice when appointing judges to the Supreme Court, b) the Constitution does not provide for any provision to enact a law stipulating the establishment of a Judicial Appointments Commission, and c) there hardly existed any circumstance which required immediate action for promulgating the impugned Ordinance for appointment of Judges of the Supreme Court.

## FUNCTIONING OF THE SUPREME JUDICIAL COMMISSION

For the first time in the history of Bangladesh, the President on 12 November 2008 appointed seven new additional judges to the High Court Division for two years on the recommendation of the Supreme Judicial Commission,[110] one of whom declined to accept the offer of judgeship due to his ill-health. In its first meeting, held on 16 October 2008, the Commission also recommended four senior-most judges of the High Court Division for the two vacant posts in the Appellate Division.[111]

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[104]Bangl. Const. ch. 5, art.65(1) provides that "There shall be a Parliament for Bangladesh (to be known as the House of the Nation) in which subject to the provisions of this Constitution, shall be vested the legislative powers of the Republic."

[105]*Idrisur Rahman v. Bangladesh*, 37 Ch. L. Chron. (HCD) ¶ 1(2008).

[106]Id. at ¶ 194.

[107]*Id.* at ¶ ¶168, 194.

[108]*Id.* at ¶ 150.

[109]*Id.* at ¶ ¶100, 111, 116.

[110]Ashutosh Sarkar, *Appellate Division Running with Fewer Judges for Long*, The Daily Star (Dec. 18 2008) (available at http://archive.thedailystar.net/newDesign/news-details.php?nid=67646) (last accessed Sept. 18, 2013).

[111]*Id.*

## NATURAL DEATH OF THE SUPREME JUDICIAL COMMISSION

It is ironic that on 26 July 2008, the Bangladesh Awami Lawyers Association, a platform of pro-Awami League lawyers, demanded that the Supreme Judicial Commission Ordinance 2008 be repealed.[112] After coming to power in a landslide victory in the general elections on 29 December 2008, the Awami League regime placed 54 out of 122 Ordinances promulgated by the non-party caretaker government before the parliament for its approval. But, as expected, the Supreme Judicial Commission Ordinance was not placed before the newly elected House of the Nation (the parliament) for passage into law. Therefore it met a natural death[113] as the life of an ordinance is always subject to the approval of the parliament. Since it is the same political party that on 25 January 1975 deleted the provision concerning Presidential consultation with the Chief Justice when appointing judges of the Supreme Court from the Constitution, it is only natural that the Awami League cannot afford the luxury of an impediment of following a detailed and time-consuming procedure under the auspices of the Supreme Judicial Commission by the executive in the appointment of judges to the highest court of the land.

## THE AFTERMATH OF THE NATURAL DEATH OF THE SUPREME JUDICIAL COMMISSION

Since doing away with the Supreme Judicial Commission in early 2009, the Awami League regime has so far (until February 2013) appointed 55 Judges to the High Court Division of Bangladesh.[114] Thus, within four years of assuming power, the regime has managed to surpass the total number of judges appointed to the High Court Division by its predecessor, the BNP Government, which appointed 45 judges during its five-year tenure from 2001 and 2006.[115]

However, the criteria for appointing these judges to the High Court Division of the Supreme Court has, in most cases, not been by merit, but allegiance to the regime. Out of the 17 judges who received appointment to the High Court Division in April 2010, nine acquired a Third Class in their LLB exams, while 13 had Third Class/Division in more than one of the public exams in their lives. Furthermore, several of these judges who were actively involved with the Bangladesh Awami Lawyers Association, a platform of pro-Awami League lawyers, did not have any experience practicing in the Appellate Division of the Supreme Court.[116]

In addition to the above predicaments, and perhaps more damningly, two of these 17 judges—Ruhul Quddus Babu and M. Khasruzzaman—are accused of committing very serious offences in the past. Mr. Ruhul Quddus Babu, who was educated in the University of Rajshahi, is one of the prime-accused in a case concerning the murder of a top activist from a student organisation at the University of Rajshahi in 1988.[117] On the other hand, M. Khasruzzaman was involved in vandalism that took place on the Supreme Court premises on 30 November 2006. In fact, he was photographed by the leading newspapers of the country kicking the door of the Chief Justice's Office.[118] Taking into account the seriousness of these charges brought against the two newly-appointed judges, the then-Chief Justice Mohammad Fazlul Karim, (who held the office of Chief Justice for only eight months as he had been superseded in getting appointed the Chief Justice of Bangladesh thrice- first in January 2004 by the Government of the Four Party Alliance, then in May 2008 by the non-party caretaker government and finally in December 2009 by the present Awami League Government) in an unprecedented move in the judicial history of the country, decided against administering the oath of office to these two judges citing "unavoidable reasons."[119] Such a bold move on the part of the Chief Justice of Bangladesh to brighten the image of the judiciary deeply embarrassed the government. However, the government ultimately managed to secure the administration of oath to these two controversial judges nearly

[112] *No UZ Elections Before JS Polls: AL Awami Ainjibi Parishad to Form Human Chains*, The Daily Star (July 27, 2008) (available at http://www.thedailystar.net/story.php?nid=47643) (last accessed Dec. 10, 2012).

[113] Rakib Hasnet Suman, *Public Interest Ignored in Picking CG's Ordinances*, The Daily Star 1 (Feb. 24, 2009).

[114] For a list of Bangledshi judges, see Supreme Court of Bangladesh, *Judges' List: High Court Division* (available at http://www.supremecourt.gov.bd/scweb/judges.php?div_id=2).

[115] TMA Samad, Political Appointments: Higher Judiciary Should Revisit the Issue, The Daily Star (online) (June 9, 2007) (available at < http://archive.thedailystar.net/law/2007/06/02/opinion.htm>); Bari at 189.

[116] This information was published in a leading Bengali Daily, The Daily Prothom Alo on April 17, 2010 (available at http://www.prothom-alo.com/detail/date/2010-04-17/news/56890#Scene_2) (translation on file with author).

[117] *Murder Case Against Ruhul Quddus Stayed*, The Daily Star 1 (July 10, 2010) (available at http://archive.thedailystar.net/newDesign/news-details.php?nid=148395).

[118] *Controversial 2 Left Out of Oath*,The Daily Star 1 (Apr. 18, 2010) (available at http://www.thedailystar.net/newDesign/print_news.php?nid=134740).

[119] *Id.; see also* Ashutosh Sarkar, *4 HC Judges Sworn in: Oath of 2 Angers Pro-BNP Lawyers*, The Daily Star 1, (Nov. 5, 2011).

six months after their appointment when Justice Karim's tenure as the Chief Justice came to an end and Justice ABM Khairul Haque took over the helm of the Office of Chief Justice.[120]

Despite the widespread outcry concerning the appointment of the above-mentioned controversial judges, the government nevertheless continued to appoint judges based on political considerations. These patronage appointments in blatant disregard of desirable qualities such as independent character, keen intellect, high legal knowledge and acumen, professional ability, equanimity, dignity, and judicial temperament annoyed even a sitting Member of the Parliament from the ruling Awami League Party, Mr. Abdul Matin Khasru, who was also the Minister for Law, Justice and Parliamentary Affairs during the 1996-2001 Awami League Regime. He remarked, "They [newly appointed Judges] have not been seen in the corridor of the Supreme Court. Despite being Law Secretary of the Ruling party, I knew nothing and I have not been even consulted. They do not have [the] skills to become upper division clerk, yet they are made Judges!"[121]

Thus it is evident that the Government of Awami League deliberately dispensed with the Supreme Judicial Commission to secure the appointment of those lawyers closely affiliated with the ruling party as judges of the Supreme Court of Bangladesh. It failed to take notice of the fact that an erroneous appointment of an unsuitable person of doubtful competence as a judge on the basis of political or personal favouritism is bound to produce irreparable damage not only to the fair administration of justice, but also to the public faith in the administration of justice. The litigating public come to the courts of law to have their disputes adjudicated with the expectation that judges are impartial and independent and will administer justice according to law without taking into account any extraneous or irrelevant considerations. This kind of faith and trust fades away if judges are appointed on considerations other than their merit.[122]

Prof. Shimon Shetreet maintains that "politics should be neither a shortcut to, nor an impediment in the ways of an appointment [of a qualified person] to a judicial office,"[123] which was endorsed by Chief Justice Sajjad Ali Shah of the Pakistan Supreme Court when he observed that the "political affiliation of a candidate for judgeship may not be a disqualification provided he is a person of integrity and has active practice as [an] advocate . . . and has sound knowledge of law."[124] However, it can hardly be expected that as soon as a judge appointed on the consideration of political allegiance "takes oath, there is a sudden transformation and he forgets his past connections and turns a new leaf of life." Justice Pandian of the Indian Supreme Court in *Supreme Court Advocates-on-Record Association v. Union of India*,[125] rightly observed that if the appointee "bears a particular stamp for the purpose of changing the cause of decisions bowing to the diktat of his appointing authority then the independence of the judiciary cannot be secured notwithstanding the guaranteed tenure of office, rights and privileges, safeguards, conditions of service and immunity."[126]

## CONCLUSIONS & RECOMMENDATIONS

The foregoing discussion reveals that the President of Bangladesh during the regime of the third non-party caretaker government (which was set up as an interim government for about four months mainly to assist the Election Commission in conducting the general elections in a free, fair, and impartial manner) promulgated the Supreme Judicial Commission Ordinance, 2008 providing for the establishment of a Supreme Judicial Commission. The Supreme Judicial Commission of Bangladesh was composed of nine ex-officio members, six of whom were from the judiciary—the Chief Justice of Bangladesh, the three senior-most judges of the Appellate Division, and two senior most judges of the High Court Division of the Supreme Court—and constituted the majority of the Commission. This domination of the Commission by the judicial members was more conducive to selecting and

[120]Sarkar, *supra* n. 115.

[121]Quoted in Nazir Ahmed, *Politicisation of the Supreme Court of Bangladesh-The Protector of Fundamental Rights and Ensurer of the Rule of Law* 3 (available at xa.yimg.com/kq/groups/4271304/1113523194/name/Politicization) (translation on file with author); *see also* Shakhawat Liton, *JS body to examine 'violation of rules,'* The Daily Star (Nov. 14, 2011) (available at http://archive.thedailystar.net/newDesign/news-details.php?nid=210055).

[122]M. Ehteshamul Bari, *The Substantive Independence of Judiciary Under the Constitutions of Malaysia and Bangladesh* (LLM Thesis, University of Malaya, 2011) 233 (available at http://studentsrepo.um.edu.my/3239/).

[123]Shimon Shetreet, *Judges on Trial: A Study of the Appointment and Accountability of the English Judiciary* 75 (North-Holland Pub. Co. 1976).

[124]Chief Justice Sajjad Ali Shah in Al-Jehad *Trust v Federation of Pakistan*, PLD 1996 SC 324, 409.

[125]*Advocates-on-Record*, 4 SCC 441.

[126]*Id.* at 525.

recommending candidates objectively, keeping in mind the needs of the office. Although the Supreme Judicial Commission was able to recommend the best candidates to the President for appointment as judges to the Supreme Court, it was not empowered to recommend candidates for appointment as the Chief Justice of Bangladesh. Furthermore, taking into account the scheme of the Constitution, the recommendations of the Commission was not given binding force on the Executive. The establishment of the Commission was provided for neither in the Constitution of Bangladesh nor in any amendment to the Constitution. Therefore, the Supreme Judicial Commission Ordinance of Bangladesh 2008 cannot be considered a valid piece of legislation.

However, in the light of the controversies surrounding the appointment of judges to the Supreme Court of Bangladesh following the natural death of the Supreme Judicial Commission, it seems that the present method for selection and appointment of judges to the Supreme Court of Bangladesh should be given a "decent burial" therefore eliminating patronage appointments or appointments based on extraneous considerations. In order to strengthen the independence and impartiality of the judiciary, an independent, effective, and meaningful judicial commission, representing various interests with pre-eminent position in favour of the judiciary, with the power of selecting and recommending the best candidates to the Head of the State for Judicial Appointment, is the demand of modern times. The principles on the independence of the judiciary, formulated and adopted by various international and regional organisations, particularly in the 1980s and thereafter, favour the appointment of superior court judges by, on the recommendation of, on the proposal/advice of, or after consultation with an appropriately constituted and representative judicial body.[127] Furthermore, the Constitutions of Guyana, Algeria, Croatia, Namibia, Fiji, Nepal, Saudi Arabia, South Africa, Rwanda, Poland, Albania, Nigeria, and Iraq adopted in the 1980s and thereafter, provided for the establishment of a nominating or recommendatory judicial body enjoying a high degree of independence from the political process.[128] In very recent times, the constitutions of some of the countries of the world have been amended to provide for the establishment of an independent body for selection and recommendation of duly-qualified persons for appointment as judges in the superior courts in order to ensure that neither political bias nor personal favouritism and animosity play any part in judicial appointments.[129] In order to bring in greater transparency and accountability in judicial appointments, the Government of India introduced two Bills: the Constitution Bill (Sixty-Seventh Amendment), 1990 and the Constitution Bill (Ninety-Eighth Amendment), 2002, in the Lower House of the Parliament, but both the Bills lapsed before they could be promulgated into law.[130]

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[127] *See* Text of the Lagos Conference of the International Commission of Jurists, 1962, ch. 5(II)(3)(b) (available at http://www.globalwebpost.com/genocide1971/h_rights/rol/5_judiciary.htm); International Bar Association's Minimum Standards of Judicial Independence, 1982, art. (A)(3)(a) (available at http://www.google.com.my/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=1&ved=0CCkQFjAA&url=http%3A%2F%2Fwww.ibanet.org%2FDocument%2FDefault.aspx%3FDocumentUid%3Dbb019013-52b1-427c-ad25-a6409b49fe29&ei=80DtUbjPN4fZrQeY-4H4Bw&usg=AFQjCNGIqtXgQ44hUQ7moiFVUke9Kq93bg&bvm=bv.49478099,d.bmk); *Universal Decl*., *supra* n. 10, at art. 2.14(b); Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, *Basic Principles on the Independence of the Judiciary*, art. 10 (1985) (available at http://www1.umn.edu/humanrts/instree/i5bpij.htm); Beijing State., *supra* n. 11, at art. 14 (acknowledging that different societies will have different processes for selecting judges); *Latimer House Principles*, *supra* n. 12, at 17 (calling for the appointment of judges with "independence of mind").

[128] Const. Coop. Rep. Guy.,ch. XI, art. 128 (available at http://pdba.georgetown.edu/Constitutions/Guyana/guyana96.html); Croat. Const. pt. 4, art.123; Const. Dem. Rep. Alg. pt. 2, ch. III, art. 155 (available at http://confinder.richmond.edu/admin/docs/local_algeria.pdf); Const. Rep. Nam. ch. 9, art. 82(1) (available at http://www.superiorcourts.org.na/supreme/docs/NamibiaConstitution.pdf); Const. Sov. Dem. Rep. Fiji pt. 6, ch. VII, art. Art. 103(2) (available at http://www.paclii.org/fj/promu/promu_dec/cotsdrofd1990712.pdf); Const. King. Nepal pt. 11, art. 87(1); Const. King. Saudi Arabia pt. 6, art. 52 (available at http://www.servat.unibe.ch/icl/sa00000_.html); Const. Rep. S. Afr. ch. 8, art. 174(3) (available at http://www.info.gov.za/documents/constitution/1996/96cons8.htm#174); Const. Rep. Rwa.tit. IV, ch. 5, § 3, art. 147-48 (available at http://www.ilo.org/wcmsp5/groups/public/--ed_protect/--protrav/--ilo_aids/documents/legaldocument/wcms_127576.pdf); Const. Rep. Pol. ch. VIII, art. 179 (available at http://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm); Alb. Const. pt. 9, art.136 (available at http://www.ipls.org/services/kusht/cp9.html); Iraq. Const. art 91(2) (available at http://www.wipo.int/wipolex/en/text.jsp?file_id=230000); Const. Rep. Trin. & Tob. 1976, art104(1) (available at http://www.ttparliament.org/documents/1048.pdf); Const. Fed. Rep. Nig. ch. VII, pt. 1(A)(231) (available at http://www.nigeria-law.org/ConstitutionOfTheFederalRepublicOfNigeria.htm#Chapter_7).

[129] *See e.g. supra* n. 42 (1973 Constitution of Pakistan as amended in 2010 provides for the establishment of a Judicial Commission); *see also* U.K. Const. Reform Act 2005,which provides for the establishment of a Judicial Appointments Commission (available at http://www.legislation.gov.uk/ukpga/2005/4).

[130] [Indian] Advisory Panel on Strengthening of the institutions of Parliamentary Democracy *National Commission to Review the Working of the [Indian] Constitution: A Consultation Paper on Superior Judiciary* (Sept. 26, 2001) (available at http://lawmin.nic.in/ncrwc/finalreport/v2b1-14.htm); Rajeev Dhavant, *The Transfer of Judges*, The Hindu: Online Edition of India's National Newspaper (Oct. 29, 2004) (available at http://www.hindu.com/2004/10/29/stories/2004102902351000.

In *Supreme Court Advocates-on-Record Association v. Union of India*,[131] Justice Kuldip Singh of the Indian Supreme Court gave the words "consultation with the Chief Justice of India" a broad interpretation (i.e., that the Chief Justice's opinion was binding on the Executive) and observed, "We have come to the conclusion that the exclusion of the final say of the executive in the matter of appointment of judges is the only way to maintain the independence of judiciary."[132] The objective of maintaining the independence of the judiciary should be achieved neither by way of judicial activism nor by passing any Act or by promulgating any Ordinance (as Bangladesh did in 2008). In order to ensure that the matter of appointment to the Supreme Court of Bangladesh does not result in politically biased judges or, judges who are, or feel, beholden to the appointing authority, an independent Supreme Judicial Commission should be established via constitutional amendments. The Head of State's power to appointing judges of the superior courts is to be exercised on the recommendation of such a commission. The recommendation of the Commission should be binding upon the Constitutional Head, but it should be open to the President to refer the recommendation back to the Commission, along with the information in his possession regarding the suitability of the candidates. If, however, after reconsideration, the Commission reiterates its recommendation, then the President should be bound to make the appointment. Preferably the Supreme Judicial Commission should consist of ex-officio members from the higher judiciary (e.g. the Chief Justice and the five senior-most judges), the last retired Chief Justice or Judge, and a Professor of Law chosen on the basis of seniority from public universities by rotation. In this context, it is very pertinent to remember the immortal words of former Chief Justice of Australia Sir Harry Gibbs, who said, "Judicial Commissions, advisory Committees and procedures for consultation [with the Chief Justice] will be useless unless there exists among the politicians of all parties . . . the will to appoint only the best."[133]

*Footnote continued*
htm) V. Venkatesan, *Judiciary: A Flawed Mechanism 20* Frontline: India's National Magazine,11, 1 (June 6, 2003) (available at http://www.frontline.in/static/html/fl2011/stories/20030606003604000.htm).

[131] *Advocates-on-Record*, 4 SCC 441.

[132] *Id* at 663.

[133] Harry Gibbs, *The Appointment of Judges*, 61 Aust. L.J. 7, 11 (1987).