

Chapter III:

Method of Appointment of the Judges of the Supreme Court Under the Constitution of Bangladesh, 1972 (as Amended from Time to Time by the Civilian and Martial Law Regimes) and the Defunct Supreme Judicial Commission Ordinance, 2008

The following discussion will reveal how the 1972 Constitution of Bangladesh originally conferred on the President the power to appoint the Chief Justice of Bangladesh on the advice of the Prime Minister. By amending the Constitution in 1991 the President has been freed from the obligation of acting in accordance with the advice of the Prime Minister. This analysis will also demonstrate that the convention of appointing the senior most judge of the Appellate Division of the Supreme Court as the Chief Justice, developed in order to ensure that extraneous considerations do not play a part in this pivotal appointment process, has been violated since 2003 on 5 occasions. Additionally, the deliberation will show that the original provision of the 1972 Constitution of Bangladesh concerning appointment of the judges of the Appellate and High Court Divisions of the Supreme Court by the President in consultation with the Chief Justice of Bangladesh was changed by the Constitution (Fourth Amendment) Act, 1975 giving him (the President) the authority to appoint judges only on the advice of the Prime Minister thereby allowing wide scope for the intrusion of politics into the process. But the first Martial Law regime (1975-1979) took an unexpected step to restore the provision concerning consultation into the Constitution in May 1976. But, only within one and a half year, in November 1977, the regime changed its mind to be in line with the immediate previous civilian regime to delete the provision relating to consultation with the Chief Justice from the Constitution. It will further manifest the violations of the convention of appointing the senior most judges of the High Court Division as the judges of the Appellate Division of the Supreme Court by the successive civilian governments and Martial Law regimes on numerous occasions. Finally, this discourse will show how the journey of the

Supreme Judicial Commission, established in 2008 by the third Non-Party Care-taker Government (an interim Government set up for ninety days mainly to assist the Election Commission in conducting the General Elections) by promulgating an Ordinance, to recommend the best candidates to the President for appointment as the judges of the Supreme Court was calculatedly brought to an end by the Awami League Government in February 2009 by not placing the said Ordinance before the first session of the newly constituted Parliament.

A. Appointment of Judges to the Supreme Court of Bangladesh

Part VI, titled 'THE JUDICIARY' having pyramidal structure, of the Constitution of the People's Republic of Bangladesh, 1972 provides for in Chapter I 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 '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.'³¹² Although under 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 as 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. Similar structure of the highest court is also to be found in the Constitution of the Republic of Guyana, 1980³¹³ and the Constitution of Barbados, 1966.³¹⁴

³¹² Article 9(1), The Constitution of the People's Republic of Bangladesh, 1972.

³¹³ Article 123, The Constitution of the Republic of Guyana, 1980 provides that 'the Supreme Court of Judicature shall consist of a Court of Appeal and a High Court.'

³¹⁴ Article 80(1), The Constitution of Barbados, 1966 states that the Supreme Court of Judicature of Barbados is composed of a High Court and a Court of Appeal.

The Constitution of Bangladesh contains provisions relating to the appointment of the Chief Justice, Judges of the Appellate Division and additional as well as regular Judges of the High Court Division of the Supreme Court. These provisions shall be examined as to show whether they ensure a proper selection of judges which lies at the heart of all the problems facing the judiciary in Bangladesh.

A.1. The Appointment of the Chief Justice Of Bangladesh

The Chief Justice, designated by the Country's 1972 Constitution as 'the Chief Justice of Bangladesh,'³¹⁵ is the head of the Bangladeshi Judiciary and paterfamilias of the judicial fraternity. His office is, therefore, the most dignified and exalted post in the Judiciary of Bangladesh having ranked fourth in the State Order of Precedence.

The Chief Justice, who as the head of the judiciary sits only in the Appellate Division of the Supreme Court,³¹⁶ is the symbol of justice and freedom and, as such, his appointment is of critical importance in the administration of justice for retaining public confidence in the impartiality, credibility and reliability of the highest court of the land- the Supreme Court. The people must be ensured that the Chief Justice is not appointed only for sharing the political and social philosophy of the party in power as it is required to adjudicate the lawfulness of the actions of the executive and that there is a mechanism, independent of the government control, for the appointment of the Chief Justice taking into account the well-defined objective criteria. As to the importance of the selection and appointment of the Chief Justice to ensure the independence of the judiciary, the observations of then Chief Justice of the Pakistan Supreme Court, Saiduzzaman Siddiqui, made in 1994 in *Asad Ali v Federation of Pakistan*³¹⁷ are well deserved to be mentioned:

³¹⁵ Article 94(2), The Constitution of the People's Republic of Bangladesh, 1972.

³¹⁶ Article 94(3), *ibid.*

³¹⁷ PLD 1998 SC 161.

The selection of a person to the high office of the Chief Justice of Pakistan is a pivotal appointment for maintaining the independence of judiciary and for providing a free and unobstructed access to impartial and independent Courts/Tribunals to the ordinary citizens guaranteed under Articles 9 and 25 of the Constitution.³¹⁸

These realities were indeed ignored and disregarded when the Constitution of Bangladesh, 1972 originally provided that: ‘The Chief Justice shall be appointed by the President....’³¹⁹ Thus the power to appoint the Chief Justice is an executive power vested in the President who is duty bound to exercise this power under Article 48(3) as a constitutional head ‘in accordance with the advice of the Prime Minister.’ Later on, in September 1991, the Constitution (Twelfth Amendment) Act, 1991, which was passed on 14 August 1991 and came into force on 18 September on being majority of the votes cast in the referendum in favour of the President’s assent, is one of the two Amendment Acts³²⁰ passed by the Parliament unanimously in the same year (an unprecedented event in the history of Bangladesh), freed the President from the obligation of consulting the Prime Minister in appointing the Chief Justice of Bangladesh.³²¹

Before making any comment on the changed method, it would be apposite to touch upon here the manner in which the Chief Justice of the highest court is appointed in different countries of the world. The methods of appointment followed in various jurisdictions can be grouped into four- which are as follows:

³¹⁸ Ibid., at p. 189.

³¹⁹ Article 95(1), The Constitution of the People’s Republic of Bangladesh, 1972.

³²⁰ The other Act is the Constitution (Eleventh Amendment) Act, 1991 passed on 14 August 1991.

³²¹ Amended art 48(3) provides that ‘In exercise of all his functions, save only that of appointing the Prime Minister pursuant to clause (3) of art 56 and the Chief Justice pursuant to clause 1 of art 95, the President shall act in accordance with the advice of the Prime Minister.’

1. appointment of Chief Justice by the head of the state either unilaterally as in Ireland, Kenya, Sri Lanka and Sudan³²²; or
 - a) on the advice of the Prime Minister as in Malta and Western Samoa, on the advice of the Prime Minister after and/consultation with the leader of the opposition as in Fiji and Trinidad and Tobago, on the advice of the Prime Minister after consulting the Conference of Rulers as in Malaysia, on the advice of the Cabinet as in Greece and Japan; with the consent of the Parliament as in South Korea and Puerto Rico³²³; or
 - b) on obtaining the agreement of the leader of the opposition as in Guyana³²⁴; or
 - c) on the proposal/recommendation of, or in consultation with, an independent selection body such as judicial council/national judicial commission/ judicial

³²² Article 35(1), The Constitution of Ireland, 1937 states: ‘The Judges of the Supreme Court shall be appointed by the President.’

Article 61(1), The Constitution of Kenya, 1963 provides that the Chief Justice of the High Court shall be appointed by the President.

Article 107(1), The Constitution of Sri Lanka, 1978 stipulates that the Chief Justice of the Supreme Court shall be appointed by the President.

Article 104(1), The Constitution of Sudan, 1998 states that the President of the Republic shall appoint the Chief Justice.

³²³ Article 98, The Constitution of Malta, 1964 provides that the appointment of the Chief Justice shall be made by the President acting in accordance with the advice of the Prime Minister.

Article 65(2), The Constitution of Western Samoa, 1960 states ‘The Chief Justice shall be appointed by the Head of the State; acting on the advice of the Prime Minister.’

Article 132(1), The Constitution of the Sovereign Democratic Republic of Fiji, 1990 stipulates: ‘The Chief Justice of the Supreme Court is appointed by the President on the advice of the Prime Minister following consultation by him or her with the Leader of the Opposition.’

Article 102, The Constitution of the Republic of Trinidad and Tobago, 1976 states: ‘The Chief Justice shall be appointed by the President after consultation with the Prime Minister and the Leader of the Opposition.’

Article 122B, The Federal Constitution of Malaysia, 1963 provides that the Chief Justice of the Federal Court shall be appointed by the Head of the State acting on the advice of the Prime Minister, after consulting the Conference of Rulers.

Article 91(5), The Constitution of Greece, 1975 states ‘Promotion to the office of President of the Supreme Court shall be effected by Presidential decree issued on the proposal of the Cabinet by selecting from among the members of the highest court.’

The Constitution of Japan, 1946 provides that the appointment of the Chief Judge of the Supreme Court shall be made by the Emperor as designated by the Cabinet.

Article 8, The Constitution of the Commonwealth of Puerto Rico, 1952 stipulates that the Chief Justice shall be appointed by the Governor with the advice and consent of the Senate.

Article 104(1), The Constitution of the Republic of South Korea, 1948 states that the Chief Justice of the Supreme Court is appointed by the President with the consent of the National Assembly.

³²⁴ Article 127(1), The Constitution of the Cooperative Republic of Guyana, 1980 states that the Chief Justice of the Supreme Court of Guyana shall be appointed by the President acting after obtaining the agreement of the Leader of the Opposition.

service commission/constitutional council/ high council of justice as in Armenia, Poland, Saudi Arabia, Spain, Namibia, Nepal, Nigeria, in consultation with the judges of superior courts as in India;³²⁵ or

2. appointment by the parliament upon proposal/nomination/recommendation by the head of the states as in Croatia, Ethiopia and Russia;³²⁶ or
3. election of the Chief Justice by the judges of the Supreme Court as in Belgium, Denmark and Ukraine;³²⁷ or

³²⁵ Article 95(3), The Constitution of Armenia, 1955 provides that the President of the Court of Appeals shall be appointed on the proposal of the Judicial Council.

Article 179(3), The Constitution of Poland, 1997 states that the First President of the Supreme Court shall be applied by the President of the Republic from amongst candidates proposed by the General Assembly of the Judges of the Supreme Court.

Article 52, The Constitution of the Kingdom of Saudi Arabia, 1992 stipulates that the appointment of judges (including the Chief Justice) by Royal Decree upon a proposal from the Higher Council of Justice.

Article 123(2), The Constitution of Spain, 1978 provides that the President of the Supreme Court shall be appointed by the King at the proposal of the General Council of the judicial branch.

Article 82(1), The Constitution of the Republic of Namibia, 1990 states that the appointment of Chief Justice of the Supreme Court shall be made by the President on recommendation of the Judicial Service Commission.

Article 87(1), The Constitution of the Kingdom of Nepal, 1990 provides that the Head of the State shall appoint the Chief Justice of Nepal on the recommendation of the Constitutional Council.

Article 231(1), The Constitutional of the Federal Republic of Nigeria, 1999 stipulates that the appointment of a person to the office of Chief Justice of Nigeria shall be made by the President on the recommendation of the National Judicial Council subject to confirmation of such appointment by the Senate.

Article 124(2), The Constitution of India, 1949 provides that every judge of the Supreme Court shall be appointed by the President after consultation with such judges of the Supreme Court and of the High Court in the States as the President may deem necessary for the purpose.

³²⁶ Article 118, The Constitution of the Republic of Croatia, 1990, provides that the President of the Supreme Court of the Republic of Croatia shall be appointed by the Croatian Parliament at the proposal of the President of the Republic with a prior opinion of the general session of the Supreme Court of the Republic of Croatia and of the authorised committee of the Croatian Parliament.

Article 81(1), The Constitution of the Democratic Republic of Ethiopia, 1994 states that the President and Vice-President of the Federal Supreme Court shall upon recommendation by the Prime Minister be appointed by the House of Peoples' Representatives.

Article 128(1), The Constitution of the Federation of Russia, 1993 stipulates that the judges of the Supreme Court of the Russia Federation shall be appointed by the Federal Council following nomination by the President of the Russian Federation.

Article 21(3), The Constitution of the Kingdom of Bhutan, 2005 provides that the Chief Justice of Bhutan shall be appointed from among the Judges of the Supreme Court or from among eminent jurists in consultation with the National Judicial Commission.

Article 174(3), The Constitution of South Africa, 1996 states that the President, after consulting the Judicial Service Commission, appoint the Chief Justice of the Supreme Court of Appeal.

³²⁷ Article 151(4), The Constitution of Belgium, 1970 provides that the Court of Cassation and the High Courts' choose within themselves their Presidents and Vice-Presidents.

Article 59(2), The Constitution of the Kingdom of Denmark, 1953 stipulates that the High Court of the Realm shall elect a President from among its members.

Article 128, The Constitution of Ukraine, 1996 states that the Chairman of the Supreme Court of Ukraine is elected to office by the Plenary Assembly of the Supreme Court of Ukraine by secret ballot.

4. election of the Chief Justice by the Parliament upon nomination/proposal/recommendation by the head of the state as in Georgia, Hungary, Rwanda and Serbia and Montenegro;³²⁸

Therefore, it is evident that there are four broad modalities prevalent in different jurisdictions for appointing the Chief Justice, of which the method of appointment by the head of the state on the basis of proposal/recommendation of, or in consultation with, an independent judicial/advisory body has been resorted to by a large number of countries followed by the procedure to appoint by the head of the state on the advice of the prime minister/cabinet or on the agreement of the leader of the opposition. Since the Chief Justice symbolizes and epitomises the independence of the judiciary, his appointment cannot be left to the exclusive discretion of the executive thereby paving the way of intruding political consideration into the process and, as such, only a very few countries (e.g. Ireland, Kenya, Sri Lanka and Sudan) have bestowed exclusive power to appoint the head of the judiciary on the President. As a matter of fact, the President of Bangladesh has been given a blank cheque of unfettered discretion to appoint the Chief Justice of Bangladesh ignoring the benefit of the shared responsibility, preferably with a selection committee consisting of majority members from the higher judiciary, to exclude politically motivated appointment for improper motives.

³²⁸ Article 90(2), The Constitution of Georgia, 1995 provides that the President of the Supreme Court of Georgia shall be elected for a period of not less than ten years by the Parliament by the majority of the number of the members of Parliament on the current nominal list upon the submission of the President of Georgia.

Article 48(1), The Constitution of the Republic of Hungary, 1949 states that based on the recommendation made by the President of the Republic, the Parliament shall elect the President of the Supreme Court.

Article 147, The Constitution of the Federal Rwanda, 2003 stipulates that the President of the Supreme Court is elected by the Senate from two candidates in respect of each port proposed by the President of the Republic after consultation with the cabinet and the Supreme Council of the Judiciary.

Article 47, The Constitutional Charter of the State Union of Serbia and Montenegro, 1990 provides that the judges of the Court of Serbia and Montenegro shall be elected by the Assembly of Serbia and Montenegro upon the proposal of the Council of Ministers.

There is no specific qualification (competence) in the Constitution of Bangladesh as to the appointment of the Chief Justice. Therefore, the qualifications laid down in the Constitution for the appointment of judges of the High Court Division and Appellate Division of the Supreme Court are equally applicable in case of appointment of the Chief Justice of Bangladesh. As to the criteria for selecting the Supreme Court Judges, the Constitution originally provides that:

(2) A person shall not be qualified for appointment as a judge unless he is a citizen of Bangladesh and-

- a) has for not less than ten years been an advocate of the Supreme Court; or
- b) has, for not less than ten years, held judicial office or an advocate in the territory of Bangladesh and has, for not less than three years, exercised the power of a District Judge.³²⁹

Thus the Constitution of Bangladesh provides for the appointment of judges to the Supreme Court both from the bench and the bar. Under the original provision, only a citizen of Bangladesh, not a foreigner, could be appointed as a Judge of the Supreme Court provided he fulfilled one of the three qualification requirements, namely,

1. experience as an advocate of the Supreme court for not less than ten years;
2. experience as an advocate in the territory of Bangladesh for not less than ten years and functioning as a district judge for not less than three years; or
3. experience as a judicial officer for not less than ten years and performing the functions of a district judge for not less than three years.

It should be stated that ordinarily an advocate who has practised before subordinate courts in Bangladesh for a period of two years may be enrolled as an advocate of the Supreme

³²⁹ Original Article 95(2), The Constitution of the People's Republic of Bangladesh, 1972.

Court³³⁰ and after practising before the Supreme Court for a period of not less than 10 years he shall be eligible for appointment as a judge of the Supreme Court. In 1977, the provision for appointing an advocate having the experience of practising before the subordinate courts for not less than 10 years and of exercising the powers of a district judge for not less three years, has been dispensed with by an amendment to the Constitution.³³¹ Furthermore, the same amendment deleted from the Constitution the requirement of acting as a district judge for a judicial officer having at least ten years experience for appointing as a judge of the Supreme Court. Therefore, under the existing arrangement of the Constitution, an advocate having 10 years practice before the Supreme Court or a judicial officer having not less than ten years experience shall be qualified for a berth in the apex court of the country.

It is noticeable that the Constitution does not provide for any guidelines as to the academic qualification (e.g. preference should be given to the advocate having LL.M, MPhil or PhD degree) and brilliant result, professional ability, reputation and integrity for the selection of the Supreme Court advocates and judicial officers as the judges of the Supreme Court. Therefore, any Supreme Court advocate having no standing practice (e.g. who only kept his enrolment updated by paying the prescribed fees without going to the Court) or having no experience of handling crucial cases (only moved simple matters like bail or stay petition before the Court) can be appointed as a judge of the Supreme Court. Similarly, the Constitution is also silent as to the criteria- e.g. seniority, disposal of cases, quality of judgment given, maintenance of good relationship with the colleagues and the bar- which should be kept in mind in appointing a judicial officer, having at least ten years experience, as a judge of the Supreme Court. Thus any judge of the subordinate

³³⁰ Article 21(1), .Bangladesh Legal Practitioners and Bar Council Order, 1972.

³³¹ Section 2, Second Proclamation (Tenth Amendment) Order 1977 (Second Proclamation Order No 1 of 1977), 27 November 1977.

court, who has served the court for at least ten years, having not been appointed as a district judge (for the appointment of a district judge, a judicial officer requires at least ten years experience including three years experience as a joint district judge or both as a joint district judge and additional district judge³³²) can theoretically be appointed as a judge of the Supreme Court although no one below the rank of the district judge has ever (until December 2010) been appointed as a judge of the Supreme Court.

It is pertinent to mention here that in 1977 clause (c) has been added to Article 95(2) of the Constitution empowering the Parliament to enact law prescribing any other qualification as an alternative to 10 years experience as a Supreme Court advocate or 10 years experience as a judicial officer for appointment as a judge of the Supreme Court.³³³ But no such law prescribing other qualification for the appointment of judges of the Supreme Court has yet (December 2010) been enacted.

However, in the absence of any constitutional provision specifying that the Chief Justice is to be appointed from amongst the judges of the Appellate Division, it can strongly be argued that any advocate of the Supreme Court or judicial officer, having fulfilled the qualifications as laid down in Article 95(2) of the Constitution of Bangladesh for the appointment of judges of the Supreme Court, can directly be appointed as the Chief Justice of Bangladesh.

But, the appointment of the Chief Justice has been left at the pleasure of the President who is not supposed to know the judicial track record of the judges of the Appellate Division (i.e. their performance in handling and conducting cases including cases of constitutional importance), their keen intellect, legal acumen, integrity and reputation. In fact, it is the Ministry of Law, Justice and Parliamentary Affairs which initiates the

³³² Part XXII, Bangladesh Civil Service Recruitment Rules 1981(as amended in 1995).

³³³ The Second Proclamation (Tenth Amendment) Order, 1977.

proposal through the Prime Minister recommending the senior-most judge of the Appellate Division for the appointment as the Chief Justice of Bangladesh whenever vacancy occurs in that office. The President as a rule ordinarily approves the proposal and this convention of appointing the most senior judge of the Appellate Division as the Chief Justice was consistently observed in Bangladesh until June 2003 although there was an abortive attempt made by the then President, H.M. Ershad, in January 1990.

After the retirement of the Chief Justice Badrul Haider Chowdhury on 31 December 1989, the then President H. M. Ershad appointed on 1 January 1990 the senior most Judge of the Appellate Division, Justice Shahabuddin Ahmed, as the Acting Chief Justice, instead of the regular Chief Justice, under Article 97 of the Constitution, which evoked sharp reaction of the Supreme Court Bar Association. The Association demanded the maintenance of the tradition of appointing the senior most Judge of the Appellate Division to the Office of the Chief Justice of Bangladesh. After thirteen days, on 14 January 1990, Justice Shahabuddin Ahmed was appointed as the sixth regular Chief Justice of the country.

A.1.1. Violation of the Convention of Seniority in Appointing Chief Justice of Bangladesh

The convention or tradition of seniority in appointing the senior most Judge of the Appellate Division as the Chief Justice of Bangladesh was violated by the regime of the B.N.P- Jamaat Alliance (2001-2006), the Non-Party Caretaker Government (2006-2008) and the Awami League regime (2009-to date).

A.1.2. Supersession During the Regime of the B.N.P-Jamaat Alliance (2001-2006)

The convention of seniority was first violated on 23 June 2003 by the regime of the B.N.P- Jamaat Alliance when Justice K.M. Hasan, who had been superseded twice by the previous

Awami League Government (1996-2001) first on 9 January 2000 in elevating Justice Rabbani and Justice Ruhul Amin and on 15 May 2001 in elevating Justice Md. Fazlul Karim to the Appellate Division ignoring the recommendation of the Chief Justice, was appointed as the Chief Justice of Bangladesh in supersession of two fellow colleagues, Justice Md. Ruhul Amin and Justice Md. Fazlul Karim, who had earlier been elevated to the Appellate Division superseding their senior judge Justice K.M. Hasan. The four party Alliance Government justified this supersession by terming it as a corrective measure aimed at to provide redress/relief to the earlier injustice perpetrated on Justice K.M. Hasan.

The next violation took place when, after the retirement of Justice K.M. Hasan on 26 January 2004 as the Chief Justice of Bangladesh, Justice J R Mudassir Hussain was appointed as the Chief Justice of Bangladesh on 27 January 2004 in preference to the same two judges- Justice Md. Ruhul Amin and Justice Md. Fazlul Karim, who had also superseded him in getting berth on the Appellate Division.³³⁴ This supersession was also justified in the same vein as it had been done on the previous occasion.

A.1.3. Supersession During the Non-Party Care-taker Government (2007-2008)

During the regime of the Non-Party Care-taker Government (consisting of the Chief Advisor and ten other advisors), which is an interim government established within fifteen days of the dissolution of Parliament that have the mandate to carry on ordinarily the routine functions of the government and is destined to 'give to the Election Commission all possible aid and assistance for holding the general election of members of Parliament peacefully, fairly and impartially'³³⁵, President Professor Dr. Iajuddin Ahmed appointed on 25 May 2008 Justice M.M. Ruhul Amin as the (16th) Chief Justice of the Supreme Court of Bangladesh (on

³³⁴ Asian Human Rights Commission, 'Bangladesh: Culture of Supersession in Supreme Court will Undermine Rule of Law', 26 May 2008.

³³⁵ The Constitution (Thirteenth Amendment) Act, 1996, added Articles 58B, 58C and 58D to the Constitution.

retirement of Chief Justice Mohammad Ruhul Amin) in supersession of the senior most judge of the Appellate Division, Justice Fazlul Karim.

The President of the Supreme Court Bar Association (SCBA) Barrister Shafique Ahmed, expressed his dissatisfaction and disapproval of such an appointment, thus:

Although supersession has also taken place in appointing Chief Justice and Appellate Division Judges during the past governments, the Bar has never accepted such supersession... such supersession has led the people concerned to apprehend political ill-determination of the government.³³⁶

The Association broke its tradition of welcoming the new Chief Justice when it refrained from facilitating Justice M.M. Ruhul Amin on his first appearance in the Court on 1 June as the Chief Justice. It also refrained from giving a traditional farewell felicitation to the outgoing Chief Justice Mohammad Ruhul Amin on 29 May. This abstention from the customary practices of the SCBA of honouring the outgoing and the newly appointed Chief Justice was also held to be a mark of protest against the Appellate Division's recent verdict that barred the highest court from hearing bail petition of any accused under the Emergency Power Rules, 2007.³³⁷

A.1.4. Supersession During the Present Awami League Government (2009-todate)

Within a period of two years, the present Awami League Government has violated the principle of seniority in appointing the Chief Justice on two occasions, first in December 2009 and then in September 2010. President Zillur Rahman appointed Justice Md. Tafazzul Islam, who headed the five member special bench of the Appellate Division of the Supreme Court that pronounced on 19 November 2009 the 'landmark verdict in *Bangabandhu Sheikh*

³³⁶ Asian Human Rights Commission, supra note 333.

³³⁷ Ibid; Staff Correspondent, 'New CJ takes oath', *The Daily Star* (Dhaka), 2 June 2008, 1.

Mujibur Rahman (father of the present Prime Minister) assassination case’ mainly retaining the High Court’s decision³³⁸, as the Chief Justice of Bangladesh in supersession of the senior most judge of the Appellate Division Justice Mohammad Fazlul Karim³³⁹ (thus Justice Karim became the victim of supersession for the fourth time). It is ironical that the then President of the Supreme Court Bar Association who in May 2008 criticised and disapproved the appointment of M.M. Ruhul Amin as the Chief Justice of Bangladesh, made during the regime of the Non-Party Care-taker Government in supersession of the senior most judge of the Appellate Division Mohammad Fazlul Karim, has now a complete change of heart (as Minister for Law, Justice and Parliamentary Affairs of the present regime) in proposing Justice Tafazzul Islam, ignoring the same senior Justice Mohammad Fazlul Karim, to appoint as the Chief Justice of Bangladesh. The President again violated the principle of seniority on 26 September 2010 when he appointed Justice A.B.M Khairul Haque (replacing Justice Fazlul Karim) as the nineteenth Chief Justice of the country ahead of his two senior colleagues in the Appellate Division.³⁴⁰

Because of his appointment as an additional and regular judge of the High Court Division in 1998 and 2000 respectively by the then Awami League Government, his elevation to the Appellate Division in July 2009 by the present Awami League regime, upholding a lower court’s verdict sentencing 15 killers of Bangabandhu Sheikh Mujibur Rahman and his family, his judgment as a judge of the High Court Division declaring the Constitution (Fifth Amendment) Act, 1979, passed to ratify and confirm all the actions of the first Martial Law Regime (1975-1979), unconstitutional³⁴¹, Chief Justice Khairul Haque’s appointment has been stigmatized and branded by the legal and political circles as a politically motivated

³³⁸ Staff Correspondent, ‘Tafazzul new chief justice’, *The Daily Star* (Dhaka), 16 December 2009, 1.

³³⁹ Staff Correspondent, ‘Outgoing CJ slated at farewell’, *The Daily Star* (Dhaka), 30 September 2010, 1.

³⁴⁰ Staff Correspondent, ‘Justice Khairul Haque new chief justice’, *The Daily Star* (Dhaka), 27 September 2010,

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³⁴¹ Ibid.

appointment in which considerations of sharing ideological views has mainly intruded into the choice. However, the present President and the Secretary-General of the Supreme Court Bar Association maintained the Association's tradition of protesting (and criticising) the supersession of the two judges (who considered it dignified to go on leave) senior to the newly appointed Chief Justice terming the 'appointment as politically motivated' and had the effect of tarnishing 'the image of the apex court.'³⁴²

Furthermore, it is believed that appointing a judge, ranked third in the seniority list, as the Chief Justice, the Government might have two hidden agendas, namely, immediate and ultimate. The immediate plan was to get oath administered to the newly appointed (appointed in April 2010) two additional judges, of which one was accused in a murder case while other allegedly kicked on the door of the Chief Justice's room in November 2006, by the present Chief Justice as his predecessor (Chief Justice Fazlul Karim) had declined to do so citing 'unavoidable reasons.' Its immediate plan has, in the meantime, been executed by the new Chief Justice A.B.M Khairul Haque who administered oath in November 2010 to the aforesaid judges, to use his words for discharging 'constitutional obligation.' The eventual and terminal plan is to secure the appointment of the new Chief Justice as the Chief Advisor of the next Non-Party Care-taker Government (for being retired last).

Thus it appears that the consideration of political allegiance has played a dominant factor, in fact main factor, instead of seniority, in appointing the Chief Justice since 1996 when the Constitution (Thirteenth Amendment) Act, 1996 made the provision of heading the Non-Party Care-taker Government by the immediate past Chief Justice to be constituted after the dissolution of Parliament (within 15 days) for ensuring free, fair and credible General Elections. It is not kept in mind that the violation of the principle of seniority in appointing

³⁴² M. Abdul Latif Mondal, 'Averting controversy in appointment of Chief Justice', *The Daily Star* (Online), 10 October 2010 <http://www.thedailystar.net/newDesign/news-details.php?nid=157772> (accessed on 15 November 2010).

Chief Justice not only causes injustice to the superseded judges by shattering and crashing their legitimate expectation of becoming Chief Justice but also makes room for further injustice likely to be meted out in future against the litigants, particularly in cases where the government is a party. This has also the disastrous impact of making the highly dignified and prestigious office of the Chief Justice controversial and of lowering public faith, confidence and trust in the impartiality of the highest court of the land. No one can calculate the aggregate amount of evil inflicted on the community by such a bad decision of supersession. Furthermore, if the superseded judges in protest resign or take leave until retirement, the country will be deprived of the service of the senior, experienced and competent judges. It can hardly be expected, especially in the third world countries, that the junior judge appointed as the Chief Justice overlooking the claim of his senior colleagues, will refuse to accept such an appointment or even accepted will resign later on, to save the apex court from political clout and controversy.

A.1.5. Justification for Observing the Convention of Seniority in Appointing the Chief Justice Of Bangladesh

Although Article 95 of the Bangladesh Constitution does not provide that the senior most judge of the Supreme Court shall be appointed as the Chief Justice of Bangladesh, a convention of appointing senior most judge of the Supreme Court as the Chief Justice, as mentioned earlier, has developed which must consistently be followed as an inflexible and mechanical rule. Although it is quite possible that in a given case, the senior most judge might not be the most suitable choice or might not come up to the highest standard expecting of him and, as such, the inflexible rule of seniority can lower judicial performance, yet the rule of seniority must be adhered to in appointing the Chief Justice for the following reasons:

In the first place, there is a greater safety in appointing invariably the senior most judge as the Chief Justice, the *sentinel qui vive*/ watchdog of the independence of the judiciary, as the President would be unable to pick and choose among the judges on the basis of extraneous considerations, e.g. political or personal favouritism.

Secondly, the senior most judge of the Supreme Court has a legitimate expectancy to be considered as the Chief Justice and, as such, in the absence of his sickness or unwillingness to accept the office of Chief Justice, he is entitled to be appointed as the Chief Justice of Bangladesh. This legitimate expectation of the most senior judge to be appointed as the Chief Justice because of the established convention/practice has been recognised by Chief Justice Sajjad Ali Shah of the Pakistan Supreme Court in *Al-Jihad Trust v Federation of Pakistan*³⁴³.

Thirdly, the supersession of the senior most judge in appointing the Chief Justice of Bangladesh will hurt his sentiment, ego and self-respect and, as such, he may find it difficult to accept the appointed Chief Justice's leadership in good grace. As a result, he may take retirement or take leave until retirement and thereby creating a vacuum of experienced and competent judge in the Appellate Division of the Supreme Court.

Fourthly, the appointment of the Chief Justice by seniority, as mentioned earlier, will prevent a scramble among judges of the Supreme Court for the highest office- the competition to show who has better imbibed the gospel of the ruling party as to catch the eye and ear of the appointing authority whenever a vacancy arises. Even the junior most judge may think that, by giving decision in favour of the executive in a case and by cultivating good relation with it, he will stand a good chance to become the Chief Justice of Bangladesh which will invariably ruin the highest institution of justice and shatter public confidence in it.

³⁴³ PLD 1996 SC 324, at p. 365.

Fifthly, it should be mentioned here that the Constitution of Bangladesh provides for the appointment of regular Chief Justice and acting Chief Justice. Article 95 of the Bangladesh Constitution stipulates for the regular appointment of the Chief Justice, while Article 97 speaks of the appointment of an Acting Chief Justice as a stop-gap arrangement for a shorter period. Unlike the Constitution of India, which in Article 126 has empowered the President to appoint any judge of the Supreme Court irrespective of seniority in cases when the office of the Chief Justice of India is vacant or when the Chief Justice is unable to perform his duties by reason of absence or otherwise, the Constitution of Bangladesh in Article 97³⁴⁴ unequivocally provides for following the mechanical rule of seniority (mandatorily) by the President in appointing the acting Chief Justice of Bangladesh (in cases of vacancy in the office of the Chief Justice or because of absence and illness of the Chief Justice if he is unable to perform his functions). It seems that the expression ‘If the office of the Chief Justice becomes vacant’ does not refer to the vacancy which occurs on account of the normal retirement of the incumbent Chief Justice, rather it refers only to the vacancy caused by sudden death, resignation or any other unforeseen reasons.

Therefore, since in case of an unexpected vacancy, the Constitution of Bangladesh provides for the appointment of an Acting Chief Justice by the President entirely on the basis of seniority denying him the power to pick and choose from amongst the judges of the Appellate Division and, thereby negating the possibility of patronage appointment, it can strongly be argued that similar approach is to be taken either by following without deviation whatsoever the conventional rule of seniority or by introducing an amendment to Article 95 of the Constitution to the effect that the President shall appoint only the senior most judges of the

³⁴⁴ Article 97, The Constitution of the People’s Republic of Bangladesh, 1972 states that ‘If the office of the Chief Justice becomes vacant, or if the President is satisfied that the Chief Justice is, on account of absence, illness, or any other cause, unable to perform the functions of his office, those functions shall, until some other person has entered upon that office, or until the Chief Justice has resumed his duties, as the case may be, be performed by the next most senior judge of the Appellate Division.’

Appellate Division of the Supreme Court as the Chief Justice of Bangladesh. In this context, the recommendation of the Arrears Committee (consisting of three Chief Justices of the High Courts [of Kerala, Kolkata and Madras] appointed by the Government of India in 1989 to examine large arrears in the High Courts and to suggest remedies, made in its Report would be of much relevance to quote: ‘The Committee, therefore, recommends that the second proviso to Article 124(2) be deleted and an appropriate proviso be substituted to the effect that the senior most Judge of the Supreme Court shall ordinarily be appointed as the Chief Justice of India.’³⁴⁵

A.2. Appointment of Judges of The Appellate Division of the Supreme Court

The Appellate Division is the higher Division of the Supreme Court (High Court being the lower Division) which hears and determines appeals against judgment, decrees, orders and sentences of the High Court Division.³⁴⁶ The judges (along with the Chief Justice) appointed to the Appellate Division, the maximum number of which has neither been determined by the Constitution nor has Parliament been empowered to fix the number of judges, sit only in that Division.³⁴⁷ It is the President of the Country who has been invested with the power of ascertaining the strength of the judges of the Supreme Court on the advice of the Prime Minister.³⁴⁸ Accordingly, the number of judges to be appointed in the Appellate Division was initially fixed at five, which was later in 2002 enhanced to 7 by the President during the regime of the Bangladesh Nationalist Party (2001-2006). Finally on 9 July 2009, the present President Zillur Rahman increased the number of posts of judges in the Appellate Division of the Supreme Court from seven to 11 as per Article 94(2) of the Constitution of

³⁴⁵ Arrears Committee, constituted by the Government of India, *The Report* (1989), para 7.20.

³⁴⁶ Article 103(1), The Constitution of the People’s Republic of Bangladesh, 1972. The Appellate Division does not have any original jurisdiction except the power subject to law to make an order for the investigation of or punishment for any contempt of itself.

³⁴⁷ Article 94(3), *ibid.*

³⁴⁸ Articles 94(2) and 48(3), *ibid.*

Bangladesh.³⁴⁹ The official handout did not specify the reasons (e.g. increased number of cases, speedy disposal of backlog of cases) for increasing the number of judges in the higher division of the Apex Court. There is neither any provision in the Constitution of Bangladesh nor any Constitutional convention requiring the President to consult the Chief Justice of Bangladesh who is the most competent and well-equipped person to articulate his objective opinion after discussing the matter with the senior colleagues and after taking into account the number of cases pending before the Appellate Division. Therefore, in order to prevent the practice of packing of the Appellate Division with the judges having similar political allegiance and ideological outlook after increasing the number of judges in accordance with executives' subjective satisfaction, an amendment should be introduced in Article 94(2) of the Constitution of Bangladesh requiring the President to exercise his power of increasing the number of judges either upon a request of the Supreme Court as provided for by the Constitution of the Commonwealth of Puerto Rico, 1952³⁵⁰ or on the recommendation of the Supreme Judicial Commission as it is to be found on the Constitution of Namibia, 1990.³⁵¹

With regard to the appointment of the judges of the Supreme Court, the 1972 Constitution of Bangladesh originally provided that 'The judges [of the Supreme Court] shall be appointed by the President after consultation with the Chief Justice.'³⁵²

Thus under this method of appointment, which is equally applicable to the appointment of judges of both the Appellate and High Court Divisions of the Supreme Court, the President was required to exercise his power in accordance with the advice of the Prime Minister.³⁵³

³⁴⁹ Staff Correspondent, 'SC Appellate Division gets 4 more judges', *The Daily Star* (online), 15 July 2009, <http://www.thedailystar.net/newDesign/news-details.php?nid=96998> (accessed on 15 November 2010).

³⁵⁰ Article 3, The Constitution of the Commonwealth of Puerto Rico, 1952 provides that 'The number of Justices [of the Supreme Court] may be changed only by law upon request of the Supreme Court.'

³⁵¹ Article 79(1), The Constitution of Namibia, 1990 provides that 'The Supreme Court shall consist of Such additional judges as the President acting on the recommendation of the Judicial Service Commission may determine.'

³⁵² Article 95(1), The Constitution of the People's Republic of Bangladesh, 1972.

³⁵³ Article 48(3), *ibid.*

This is essentially the British method of appointing judges of higher judiciary prevalent until the enactment of the Constitutional Reforms Act, 2005 when the Crown used to appoint the judges by convention on the advice of the Prime Minister after consulting the Lord Chancellor³⁵⁴ as the head of the judiciary (i.e. Lord Chancellor used to sit as the Chief Justice in the Judicial Committee of the House of Lords). In the Subcontinent, it is the Indian Constitution, 1949 which for the first time provides for the consultation by the President with the Chief Justice along with ‘such of the Judges of the Supreme Court and of the High Court in the States as the President may deem necessary’³⁵⁵ in appointing judges of the Supreme Court. The 1956 and 1962 Constitutions of Pakistan adopted the Indian method by providing for the appointment of judges of the Supreme Court by the President after consultation with the Chief Justice with the modification that he is not required to consult such of the judges of the Supreme Court and of the High Courts in the States in his discretion.³⁵⁶

This method of appointing judges of the Supreme Court in consultation with the Chief Justice, as incorporated originally into the Constitution of Bangladesh, was in accordance with the suggestion of the International Congress of Jurists, held in New Delhi in January 1959 that, whatever, body actually makes judicial appointment, it is desirable that the Judiciary should itself cooperate or at least be consulted.³⁵⁷

³⁵⁴ O. Hood Phillips’, *Constitutional and Administrative Law* (Sweet & Maxwell, 1987) at pp. 380-1.

³⁵⁵ Article 124(2), The Indian Constitution, 1949 which provides ‘Every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal after consultation with such of the Judges of the Supreme Court and of the High Courts in the States as the President may deem necessary for the purpose and shall hold office until he attains the age of sixty-five years:

Provided that in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of India shall always be consulted:’

³⁵⁶ As Article 149(1), the Constitution of Pakistan, 1956 provided that the Chief Justice of Pakistan shall be appointed by the President and the other judges of the Supreme Court shall be appointed after consultation with the Chief Justice. Article 50 (1), The Constitution of Pakistan, 1962 which in fact reproduced in it the provisions of the Article 149(1) of the 1956 Constitution regarding the appointment of judges of the Supreme Court, provided that ‘The Chief Justice of the Supreme Court shall be appointed by the President, and the other Judges shall be appointed by the President after consultation with the Chief Justice.’

³⁵⁷ International Congress of Jurists, Committee of Committee IV, *The Report* (New Delhi, 1959) Article II.

Since the President (as a layman) can have no knowledge about the legal acumen, legal expertise, independence and firmness, ability to handle cases, personal conduct of advocates or subordinate judicial officers, the requirement of consulting the Chief Justice, having expert knowledge about the ability, competency and suitability of an advocate or a judicial officers for judgeship, was provided for to ensure the selection of the most appropriate person for appointment. Apart from fulfilling the general qualification requirements as laid down in Article 95(2) of the Constitution, e.g. citizenship of Bangladesh and either experience as an advocate of the Supreme Court for not less than 10 years or experience as a judicial officer for not less than 10 years as mentioned earlier, there is no other pre-requisite provided for either by the Constitution or by any other law. Therefore, theoretically it is possible that any advocate or any judicial officer, who fulfils the prescribed Constitutional requisites, can directly be appointed as a judge of the Appellate Division without being a judge of the High Court Division. But in practice, no such an advocate or a judicial officer, except High Court Division Judges, has yet been appointed directly as a judge of the Appellate Division of the Supreme Court. Of course, Bangladesh, as a former province of Pakistan, first under the name of East Bengal and then of East Pakistan (August 1947- March 1971), witnessed the direct appointment of two jurists of outstanding calibre, Manzoor Qadir and Tufail Ali Abdur Rahman, as the Chief Justice of West Pakistan High Court during the regime of President Ayub Khan (1958-1969) and as the Chief Justice of the then High Court of Sind and Balochistan (restored this original spelling by the Constitution (Eighteenth Amendment) Act, 2010) in 1972 respectively.³⁵⁸

However, a convention has been developed to provide flesh to cloth the dry bone of the Constitution to the effect that the appointment of judges to the Appellate Division of the Supreme Court shall be made from amongst the judges of the High Court Division on the

³⁵⁸ PLD 1996 SC 324, at pp. 494-5.

basis of seniority and, as such, the meaning and nature of the pivotal word ‘consultation’ used in the appointment process shall be examined in discussing the appointment of the judges of the High Court Division of the apex court with special reference to the relevant leading decisions of the Indian, Pakistani and Bangladeshi Supreme Courts.

A.2.1. Deleting the Constitutional Provision Regarding Consultation by the Constitution (Fourth Amendment) Act, 1975

The Constitution (Fourth Amendment) Act, 1975, which was passed by the Parliament about two years and two months of coming into effect of the Constitution during the first elected Government of the Awami League (1973-1975), is an extreme amendment that changed the fundamental character of the Constitution. For, it, *inter alia*, replaced parliamentary democracy with a presidential form of government³⁵⁹ on American pattern without its checks and balances, concentrating virtually all the powers in the hands of the President including the power to remove the judges of the Supreme Court at his pleasure³⁶⁰, to withhold assent to a bill passed by the Parliament³⁶¹ and to declare Bangladesh as a one-party State³⁶² (in fact, Bangladesh was declared as a one-party State on 25 February 1975). Prime Minister Sheikh Mujibur Rahman, who was proclaimed by the Constitution (Fourth Amendment) Act as the President of Bangladesh for a five year term (24 January 1975- 24 January 1980)³⁶³, described this adroit political manoeuvre as the ‘second revolution’, the ‘historic struggle for national liberation’/ ‘the war for national independence’ of (March- December) 1971 being the first revolution. However, the Constitution (Fourth Amendment) Act, provided that ‘The judges [of the Supreme Court] shall be appointed by the President.’

³⁵⁹ Article 4, The Constitution (Fourth Amendment) Act, 1975.

³⁶⁰ Article 15 (i.e. amended Article 96 of the Constitution), *ibid.*

³⁶¹ Article 12 (i.e. amended Article 80 of the Constitution), *ibid.*

³⁶² Article 23 (newly added art 117A of the Constitution), *ibid.*

³⁶³ Article 35, *ibid.*

Thus the President's obligation to consult the Chief Justice in appointing puisne judges of the Supreme Court was dispensed with. The abolition of Constitutional requirement of consultation with the Chief Justice extended the door too wide-open for the appointment of judges by the President on extraneous considerations such as broad sympathy with the social and ideological outlook of the party in power or rewarding someone by giving a place on the bench for rendering service in the past. For, the President, who could not be expected to have the knowledge about the candidate's legal acumen and suitability for appointment to the high judicial office being influenced and persuaded would likely to measure fitness of a candidate in terms of political affiliation and allegiance rather than judicial quality. This would result in appointing spineless, obedient and manageable judges which is quite the opposite and antithesis of an independent and courageous judiciary as enshrined in the Constitution of Bangladesh as a fundamental characteristic to the effect: 'Subject to the provisions of this Constitution the Chief Justice and the other judges shall be independent in the exercise of their judicial functions.'³⁶⁴ This led Justice Md. Joynal Abedin to observe in 2009 in *Bangladesh and Justice Syed Md. Dastagir Hossain and others v Md. Idrisur Rahman*³⁶⁵:

Since the fourth amendment of the Constitution, amongst others, affected one of the basic structures of the Constitution by destroying the independence of judiciary by eliminating the process of consultation in the matter of appointment of Judges in the superior Judiciary it is considered as invalid but for some unavoidable reason it could not have been set aside.³⁶⁶

'Unavoidable reason', as mentioned in above observations may imply that this Amendment has never been challenged before the Supreme Court as most of the changes introduced by the Constitution (Fourth Amendment) Act were dispensed with by the first Martial Law Regime (1975-1979).

³⁶⁴ Article 94(4), The Constitution of the People's Republic of Bangladesh, 1972.

³⁶⁵ 38 CLC (AD) 2009 < <http://www.clcbd.org/judgments/19-constitutional-law/3431-bangladesh-and-justice-syed-md-dastagir-hossain-and-ors-vs-md-idrisur-rahman-2009-38-clc-ad-.html> >.

³⁶⁶ Ibid., at para 64.

A.2.2. *Restoration of Constitutional Provision Concerning Consultation And Deletion Again by the First Martial Law Regime (1975-1979)*

For the first time in the history of Bangladesh, Martial Law was declared on 15 August 1975, immediately after the assassination of the President of the Country, Sheikh Mujibur Rahman. It was declared at a time when the country had already been in a State Emergency imposed on 28 December 1974. It seems that Martial Law was proclaimed as a precautionary measure as emergency powers were not considered enough to obviate any public resistance and meet a possible threat to the newly established regime. The authorities on Constitutional Law in the United Kingdom do not deal with this kind of Martial Law declared by the leaders of a *coup d'état* after the overthrow of a legitimate civilian regime by force.³⁶⁷ 'This kind of Martial Law' observed Justice Murshed of the East Pakistan High Court in 1963, with reference to the imposition of Martial Law in Pakistan in 1958, in *Lt. Col. G. L. Bhattacharya v State*³⁶⁸, 'constitutes a class apart and has nothing to do with "Constitutional" Martial Law.'³⁶⁹ In Constitutional Law, Martial Law, which is the great law of social defence, finds justification in the doctrine of necessity for its promulgation in times of grave emergency, when society is disordered by civil war, insurrection or invasion by a foreign enemy, for the speedy restoration of peace and tranquillity, public order and safety in which the civil authority may function and flourish.³⁷⁰ Since Martial Law was proclaimed in Bangladesh in peace time and there was no question of suppressing riot, rebellion or insurrection, the declaration of Martial Law on 15 August 1975 did not satisfy the test of the common law doctrine of necessity.³⁷¹ It was to be seen as an extra-constitutional act since throughout the text of the 1972

³⁶⁷ M. Ershadul Bari, *Martial Law in Bangladesh, 1975-1979: A Legal Analysis* (PhD Thesis, SOAS, University of London, 1985) at pp. 150-1.

³⁶⁸ 13 PLR (Dacca Series) 377.

³⁶⁹ *Ibid.*, at pp. 420-1.

³⁷⁰ Bari, *supra* note 367, at pp. 423-4.

³⁷¹ *Ibid.*, p. 428.

Constitution of Bangladesh no reference whatsoever has been made to Martial Law.³⁷² Unlike the 1956 and 1962 Constitutions of Pakistan, which had been abrogated after Proclamation of Martial Law in 1958 and 1969 respectively, the 1972 Constitution of Bangladesh was not abrogated by the 1975 Martial Law administration. Neither was it suspended at any time during the Martial Law period. But it ceased to exist as the Supreme Law of the Country as it was made subject to the First Proclamation (issued on 20 August 1975), and Martial Law Regulations or Orders issued by the Martial Law regime from time to time and, as such, the Constitution assumed a subordinate status.³⁷³ Although under the 1972 Constitution of Bangladesh only the Parliament did have the power to amend it and the President was not given any authority to make and promulgate any ordinance for altering or suspending any provision of the Constitution, the President assumed on 19 September 1975 the power of making orders on any subject in, or provided by the 1972 Constitution through the promulgation of the Proclamation (First Amendment) Order, 1975 (Proclamation Order No I of 1975). Accordingly, he amended the Constitution from time to time by issuing Proclamations (Amendments) Orders.

Thus President A.M. Sayem, a former Chief Justice of Bangladesh (1972-1975) who had replaced Khandaker Mostaque Ahmed (the first President under Martial Law who had retained the structure of civilian administration) as the President on 6 November 1975 and Chief Martial Law Administrator (who perhaps was the first Chief Justice to assume the powers of the Chief Martial Law Administrator in the history of Martial Law administration) on 8 November 1975³⁷⁴, issued the Second Proclamation (Seventh Amendment) Order, 1976

³⁷² Ibid., p. 429.

³⁷³ Ibid., p. 153.

³⁷⁴ Ibid., at p. 135.

on 28 May 1976 which provided that ‘The judges shall be appointed by the President after consultation with the Chief Justice.’³⁷⁵

Thus the constitutional provision of consultation with the Chief Justice by the President in appointing judges to the Supreme Court, removed by the civilian regime of Awami League, was restored by the Martial Law Administration. But the stipulation of consulting the Chief Justice in appointing the judges of the Supreme Court by the President was destined to remain in force only for one year and six months. President and Chief Martial Law Administrator Ziaur Rahman, who had replaced Abu Sadat Mohammad Sayem as the Chief Martial Law Administrator on 29 November 1976 and the President on 21 April 1977, issued on 27 November 1977 the Second Proclamation (Tenth Amendment) Order, 1977 which restored the method of appointment as had been introduced by the Constitution (Fourth Amendment) Act, 1975. As it provided that the ‘The judges [of the Supreme Court] shall be appointed by the President.’³⁷⁶ This provision contained in Article 95(1) is still (2010) in the Constitution in view of ratification, confirmation and validation by the Constitution (Fifth Amendment) Act, passed by the Parliament on 6 April 1979.

Thus the President has again been freed from the Constitutional obligation of consulting the Chief Justice, who was in the best possible position to assess the probable fitness of the men likely to prove successful on the bench, in appointing judges of the Supreme Court. Since the President cannot be expected to intimately know the members of the bar and the bench and, as such, may be moved by political considerations, it appears that the President’s existing power of appointment, is not circumscribed with safeguards to ensure that appointments of judges will be made only with the need of the offices in view.

³⁷⁵ Article 4, The Second Proclamation (Seventh Amendment) Order, 1976 (Second Proclamation Order No IV of 1976).

³⁷⁶ Article 2, The Second Proclamation (10th Amendment) Order, 1977 (Second Proclamation Order No I of 1977).

Although the provision for consultation with the Chief Justice, restored in Article 95 of the Constitution of Bangladesh in 1976, was again deleted in 1977 by the Martial Law regime and the deletion was ratified, confirmed and validated by the Constitution (Fifth Amendment) Act, 1979, Justice A.B.M Khairul Huque (as he then was) in August 2005 in *Bangladesh Italian Marble Works Limited v Government of Bangladesh and others*,³⁷⁷ while declaring the Constitution (Fifth Amendment) Act, 1979 *ultra vires* to the Constitution, condoned and validated Article 95 as amended incorporating into it the provision regarding consultation with the Chief Justice by the Second Proclamation (Seventh Amendment) Order, 1976 which had not been in force when the said Fifth Amendment was passed. As he observed:

we do not condone the amendment of clause (1) of Article 95 by the Second Proclamation (Tenth Amendment) Order, 1977 which would amount to revival of Article 95(1) as amended by the Second Proclamation (Seventh Amendment) Order, 1976 which commensurate with that of the original Constitution which reads as follows:

“95. Appointments of Supreme Court Judges (1) The Judges shall be appointed by the President after consultation, with the Chief Justice.”³⁷⁸

On appeal, in 2010 in *Khondker Delwar Hossain & Others v Bangladesh Italian Marble Works Limited*³⁷⁹ the Chief Justice of Bangladesh, Justice Md. Tafazzul Islam rightly observed that the repealed provision of the Second Proclamation (Seventh Amendment) Order 1976 concerning consultation with the Chief Justice by the President cannot legally be retained and validated by the High Court Division. As he held that the appointment of judges by the President after consultation with the Chief Justice

³⁷⁷ 34 CLC (HCD) 2005 < <http://clcbd.org/judgments/19-constitutional-law/3536-fifth-amendment-to-the-constitution-of-bangladesh-judgment-2005-34-clc-hcd.html>>.

³⁷⁸ *Ibid.*, at p. 383.

³⁷⁹ The case has not yet been published in the annual Dhaka Law Reports (DLR), which publishes judgments of the superior courts, namely, the High Court Division and the Appellate Division of the Supreme Court of Bangladesh. However, the Judgment is available at [bdnews24.com](http://bdnews24.com/image/5th%20Amendment.pdf) (Bangladesh’s first Online Newspaper) < <http://bdnews24.com/image/5th%20Amendment.pdf>> (accessed on 10 December 2010).

as provided by Second Proclamation (Seventh Amendment Order 1977) was deleted by the Second Proclamation (Tenth Amendment) Order, 1977. Accordingly, after the amendment of the amended Article 95 by the Second Proclamation (Tenth Amendment) Order, 1977, Article 95 as amended by the Second Proclamation Order No. IV of 1976, did no longer exist, and therefore, it was not ratified or validated or confirmed by the Fifth Amendment. Accordingly this Article 95 as amended by the Second Proclamation Order No. IV of 1976 could not be legally [sic] condoned by the High Court Division as it was not in force on the day the Fifth Amendment was passed. More so, a repealed provision cannot be legally [sic] retained and/or validated by the Court. So Article 95 will remain as it existed on August 15, 1975.³⁸⁰

However, although the President and Chief Martial Law Administrator after restoring the provision regarding consultation with the Chief Justice for one and half year (28 May 1976- 26 November 1977) again abolished it by the Second Proclamation (Tenth Amendment) Order from 27 November 1977, then Chief Justice of Bangladesh, Justice Kemal Uddin Hossain (February 1978- 11 April 1982), made it public in 1986 in Justice Ibrahim Memorial Lecture that he (President Ziaur Rahman) had established the convention of consulting the Chief Justice in appointing judges of the Supreme Court.³⁸¹ In an interview with the author, Justice Kemal Uddin Hossain maintained, it was true that his recommendations had not always been accepted by President Ziaur Rahman in appointing judges, but it was equally true that none was appointed as a judge of the Supreme Court by the President without his concurrence.³⁸² It appears that the restoration of Constitutional provision of consulting the Chief Justice by President Sayem and the creation of a convention of consultation with the Chief Justice in 1978 after its abolition in 27 November 1977 were unknown to Justice Syed

³⁸⁰ *Khondker Delwar Hossain & Others v Bangladesh Italian Marble Works Limited*, 2010, 178-9, available at bdnews24.com (Bangladesh's first Online Newspaper) < <http://bdnews24.com/image/5th%20Amendment.pdf>> (accessed on 10 December 2010).

³⁸¹ Justice Kemal Uddin Hossain, 'Independent Judiciary in Developing Countries' (Speech delivered at the Justice Ibrahim Memorial Lecture Series, University of Dhaka, 1986) at p. 45.

³⁸² Interview with Justice Kemal Uddin Hossain (Dhaka, 30 August 2008).

Amirul Islam of the Supreme Court of Bangladesh when he observed in June 2001 in *S.N. Goswami Advocate v Bangladesh*³⁸³ that:

This is not true that there is consistent practice and convention regarding consultation with the Chief Justice in the matter of appointment of Judges of both the Division. It is untrue and a misstatement of fact. It was true up to 1974 and since 1975 when the 4th Amendment came into force the process of consultation was done away [with] and since then until February 1994 no consultation was made with the Chief Justice while making appointment of Judges in both the Divisions after the 4th Amendment of the Constitution the President never consulted the Chief Justice. The Executive on their own appointed the judges.³⁸⁴

But within a period of one year, it seems that Justice Syed Amirul Islam became aware and enlightened about the convention of consulting the Chief Justice by the President in appointing judges, though not about the restoration of consultation with the Chief Justice. As in 2002 he observed in the *State v Chief Editor, Manabjamin & Others*³⁸⁵:

.... but it is, revealed that even after the Fourth Amendment the judges were, appointed in consultation with the Chief Justice of Bangladesh even during the Martial Law Regime though the matter of consultation was not reflected in the notification until February 1994.³⁸⁶

A.2.3. Method of Appointment of Judges Under the Second Martial Law Regime (1982-1986)

³⁸³ 55 DLR (2003) 392.

³⁸⁴ Ibid., at pp. 344-5.

³⁸⁵ 31 CLC (HCD) (2002), Part 1 & 2 <<http://clcbd.org/judgments/18-criminal-law/3805-state-vs-chief-editor-manabjamin-and-others-2002-31-clc-hcdpart-one.html>> & <<http://clcbd.org/judgments/18-criminal-law/3806-state-vs-chief-editor-manabjamin-and-others-2002-31-clc-hcdpart-two.html>>. The case is also reported in 57 DLR (2005) 359.

³⁸⁶ 31 CLC (HCD) (2002), Part 2, para 222 <http://clcbd.org/judgments/18-criminal-law/3806-state-vs-chief-editor-manabjamin-and-others-2002-31-clc-hcdpart-two.html>.

Bangladesh returned to democratic rule on 6 April 1979 at the initiative of President Ziaur Rahman when the Martial Law, which had been declared on 15 August 1975, was withdrawn. But the civilian governments of Bangladesh did not last long. For, the President was assassinated on 30 May 1981 by a handful of members of the armed forces and the elected President Justice Abdus Sattar, who had first succeeded Ziaur Rahman as the acting President under Article 55(1) of the Constitution and then got elected as the President in November 1981 securing a landslide victory, was eased out of power merely four months and four days of his election, on 24 March 1982 in a bloodless coup. This time the armed forces were again back in the saddle under the leadership of the Chief of Army Staff Hussain Mohammad Ershad who placed the entire country under Martial Law and the 1972 Constitution was suspended. This declaration of Martial Law belied the assertion of the then Prime Minister Shah Azizur Rahman made on 2 March 1982 (merely 20 days before the proclamation of Martial Law) in the Parliament that there was no possibility of imposing Martial Law in Bangladesh as 'democracy has found firm roots in the soil of Bangladesh.'³⁸⁷ However, General Ershad did not exactly come riding on horseback as a disinterested non-partisan saviour of the nation as he, only 12 days after the election of Justice Abdus Sattar as President on 27 November 1981 put forward publicly the idea of evolving a mechanism through which the Army could share power with civilian government so that the periodic coup attempts or possibility of any form of army adventurism would come to an end.³⁸⁸ General Ershad was first satisfied with the assumption of the office of the Chief Martial Law Administrator with the absolute power of promulgating Martial Law Orders and Regulations dealing practically with every organ of the Government. Although he himself took up 'the

³⁸⁷ *Asian Recorder*, 26 March 1982- 1 April 1982, 16519 (corrected page 101435).

³⁸⁸ S. Kamaluddin, 'Bangladesh, the Generals are Posed to Take Over as Sattar Says, Changing of the Guard', *Far Eastern Economic Review* (Hong Kong), 19 March 1982, 12; S. Kamaluddin, 'Bangladesh, Ershad's New Order', *Far Eastern Economic Review* (Hong Kong), 20 August 1982, 16.

entire executive and legislative authority'³⁸⁹ eliminating the constitutional process of the separation of powers, he did not assume the office of the President of the Country. Justice A.F.M Ahsanuddin Chowdhury was sworn in as the 9th President of Bangladesh on 27 March 1982 with the degrading and ignominious condition that he could 'not exercise any power or perform any function without the advice and approval of the Chief Martial Law Administrator.'³⁹⁰

The Proclamation of Martial Law, issued on 24 March 1982, which provided that the judges of the Supreme Court including the Chief Justice would continue to function³⁹¹, did not contain any provision whatsoever regarding the appointment of judges of the Supreme Court. But the Proclamation (First Amendment) Order, issued on 11 April 1982, empowered the Chief Martial Law Administrator, not the President of the Country, to appoint the 'Chief Justice and other Judges of the Supreme Court from among Advocates of the Supreme Court or Judicial officers.' Although the Chief Martial Law Administrator was given the power of appointing judges of the Supreme Court from amongst advocates of the apex court or judicial officers irrespective of their length of experience in contravention of Constitutional provisions (i.e. at least 10 years standing practise as an advocate of the Supreme Court or at least 10 years experience as a judicial officer)³⁹², no advocate of the Supreme Court or judicial officer having less than ten years experience was ever appointed by the Second Martial Law regime.³⁹³

However, on 11 December 1983, the Chief Marital Law Administrator H.M. Ershad replaced Justice A.F.M. Ahsanuddin Chowdhury as the President of the country allegedly to pave the way for the transition from Martial Law to democracy and, as natural consequence of this

³⁸⁹ The Proclamation (First Amendment) Order I of 1982, 11 April 1982.

³⁹⁰ Article 2(6), *ibid.*

³⁹¹ Clause 9, The Proclamation of Martial Law, 24 March 1982.

³⁹² Article 95(2), The Constitution of the People's Republic of Bangladesh, 1972.

³⁹³ Interview with the then Deputy Secretary, Ministry of Law, Justice and Parliamentary Affairs (1 September 2008).

change, the Chief Martial Law Administrator was substituted by the President as the appointing authority of the judges of the Supreme Court.³⁹⁴ Thus Lt. General Ershad followed the footsteps of General Zia-ul-Hoque of Pakistan, who had first assumed the office of the Chief Martial Law Administrator upon seizure of power in July 1977 apparently to demonstrate that he was not power hungry, but later in September 1978 when he felt confident enough, took over as the President of the country.

A.2.4. Violation of the Convention of Seniority in Appointing Judges of the Appellate Division

Since the Constitution of Bangladesh does not contain any explicit provision as to the appointment of judges of the Appellate Division from amongst the judges of the High Court Division, a convention was established not only to appoint the Judges of the Appellate Division from the High Court Division Judges but also to make the appointment on the basis of seniority. The convention of following seniority in appointing judges of the Appellate Division was consistently followed for about four years from 16 December 1972- 12 August 1976. But since 13 August 1976, the convention of seniority has been transgressed at regular intervals by successive governments, whether military or civilian.

A.2.5. Contravention of the Principle of Seniority in Appointing Judges of the Appellate Division by the First Martial Law Regime (August 1975- April 1979)

The convention of the principle of seniority in appointing judges of the Appellate Division of the Supreme Court from the High Court Division was first violated on 13 August 1976 when President and Chief Martial Law Administrator Justice Sayem elevated Justice Debesh Chandra Bhattachari to the Appellate Division superseding the then senior most judge of the High Court Division Justice Ruhul Islam.³⁹⁵ The next civilian regime of the Bangladesh

³⁹⁴ The Proclamation Order No. III of 1983, 11 December 1983.

³⁹⁵ Information collected from the official records of the Supreme Court of Bangladesh; 'List of Superseded Judges', *The Dainik Sangbad* (Dhaka), 14 January 2001, 1.

Nationalist Party first headed by President Ziaur Rahman (6 April 1979- 29 May 1981) and then by President Justice Abdus Sattar (30 May 1981- 23 March 1982), did not violate the principle of seniority.

A.2.6. Violation of the Principle of Seniority in Elevating Judges to the Appellate Division by the Second Martial Law Regime (24 March 1982- November 1986)

After the declaration of Martial Law on 24 March 1982, the convention of seniority was violated on two occasions, in April 1982 and December 1985, in appointing judges to the Appellate Division from the judges of the High Court Division. Lt. General H.M. Ershad as the Chief Martial Law Administrator appointed on 21 April 1982 A.T.M Masud as the judge of the Appellate Division bypassing his senior, Justice Mohsin Ali. Then as the President of Bangladesh, H.M. Ershad on 26 December 1985, elevated Justice M.H. Rahman and Justice A.T.M Afzal to the Appellate Division superseding three senior High Court Division Judges- Justice A.R.M Amirul Islam Chowdhury, Justice Md. Habibur Rahman (CSP) and Justice Abdul Matin Khan Chowdhry.³⁹⁶

A.2.7. Breach of the Principle of Seniority in Appointing Judges of the Appellate Division by the Civilian Regime of H.M. Ershad (1986- 1990)

H.M. Ershad as the civilian President of the country violated the convention of following seniority in appointing Justice Mustafa Kamal, a High Court Division Judge, as the Judge of the Appellate Division ignoring his two senior fellow colleagues- Justice ARM Amirul Islam Chowdhury and Justice Sultan Hossain Khan.³⁹⁷

³⁹⁶ Ibid.

³⁹⁷ Ibid.

A.2.8. Violation of the Principle of Seniority In Elevating Judges to the Appellate Division During the Civilian Regime of the Bangladesh Nationalist Party (B.N.P) (1991-1996)

President Abdur Rahman Biswas of the Bangladesh Nationalist Party (B.N.P) elevated Justice Abdur Rouf to the Appellate Division of the Supreme Court bypassing his senior colleague Justice ARM Amirul Islam Chowdhury. Justice Amirul Islam Chowdhury was again superseded on 8 June 1995 in appointing Justice Ismailuddin Sarkar as the Judge of the Appellate Division of the Supreme Court.³⁹⁸ Thus Justice A.R.M Amirul Islam Chowdhury was ignored on four occasions in elevating various junior judges to the Appellate Division- twice by President H.M. Ershad and twice by President Abdur Rahman Biswas.

A.2.9. Violation of the Convention of Seniority in Appointing Appellate Division Judges During the Awami League Regime (1996-2001)

President Justice Shahabuddin Ahmed, a former Chief Justice of Bangladesh (1 January 1990- 31 January 1995), superseded during the civilian regime of the Awami League two senior judges of the High Court Division- senior most Justice Md. Mozammel Haque and second senior most Justice Kazi Shafiuddin- on three occasions in appointing Justice Mahmudul Amin Chowdhury on 28 June 1999, Justice Kazi Ebadul Haque on 19 January 2000 and Justice Mainur Reza Chowdhury on 28 November 2000 as judges of the Appellate Division of the Supreme Court.³⁹⁹

It seems that both Justice Md. Mozammel Haque and Justice Kazi Shafiuddin were cut down to size for their decisions in certain sensitive cases. In November 2000, Justice Md. Mozammel Hoque held the preventive detention orders of four leaders of the opposition political party, Bangladesh Nationalist Party (BNP) as illegal and ordered the Awami League Government to pay BD Taka four lac (four hundred thousand) as fine to them for

³⁹⁸ Ibid.

³⁹⁹ Ibid.

unnecessarily keeping them in preventive custody.⁴⁰⁰ The same Judge, Justice Mozammel Hoque in the contempt case of the *Mainul Hosein v Sheikh Hasina Wazed*⁴⁰¹ (*the Prime Minister of the Country*) held that:

We are disposing of three applications for drawing of proceedings of contempt of Court against the Honourable Prime Minister Sheikh Hasina with a note of desire that the Honourable Prime Minister shall be more careful and respectful in making any statement or comment with regard to the Judiciary or the judges or the courts of Bangladesh in future.⁴⁰²

The other judge, Justice Shafiuddin had to pay a heavy price for giving a decision in 1995 in the Case of *Anwar Hossain Khan v Speaker of Bangladesh Sangsad Bhabon and Others*⁴⁰³ in which boycotting of eight sessions of the Parliament by the opposition members (elected from the Awami League) for one hundred and one days from February 1994 to July 1995 was challenged during the regime of the BNP Government (1991-1996). Justice Qazi Shafiuddin gave direction to the aforesaid abstaining members to attend the Parliament in order to perform and discharge their constitutional functions and obligation respectively. He further observed:

We declare that the salary, emoluments, allowances and other benefits so received by the respondents are illegal and unauthorised. The aforesaid illegal and unauthorised receipts of salaries, emoluments and allowances by the absentee members of the Parliament without leave of the Parliament are recoverable by appropriate authority upon the processes of law.⁴⁰⁴

Although, Justice Md. Mozammel Hoque preferred to go on quite retirement on 1 December 2000, Justice Qazi Shafiuddin, who was supposed to retire on 1 November 2001, preferred to resign on 9 November 2000 as a mark of protest against his supersession on three occasions.

⁴⁰⁰ Ibid; *The Dainik Sangram* (Dhaka), 2 November 2000, 1.

⁴⁰¹ 53 DLR (2001) 138.

⁴⁰² Ibid., at p. 142.

⁴⁰³ 47 DLR (1995) 42.

⁴⁰⁴ Ibid at p. 53.

In an interview with one of the national dailies, Justice Shafiuddin claimed that he might had been superseded for his decision given against the Awami League in the *Anwar Hossain's Case* in 1995 terming their boycotting of the sessions of Parliament as illegal.⁴⁰⁵

However, President Justice Shahbuddin Ahmed for the fourth time violated the convention of seniority on 10 January 2001 when he appointed Justice Rabbani in preference to his senior Justice K.M. Hasan and Justice Ruhul Amin bypassing his senior colleague in the High Court Division, Justice J.R. Mudassir, as the judges of the Appellate Division of the Supreme Court by not accepting the then Chief Justice's recommendation that seniority should be respected.

The appointment of two judges from the second and fourth position of the list of recommendation of four judges⁴⁰⁶ 'disregarding time-honoured and established practice' led to an unprecedented protest by mostly the Supreme Court Lawyers belonging to the main opposition political party (Bangladesh Nationalist Party (B.N.P)) and 13 senior lawyers of the Supreme Court. A meeting of senior lawyers and former presidents and secretaries of the Supreme Court Bar Association (SCBA) was held at its office on 10 January 2001 with its President Barrister Moinul Hosein in the Chair to discuss the situation. It was decided in the meeting to form a new forum- Supreme Council of Lawyers- with Barrister Ishtiaqu Ahmed as its Convenor and Dr. Kamal Hossain, Barrister Moinul Hosein, Abdul Malek as well as Dr. M. Zahir as its members to 'unite all lawyers to protect the judiciary from interference and keep its independence.'⁴⁰⁷ It was further agreed that the remaining two judges- Justice K.M. Hasan and Justice Syed Modassir- of the 'list of senior judges' submitted by the Chief Justice be appointed to the Appellate Division of the Supreme Court. The five member Committee headed by a very distinguished and reputed lawyer, Barrister Ishtiaque Ahmad,

⁴⁰⁵ *The Daily Manabzamin* (Dhaka), 11 November 2000, 1.

⁴⁰⁶ The list of recommended four judges as sent to the President in order of seniority was as follows: 1) Justice K.M. Hasan, 2) Justice Golam Rabbani, 3) Justice Syed Modassir and 4) Justice Ruhul Amin. *The Daily Sangbad*, supra note 395.

⁴⁰⁷ *The Daily Star* (Dhaka), 11 January 2001, 1.

was given the task of pursuing the matter with the relevant authorities. Accordingly, the Committee met President Shahbuddin Ahmed on 13 January 2001 and requested him to elevate also the superseded two High Court Judges, Justice K.M. Hasan and Justice J. R. Mudassir, to the Appellate Division of the Supreme Court. The President told the five lawyers of the Committee that ‘the proposal should have been given due consideration but he has constitutional limitations as he acts on the recommendation of the Prime Minister.’⁴⁰⁸ But the then Prime Minister refused to meet the members of the Committee showing firmness in her stand. On 15 January 2001, the then Minister of Law, Justice and Parliamentary Affairs made a statement before the Parliament stating that the appointment of Judges to the Appellate Division was not a matter of promotion and, as such, seniority was not the only criterion for making the appointment. In appointing judges to the Appellate Division competence, knowledge of law and commitment to rule of law were also to be taken into account.

However, the Chief Justice was urged by a group of the Supreme Court lawyers (considered as ‘pro-opposition’ lawyers) not to administer oath to Justice Golam Rabbani and Justice Ruhul Amin, elevated to the Appellate Division of the Supreme Court from the High Court Division superseding two senior Judges. But Chief Justice Latifur Rahman went ahead with the scheduled oath taking ceremony which was attended by all the judges of the Supreme Court. The ceremony took place on 10 January 2001 at his Chamber instead of the Judges Lounge due to the agitation. The judges were confined there for more than two hours by the agitating lawyers.⁴⁰⁹ They forced suspension of the Supreme Court’s functioning on 11 January 2001. A case was filed against 16 ‘Pro-Opposition’ Lawyers including B.N.P law-

⁴⁰⁸ *The Daily Star* (Dhaka), 14 January 2001, 1.

⁴⁰⁹ *The Daily Star* (Dhaka), supra note 407.

makers Barrister Nazmul Huda, Khandaker Mahbub Uddin Ahmed under the Public Safety Act for their involvement on 10 January's incident at the Supreme Court.⁴¹⁰

It is believed that Justice Ruhul Amin was rewarded for his verdict (although split one) in the *Bangabandhu Sheikh Mujibur Rahman Murder Case* as a member of the Death- Reference Bench of the High Court Division, while Justice K.M. Hasan, the senior most judge of the High Court Division, was victimised for feeling embarrassed to act as a member of the Death-Reference Bench. But the real motive in not elevating Justice K.M. Hasan to the Appellate Division of the Supreme Court was his previous connection with the opposition party (B.N.P) as divulged by the then Prime Minister herself in an address in a public meeting at Sitakunda on 17 January 2001 in which she said that the B.N.P. had wanted to appoint their former party leader, International Affairs Secretary, and ex-Ambassador, to the Appellate Division and, as such, to politicise the Supreme Court, which have duly been frustrated.⁴¹¹

However, the appointment of Justice Md. Gholam Rabbani and Justice Md. Ruhul Amin as Judges of the Appellate Division in supersession of two of their senior colleagues in the High Court Division (namely Justice K.M. Hasan and Justice Syed JR Mudassir Hossain) was challenged for the first time (by a junior advocate of the Supreme Court and the Secretary General of an NGO, the Bangladesh Human Rights Commission) before the High Court Division in the Case of *SN Goswami, Advocate v Bangladesh*.⁴¹² Justice Syed Amirul Islam, who delivered the judgment on 3 June 2001 declared the said appointment as lawful. As he observed:

Question of supersession can only arise in a case of promotion to a higher post. In the present case we are not concerned with the promotion of the judges of the High Court Division, to the Appellate Division. It is rather the appointment of two new judges in the Appellate Division

⁴¹⁰ *The Daily Star* (Dhaka), 17 January 2001, 1.

⁴¹¹ *The Daily Ittefaq* (Dhaka), 18 January 2001, 1.

⁴¹² 55 DLR (2003) 332.

which is in dispute. An appointment of a judge to the Appellate Division from amongst the judges of the High Court Division is not a promotion, it is a fresh appointment made by the President under Article 95(1) of the Constitution from amongst the qualified persons as contained in Sub Article (2) of Article 95 of the Constitution.... The actions of the President in the matter of appointment of judges of either Division of this Court are not unfettered in that in appointing a person in the judgeship of either Division the precedent condition as laid down in Article 95(2) has to be complied with. Once the requirements as laid down in Article 95(2) are fulfilled and the President acts on the advice of the Prime Minister, this Court cannot cause an inquiry as to the reason of appointing that person as a Judge. It is the absolute prerogative of the Executive under the existing provisions of the Constitution though prior to the 4th Amendment the position was otherwise.⁴¹³

It is noticeable that the learned Justice himself held that the qualification requirements as laid down in Article 95 of the Constitution are equally applicable to both the High Court and Appellate Divisions Judges. Thus the Constitution itself has not provided for any specific criteria such as number of cases disposed of as the High Court Division Judges demonstrating merits and qualities, handling of complex cases particularly involving constitutional issues, analytical ability and professional standard which are in higher demand for an Appellate Division Judge than a High Court Division Judge. Furthermore, there is no provision for the advertisement of vacant posts in the Appellate Division and selection of candidates by a judicial committee consisting of majority members from the apex court of the land. Therefore, the appointment of judges to the Appellate Division from amongst the High Court Division Judges appears to be in essence promotion rather than appointment.

With regard to the recommendation of the then Chief Justice that all the relevant four judges of the High Court Division were equally competent and that seniority should be respected, the learned Justice held:

⁴¹³ Ibid., at p. 342.

Be that as it may, if all the judges were equally competent, the Executive did not commit any illegality in choosing any two from the equal four inasmuch as there is no law or constitutional provision or convention, requiring the seniors to be appointed.⁴¹⁴

Thus it is evident that the convention of consulting the Chief Justice since 1978, as mentioned earlier, was unknown to learned Justice Syed Amirul Islam. However, he expressed his opinion by way of guidance as to the matters to be taken into consideration in appointing a judge of the High Court Division to the Appellate Division thus:

We are aware of the opinion that if a judge of this Division is elevated to the Appellate Division it should not be on the basis of seniority alone, rather it should be on the basis of seniority-cum-merit. The hard reality is that the quality of the judges of this Division, though are of a satisfactory level, all are not equal. Some are more brilliant than others. Thus, if seniority be the sole criterion for elevation then the most brilliant may be left behind and the less competent may be elevated to the Appellate Division simply because he was appointed a judge of this Division at an earlier point of time than the others. This will have the following effect on the highest judiciary; firstly, the most brilliant judges may be left behind though they could make better contribution to the judiciary. Secondly, if seniority-cum-merit becomes the criterion then right after the appointment of a judge in this Division he will do his best to improve the quality of his judgment and his overall performance as a judge and there will be a sense of competitiveness among the judges in performing their judicial duties. This will immensely benefit the nation as a whole and the judiciary in particular and the most meritorious will move ahead the less meritorious. The judges of this Division will then leave no stone unturned to devote themselves whole-heartedly to the job- day in and day out during the tenure of their office.⁴¹⁵

⁴¹⁴ Ibid at pp. 343-44.

⁴¹⁵ Ibid., at p. 349.

It is very difficult to agree with the above observations of the learned judges. For manifestation of merit and its objective assessment are very difficult to ascertain. If the President is to decide the matters, then it can be said in the words of Justice Syed Amirul Islam who in *State v Chief Editor, Manabjamine*⁴¹⁶ observed that:

Can the Government, namely, the major litigant, be justified in enjoying absolute authority in nominating and appointing its arbitrators? The answer would be in the negative. The executive cannot be allowed to enjoy the absolute primacy in the matter of appointment of judges as its “royal privilege”. If such a process is allowed to continue, the independence of judiciary will never be attained.⁴¹⁷

Then if the Chief Justice alone is given the task of judging the merits of the judges of the High Court Division, again there is the possibility of particularly as apprehended by the same judge in the aforesaid case:

... after all the Chief Justice is a man with all the failings, all the sentiments and all the prejudices which we as common people have and therefore we think that the matter should not be left in the hands of the learned Chief Justice alone and a better result would be derived if the opinion is formed in the matter of appointment of judges in the Full Court Meeting of the Supreme Court.⁴¹⁸

However, during the pendency of the *SN Goswami Case* and 17 days before the pronouncement of the Judgment, on 15 May 2001, Justice Md. Fazlul Karim, who gave decision in *Bangabandhu Murder Case* as the third member of the Death Reference Bench of the High Court Division, as mentioned earlier, was elevated to the Appellate Division in supersession of three senior judges- Justice K.M. Hasan, Justice Syed JR Mudassir Hossain and Justice Abu Sayeed Ahmed- by President Shahabuddin.

⁴¹⁶ Supra note 385.

⁴¹⁷ Supra note 386, at para 253.

⁴¹⁸ Ibid at para 248.

Thus the convention of seniority in appointing judges of the Appellate Division from amongst the High Court Division Judges was violated on five occasions during the Government of the Awami League and Justice K.M. Hasan and Justice JR Mudassir became the victim of the violation for two times.

A.2.10. Contravention of the Convention of Seniority in Appointing Judges of the Appellate Division During the Bangladesh Nationalist Party (B.N.P) Regime (2001-2006)

The B.N.P. Government, which came into power in October 2001 and remained in power till October 2006, adhered to the convention of following seniority in elevating judges to the Appellate Division from amongst the High Court Division Judges for about two years. Justice K.M. Hasan, who had been superseded twice, was elevated to the Appellate Division on 20 January 2002. About two months later, on 5 March 2002, Justice Syed JR Mudassir Hossain (who had also been superseded twice) and Justice Abu Syed Ahmed (who had been bypassed once) were appointed to the Appellate Division. Justice Kazi A.T.M Monowaruddin, Justice Fazlul Hoque and Justice Md. Hamidul Hoque were also appointed to the Appellate Division on 25 June 2002, 17 July 2002 and 29 June 2003 respectively without deviating from the principle of seniority. Therefore, it appears that the B.N.P. regime stood by the convention of seniority five times in appointing Appellate Division Judges.⁴¹⁹

But the B.N.P. regime departed from the convention of following seniority for the first time on 13 July 2003 when Justice MM Ruhul Amin was appointed to the Appellate Division in supersession of Justice Syed Amirul Islam who had given judgment in the *SN Goswami's Case* against the seniority rule of elevating judges to the Appellate Division. Justice Syed Amirul Islam was again superseded (for the second time) next month, on 27 August 2003, when Justice Md. Tofazzal Islam was appointed as a Judge of the Appellate Division. He was

⁴¹⁹ Supra note 395.

superseded for the third and fourth time while appointing Justice M. A. Aziz and Justice Amirul Kabir Chowdhury to the Appellate Division on 7 January 2004 and 26 February 2004 respectively. When Justice M. A. Aziz of the Appellate Division was appointed as the Chief Election Commissioner on 23 May 2005⁴²⁰, Justice Md. Joynul Abedin succeeded him to the Appellate Division superseding his three senior colleagues- Justice Syed Amirul Islam, Justice Md. Hassan Ameen, and Justice A.K. Badrul Hoque.⁴²¹

Thus it appears that Justice Syed Amirul Islam, who in SN Goswami's Case upheld the instance of supersession in appointing judges to the Appellate Division 'in the absence of constitutional provision or convention [sic]' and maintained that appointment should be made on the basis of 'seniority-cum-merit' which would instil a sense of competitiveness among the judges right after their appointments 'in per performing their judicial duties', failed to make an impression upon the President during the B.N.P. regime on five occasions as (to use his own words) 'the most meritorious' judge 'to move ahead the less meritorious' and paid back, indeed, in his own coin which might make him realise belatedly that in most cases of supersession, appointments of judges to the Appellate Division have been made on political considerations or affiliations rather than on merit.

A.2.11. Convention of Seniority in Appointing Judges of the Appellate Division During the Present Awami League Regime (January 2009- To Date, 2010)

The Supreme Judicial Commission in its first meeting held on 16 October 2008, as mentioned earlier, recommended four senior most judges of the High Court Division- Justice Shah Abu Nayeem Mominur Rahman, Justice Md. Abdul Quddus, Justice Md. Abdul Aziz and Justice Bijan Kumar Das- for filling two vacant posts of judge in the Appellate Division of the

⁴²⁰ Shakhawat Liton, 'Justice Aziz becomes CEC', *The Daily Star* (Online), 24 May 2005 <http://www.thedailystar.net/2005/05/24/d5052401011.htm> (accessed on 10 December 2010).

⁴²¹ Supra note 395.

Supreme Court. The then Supreme Judicial Commission Member and Supreme Court Bar Association's President, presently the Minister for Law, Justice and Parliamentary Affairs of the Awami League Government, criticised on 17 December 2008 the delay of two months for not appointing judges to posts lying vacant since July 2008. He termed the delay as 'unfortunate' and liable for non-setting up of two benches of the Appellate Division for hearing pending cases resulting in the increase of backlog of cases only to aggravate the sufferings of the litigants.⁴²² The same person, after assuming the office of the Minister for Law, Justice and Parliamentary Affairs, took another two months to get three, out of the four previously recommended High Court Division Judges (as in the meantime on 14 January 2009 Justice Quddus retired from the service), appointed on 4 March 2009 as the judges of the Appellate Division of the Supreme Court.⁴²³ After increasing the number of posts of judges in the Appellate Division of Supreme Court from seven to 11 (on 9 July 2009), President Zillur Rahman appointed on 14 July 2009 four senior most judges of the High Court Division- Justice Bijan Kumar Das, Justice ABM Khairul Haque, Justice Md Muzzammel Hossain and Justice Surendra Kumar Sinha- as the judges of the Appellate Division of the Supreme Court.⁴²⁴

Thus the present regime of the Awami League, which have had the previous track record of violating the convention of seniority in appointing the Chief Justice of Bangladesh and Judges of the Appellate Division on numerous occasions, have so far complied with the convention of seniority in appointing judges from the High Court Division to the Appellate

⁴²² Ashutosh Sarkar, 'Appellate Division running with fewer judges for long', *The Daily Star* (Dhaka), 18 December 2008, 1.

⁴²³ Staff Correspondent, 'SC Appellate Division gets 2 new judges', *The Daily Star* (Dhaka), 5 March 2009, 1.

⁴²⁴ Staff Correspondent, 'SC Appellate Division gets 4 more judges', *The Daily Star* (Dhaka), 15 July 2009, 1.

Division, perhaps, keeping in mind the present Supreme Court Bar Association's persistent and assiduous demand to conform to the principle of seniority in the 'promotion process.'⁴²⁵

A.3. Appointment of Judges of the High Court Division

The Constitution of Bangladesh, 1972 provides for the appointment of two types of judges-regular or permanent and additional judges to the High Court Division of the Supreme Court. Since the coming into force of the Constitution in December 1972, judges are initially appointed to the High Court Division as additional judges for a period of two years and then generally they are appointed as regular or permanent judges of the High Court Division.⁴²⁶ Thus additional judgeship has become a gateway for entering the cadre of permanent judgeship; in the words of Justice Desai 'Additional Judgeship became an entry door for becoming a Judge'⁴²⁷ of the High Court Division although it is not aimed at 'to form a training base for recruiting [permanent] judges from the training base to the permanent cadre.'⁴²⁸ Since an additional judge is appointed initially for a period of two years (which can be extended for 'a further period' and the judge concerned can be appointed as a regular judge) on the satisfaction of the President that the number of judges should 'be for the time being increased', it cannot be said that he is appointed on probation 'for trying out if he is fit to be a permanent judge.'⁴²⁹ Unlike a probationer, who can be sent out any time during the period of probation, the service of an additional judge cannot ordinarily be terminated before the expiration of his term. It was the British Government in India, which governed the Indo-Pak-Bangladesh Subcontinent nearly two hundred years until August 1947, for the first time introduced the system of appointing additional judges in the High Courts in the subcontinent

⁴²⁵ Ashutosh Sarkar, 'SC may get new judges next month', *The Daily Star* (Dhaka), 23 December 2010, 1.

⁴²⁶ Article 98, the Constitution of Bangladesh, 1972.

⁴²⁷ In *S.P. Gupta v Union of India*, 1981 Supp SC 87 at p. 618.

⁴²⁸ Justice Fazal Ali, *ibid* at p. 471.

⁴²⁹ Justice Gupta, *ibid* at p. 347.

under the Indian High Courts Act, 1911⁴³⁰, the Government of India Act, 1915⁴³¹, and the Government of India Act, 1935.⁴³² Although the Constitution of India, 1949 did not originally contain any provision regarding the appointment of additional judges as on the expiration of seat on the bench for short period they would have to go back to the bar which would give 'them a pre-eminence over their colleagues and embarrasses the subordinate Judges who were at one time under their control and thus instead of helping justice they act as a hindrance to free justice,'⁴³³ the Constitution (Seventh Amendment) Act, 1956 incorporated into the Constitution the provisions concerning the appointment of additional judges.⁴³⁴ In the 1956 Constitution of Pakistan (the first Constitution of the Country), there was no provision concerning appointment of additional judges in the High Courts and, as such, judges in the High Courts initially were appointed permanently. But the 1962 and 1973 Constitutions of Pakistan provided for the appointment of additional judges even against the permanent vacancies.⁴³⁵

It may be recalled here the original provisions of Article 95(1) of the 1972 Constitution of Bangladesh concerning the appointment of judges of the Supreme Court which provided that

⁴³⁰ Section 3 of the Indian High Courts Act, 1911 empowered the Governor-General-in-Council to appoint from time to time persons to act as Additional Judges of any High Court for such period not exceeding two years as may be required.

⁴³¹ Clause (i) of the proviso to subsection (2) of Section 101 of the Government of India Act, 1915 authorised the Governor-General-in-Council to appoint persons to act as additional judges of any High Court for such period not exceeding two years as may be required.

⁴³² Section 222(3) of the Government of India Act, 1935 provided for the appointment of Additional Judges thus: 'If by reason of any temporary increase in the business of any High Court or by reason of arrears of work in any such Court, it appears to the Governor-General that the number of the Judges of the Court should be for the time being increased, the Governor-General (in his discretion) may, subject to the foregoing provisions of this chapter with respect to the maximum number of Judges, appoint persons duly qualified for appointment as Judges of the Court for such period not exceeding two years as he may specify.'

⁴³³ Tej Bahadur Sapru said in Indian Constituent Assembly. Quoted in 1981 Supp SCC 87 at 235.

⁴³⁴ Amended Article 224 (substituted) provides that '(1) If by reason of any temporary increase in the business of a High Court or by reason of arrears of work therein, it appears to the President that the number of the judges of that Court should be for the time being increased, the President may appoint duly qualified persons to be Additional Judges of the Court for such period not exceeding two years as he may specify.'

⁴³⁵ Article 96 of the 1962 Constitution of Pakistan provided that an Additional Judge could be appointed against a permanent vacancy or when a High Court Judge was absent or was unable to perform the functions of his office due to any other cause or for any reason it is necessary to increase the number of judges of a High Court for a period not exceeding two years. These provisions have been reproduced in Article 197 of the 1973 Constitution of Pakistan.

the other judges of the Supreme Court 'shall be appointed by the President after consultation with the Chief Justice.' Thus Article 95(1) deals with the appointment of regular or permanent judges to both the High Court Division and the Appellate Division of the Supreme Court after consultation between the two very high dignitaries, namely, the President and the Chief Justice of Bangladesh. On the other hand, Article 98 of the Constitution deals with the appointment of the additional judges to the High Court Division and *ad hoc* judges to the Appellate Division of the Supreme Court. As Article 98 provides that:

Notwithstanding the provisions of Article 94, if the President is satisfied, after consultation with the Chief Justice⁴³⁶, that the number of the judges of a division of the Supreme Court should be for the time being increased, the President may appoint one or more duly qualified persons to be additional judges of that division for such period not exceeding two years as he may specify, or if he thinks fit, may require a judge of the High Court Division to sit in the Appellate Division for any temporary period:

Provided that nothing in this article shall prevent a person appointed as an additional judge from being appointed as a judge under article 95 or as an additional judge for a further period under this article.

Thus unlike the Indian Constitution as amended in 1956, which provides for two specified situations-(i) temporary increase in the business of a High Court and ii) temporary increase in arrears of work therein- in which the power of appointing the additional judges by the President can be exercised and if neither of the situation is present there can be no question of exercising the power⁴³⁷, the Constitution of Bangladesh does not spell out any specific reason for the appointment of additional judges to the High Court Division of the Supreme Court; it has left the matter on the subjective satisfaction of the President, of course, after mandatory

⁴³⁶ The words 'after consultation with the Chief Justice' have been added to Article 98 in pursuance of a proposal moved by a Member of the Constituent Assembly. *The Constituent Assembly Debate*, vol. 2 (issue 1-19) (Dhaka: Assistant Controller of Publications, 1972), at pp 601-2.

⁴³⁷ *Supra* note 434.

consultation with Chief Justice, to the effect that the number of the judges of a division of the Supreme Court should be for the time being increased.

Although the words ‘for the time being’ clearly indicate that the increase in the number of judges by appointing additional judges would be for a short period or to deal with a temporary situation, the provision for appointment of an additional judge as a regular judge or his extension ‘for a further period, as contained (unlike the 1949 Indian and 1973 Pakistan Constitutions) in proviso to Article 98, may generate in him the hope and legitimate expectation while accepting the offer that he would not have to go back on the expiration of his term; he would either get a berth as a permanent judge or reappointed as an additional judge for a further period. Furthermore, this expectation generated in the minds of an additional judge by reason of such a practice, save in rare cases, followed for almost 38 years. Since the qualification requirements for the appointment of both the permanent and additional judges, as mentioned earlier, are the same and their status (except that an additional judge can hold office for the period specified in the warrant of his appointment) as well as functions are the same, it seems unjustified to appoint additional judges when there is need to appoint permanent judges and the practice of treating Article 98 as a gateway through which every High Court Division judge is required to pass before being appointed as a permanent judge. For, an additional judge appointed for two years can hardly be expected to deal with cases, particularly in which the executive is involved, as independently and fearlessly as a permanent judge can be expected; pronouncement of a fair and fearless judgment against the executive, which is the largest single litigant before the High Court Division, may cost him either appointment as a regular judge or ‘for a further period.’ Furthermore, a litigant’s confidence in the impartiality and independence of an additional judge, whose continuance in office after the specified period is subject to the will of the executive, is bound to suffer thinking that the judge is likely to be biased. Therefore, the system of appointment of

additional judges, to use the words of the Montreal Declaration on the Independence of Justice, 1983, as pointed out earlier, 'is inconsistent with judicial independence' and, as such, calls for phasing out gradually where such appointments exist.⁴³⁸

However, both Articles 95(1) and 98 of the 1972 Constitution of Bangladesh, which provide for the general rules regarding appointments of regular judges and additional judges respectively, stipulated the consultation with the Chief Justice of Bangladesh as a constitutional imperative in the matter of appointment of judges by the President to the Supreme Court. For, the Chief Justice is best suited and equipped to know the advocates and the judicial officers intimately and assess objectively their legal expertise, soundness, legal experience, professional attainment, ability to handle cases, ability to analyse and articulate, personal integrity, judicial temperament and firmness in order to select the most suitable amongst the best available candidates for appointment as judges of superior court. Sir Winston Churchill, former Prime Minister of the United Kingdom, aptly said in the House of Commons on 23 March 1954 that: 'Perhaps only those who have led the life of a Judge can know the lonely responsibility which rests upon him.'⁴³⁹ It is the Chief Justice who is eminently suited to weigh and evaluate the legal ability, potential capacity, quick thinking, integrity, reputation of the person under consideration in legal profession or judicial service and, as such, to select 'Daniel to sit in the Solomon's chair,' the outstanding and meritorious judge, in the words of Shakespeare, 'A Daniel come to judgment! yea, a Daniel.'⁴⁴⁰

During the British rule in the Indian Subcontinent, appointment of judges of the Federal Court and the High Courts were in the absolute discretion of the Crown, there was no specific provision in any law for consultation with the Chief Justice in the appointment process. The Indian Constitution of 1949 which, as mentioned earlier, after the UK envisaged a scheme of

⁴³⁸ Article 2.20, the Montreal Declaration on the Independence of Justice, 1983.

⁴³⁹ Parliamentary (House of Commons) Debates (Hansard), Vol. 525 (1954), at para 1061.

⁴⁴⁰ William Shakespeare, *The Merchant of Venice* (London: I.R. for Thomas Heyes), act 4, sc. 1, l. at pp. 223-4.

consultation by the executive with the constitutional functionaries including the Chief Justice of India, who are *ex hypothesi* well qualified to give expert opinion for appointing the best available candidates for appointment as judges of the superior courts. The 1956 and 1962 Constitutions of Pakistan accepted the Indian scheme of consultation except consultation with such of the judges of the Supreme Court and of the High Courts in the States as the President may deem necessary. The 1972 Constitution of Bangladesh accepted consultation with only one constitutional functionary- the Chief Justice of Bangladesh- in appointing by the President the judges of the High Court Division and Appellate Division of the Supreme Court. But it did neither concede primacy to the views of the Chief Justice of Bangladesh nor were his views binding on the executive. Furthermore, the framers of the Constitution of Bangladesh did not discuss and debate the word ‘consultation’ in the Constituent Assembly from 12 October to 4 November 1972 in connection with the appointment of judges of the apex court and the fixing of its parameter.⁴⁴¹

A.3.1. Lexicon Meaning of Consultation

In common parlance, consultation, which is used in connection with lawyers or with the physician, or with engineer etc., means seeking opinion or advice or aid or instruction or views of a person by another person on any given topic through correspondence or sitting across the table. The dictionary meanings of consultation are:

1. The action of consulting or taking counsel together 2. a conference in which the parties e.g. lawyers or medical practitioners, consult and deliberate.⁴⁴²

.... a meeting for deliberation, discussion or decision.⁴⁴³

Act of consulting patient with doctor; client with lawyer ...⁴⁴⁴

⁴⁴¹ *The Constituent Assembly Debate*, supra note 436, at pp 595-99.

⁴⁴² Shorter Oxford English Dictionary.

⁴⁴³ Webster’s Encyclopedia Unabridged Dictionary of the English Language.

consult means to seek opinion or advice of another, ... to deliberate together to take counsel to bring about.⁴⁴⁵

In *Corpus Juris Secundum*, the word ‘consultation’ has been defined thus:

generally as meaning the act of consulting; deliberation with a view to decision; and judicially as meaning the deliberation of two or more persons on some matter; also a council or conference to consider a special case. In particular connections, the word has been defined as meaning a conference between the counsel engaged in a case, to discuss its question or to arrange the method of conducting it, the accepting of the services of a physician, advising him of one’s symptoms, and receiving aid from him.⁴⁴⁶

A.3.2. Judicially Interpreted Meaning of Consultation

However, the word ‘consultation’ has been judicially interpreted in various cases in different jurisdictions. Justice K. Subba Rao of the Madras High Court interpreted the word ‘consult’ in general and specific (i.e. in the public authority context) senses in *R. Pushpam v State of Madras*.⁴⁴⁷ As he observed:

The word ‘consult’ implies a conference of two or more persons or an impact of two or more minds in respect of a topic in order to enable them to evolve a correct, or at least, a satisfactory solution. Such a consultation may take place at a conference table or through correspondence.... It is necessary that the consultation shall be directed to the essential points and to the core of the subject involved in the discussions.... A consultation may be between an uninformed persons and an expert or between two experts. A patient consults a doctor; a client consults his lawyer; two lawyers or two doctors may hold consultations between themselves. In either cases the final decision is with the consultor, but he will not generally ignore the advice except for good reasons. So too in the case of a public authority. Many

⁴⁴⁴ Black’s Law Dictionary.

⁴⁴⁵ Words and Phrases- Permanent Edition.

⁴⁴⁶ Corpus Juris Secundum, Vol. 16-A, at p. 1243.

⁴⁴⁷ AIR 1953 Mad 392.

instances may be found in statutes when an authority entrusted with a duty is directed to perform the same in consultation with another authority which is qualified to give advice in respect of that duty. It is true that the final order is made and the ultimate responsibility rests with the former authority. But it will not, and cannot be, a performance of duty if no consultation is made, and even if made, is only in formal compliance with the provisions. In either case the order is not made in compliance with the provision of the Act.⁴⁴⁸

Thus the essence of Justice K Subba Rao contention is that in cases of consultation between an uninformed person and an expert or between two experts or between a public authority and another authority, the final decision will lie with the consultor although it is expected that he will not generally ignore the consultee's advice except for good reasons.

In the same vein, Justice Ahmadi of the Indian Supreme Court defined consultation in *Supreme Court Advocates-on-Record Association v Union of India*⁴⁴⁹ thus:

The word "consult" as understood in ordinary parlance means to ask or seek advice or the views of a person on any given subject i.e. to take counsel from another, but it does not convey that the consultant is bound by the advice. In certain situations an expert in the field may be consulted but it is only to help the consultant take a final decision. But consulting even an expert the consultant does not mortgage his decision, the advice given is only an input among the various factors which enter decision making. He may consult one or more experts and he may accept the advice he considers most acceptable or rational but he is always free to reach his own conclusion. It is ultimately his responsibility to reach a sound decision and he is accountable for the same.⁴⁵⁰

⁴⁴⁸ Ibid.

⁴⁴⁹ (1993) 4 SCC 441.

⁴⁵⁰ Ibid., at p. 622.

But in *Port Louis Corpn v Attorney-General, Mauritius*⁴⁵¹, the Judicial Committee of the Privy Council observed: ‘consultation.... is not a one way process but a two way process.... The requirement of consultation is never to be taken perfunctorily or as a mere formality.’⁴⁵² Similarly Justice Webster in *R.V. Secretary of State for Social Service, ex parte Association of Metropolitan Authorities*⁴⁵³ observed: ‘.... the essence of consultation is the communication of a genuine invitation [with sufficient information] to give [helpful] advice and a genuine consideration of that advice....’⁴⁵⁴

A.3.3. Judicial Interpretation of Conventional Consultation with the Chief Justice in Bangladesh

The Supreme Court of Bangladesh did not have any occasion to interpret the word ‘consultation’ with the Chief Justice by the President so long it was mentioned in Article 95(1) in connection with the appointment of puisne judges of the Supreme Court (comprising of the High Court Division and Appellate Division) and in Article 98 in the context of appointment of additional judges in the High Court Division. In January 1975, the Constitution (Fourth Amendment) Act, which is considered as a draconian amendment as it introduced basic and crucial changes in the Constitution, deleted the provision of consultation with the Chief Justice by the President from the aforesaid Articles in appointing judges to the Supreme Court; the amended provision read: ‘The.... Judges shall be appointed by the President.’⁴⁵⁵ Thus this amended method became completely identical with that of the method of appointment provided for by the Government of India Act, 1935 regarding the appointment of Federal Court judges during the British Raj in India. As it was provided that: ‘every Judge of the Federal Court shall be appointed by His Majesty by warrant under the

⁴⁵¹ 1965 AC 1111 (PC).

⁴⁵² Ibid.

⁴⁵³ (1986) 1 All ER 164.

⁴⁵⁴ Ibid., at p. 167.

⁴⁵⁵ Amended Article 95(1), the Constitution of the People’s Republic of Bangladesh, 1972.

Royal Sign Manual.’⁴⁵⁶ Thus like the Crown during the British Raj in India, the President of Bangladesh was given absolute discretion to make judicial appointment without any kind of limitation. As to the implication of this sort of arrangement Dr. B. R. Ambedkar said in the Indian Constituent Assembly that it is ‘dangerous to leave the appointments to be made by the President, without any kind of reservation or limitation, that is to say, merely on the advice of the executive of the day.’⁴⁵⁷ For, neither the President can generally be expected to have knowledge about the professional attainment, legal acumen, integrity, temperament and suitability of those advocates/judicial officers functioning within the judicial sphere from whom he can select the right person for appointment as judges nor can it be ensured that in assessing their worth and fitness, political bias or personal favouritism play any part in the appointment of judges. It should also be stressed here that the provision of consultation with the Chief Justice by the President in appointing additional judges to the High Court Division, was also done away with from Article 98 by the Constitution (Fourth Amendment) Act, 1975 and, as such, he has been given unrestricted authority to appoint additional judges on the advice of the Prime Minister. However, the constitutional provisions of consulting the Chief Justice by the President in appointing judges of the Supreme Court, dispensed with by the civilian regime of the Awami League, was restored by the Martial Law regime (1975-1979) on 28 May 1976. But prior consultation with the Chief Justice by the President as an essential prerequisite lasted only one and a half year as in November 1977 the appointment of judges of the Supreme Court in Bangladesh was again made a matter of pleasure vested in the President liberating him from mandatory obligation of consulting the Chief Justice.

But the convention of consulting the Chief Justice in appointing judges of the Supreme Court, as mentioned earlier, was established in 1978 by the then President and Chief Martial Law Administrator Major-General Ziaur Rahman. Later on, this convention of consulting the

⁴⁵⁶ Section 200(2), the Government of India Act, 1935.

⁴⁵⁷ Quoted in (1993) 4 SCC 441, at p. 563.

Chief Justice was later on observed although the matter was not reflected in the Bangladesh Gazette Extraordinary relating to the appointment of judges of the Supreme Court. But it is difficult to accept the mere assertion of learned Justice Md. Abdul Matin (without showing any authority) who in *Bangladesh and Justice Syed Md. Dastagir Hossain v Md. Idrisur Rahman, Advocate*⁴⁵⁸, held that: ‘This convention was however breached by the executive in 1994 when 9 Additional Judges were appointed to the High Court Division without consultation with the Chief Justice.’⁴⁵⁹ For, the 1982 (i.e. Second) Martial Law Regime of Lt. General Hussain M. Ershad could hardly be expected to observe the convention of consulting the Chief Justice in appointing the judges of the Supreme Court as he (Ershad), unlike the 1975 Martial Law Regime, suspended the 1972 Constitution of Bangladesh⁴⁶⁰, assumed as the Chief Martial Law Administrator not only the legislative but also the executive authority (which should have been given to the President) including the power to appoint the Chief Justice, permanent judges and additional judges ‘from among Advocates of the Supreme Court or judicial officers’⁴⁶¹ irrespective of their length of experience (contrary to the Constitutional requirement of the Supreme Court advocates having at least 10 years standing practice or judicial officers having not less than 10 years experience) and to remove the Supreme Court judges ‘without assigning any reason’⁴⁶² (contrary to constitutional provision for removal by the President on the recommendation of the Supreme Judicial Council on the grounds of proved misbehaviour or incapacity). Furthermore, unlike Chief Justice Kemaluddin Hussain (appointed as the Chief Justice by the First Martial Law Regime headed by Major General Ziaur Rahman in February 1978), who disclosed in Ibrahim Memorial Lecture in 1984 about the establishment of convention of consultation, Chief Justice F. K. M. A. Munim, who replaced Justice Kemaluddin Hussain on 11 April 1982 in pursuance of the

⁴⁵⁸ 38 CLC (AD) 2009.

⁴⁵⁹ *Ibid.*, at para 182.

⁴⁶⁰ The Proclamation of Martial Law, 24 March 1982.

⁴⁶¹ The Proclamation (First Amendment) Order, 11 April 1982.

⁴⁶² *Ibid.*

enactment of a new provision fixing the tenure of the Chief Justice at three years irrespective of attaining or not attaining the retirement age of 65 years⁴⁶³, never said anything about the continuance of the convention of consulting the Chief Justice in appointing judges of the Supreme Court by the Chief Martial Law Administrator. It is very pertinent to mention here that it is the same Chief Martial Administrator H. M. Ershad who on 11 December 1983 finally replaced his appointee Justice A. F. M. Ahsanuddin Chowdhury as the President of the Country, the Chief Martial Law Administrator was substituted for the President as the appointing and removal authority of the judges of the Supreme Court.⁴⁶⁴

However, it is striking that the non-observance of the convention of consulting the Chief Justice in appointing additional judges to the High Court Division on 2 February 1994 by the President was for the first time made a contentious issue by the then Chief Justice Shahabuddin Ahmed himself in the Annual Conference of the Bar Council, held on 3 February 1994, when he apprised the gathering in his inaugural address that he had been ‘Mr. Nobody’ in the matter of appointment of the said nine judges of the Supreme Court. The Conference adopted a resolution unanimously disapproving the appointment of these judges and demanded the cancellation of the relevant gazette notification. Furthermore, the Chief Justice was requested not to administer oath to the newly appointed Judges.⁴⁶⁵ Moreover, ‘on

⁴⁶³ Ibid.

⁴⁶⁴ H.M. Ershad as the Chief Martial Law Administrator appointed from January to July 1983 four additional judges to the High Court Division of the Supreme Court (of which one was Joint Secretary of the Ministry of Law, Justice and Parliamentary Affairs and another three were Advocates of the Supreme Court) for a term of two years. (The Bangladesh Gazette Extraordinary, 17 January 1983 No. JIV/1H-1/83/50), 20 July 1983 (No. 4351G)). After assuming the office of President, he in December 1983 appointed three Deputy Attorney-Generals, one advocate of the Supreme Court and one district judge, altogether five, as the additional judges of the High Court Division for a period of two years. (Ibid., 29 December 1983). In May 1984, he appointed three additional judges (of which one District Judge, one advocate of the Supreme Court and one Deputy Attorney-General) [Ibid., 29 May 1984.], in July 1985 one (an advocate of the Supreme Court) and in December 1985 two (one district judge and one advocate of the Supreme Court) as the additional judges of the High Court Division of the Supreme Court. It seems that the decentralisation of the (one) High Court Division and establishment of its new seven permanent benches [Notification No. S. R. O 175-L/82, 8 June 1982, Notifications of 7 July 1983, 3 August 1983 and 27 December 1983] outside the capital Dhaka to bring the apex court to the door-step of the common men for obtaining prompt justice at lesser expenses necessitated the appointment of 15 additional judges.

⁴⁶⁵ *The Daily Star (Dhaka)*, 5 February 1994.

3rd of February, a Full Court Meeting consisting of all the judges of both the Divisions of this Court [the Supreme Court] unanimously resolved authorising the Chief Justice not to administer oath to the newly appointed judges.⁴⁶⁶ Accordingly, the Chief Justice, after consultation with all other judges of the Supreme Court, deferred the swearing to the newly appointed nine Judges for two days so that the President and the Prime Minister could be approached to resolve the matter. A delegation of senior and prominent members of the Supreme Court Bar met the then President Abdur Rahman Biswas, and Prime Minister Begum Khaleda Zia and requested them not to violate the convention of consulting the Chief Justice in the matter of appointment of Judges to the Supreme Court established by their late leader President Ziaur Rahman. They responded by cancelling the earlier Gazette Notification regarding the appointment of the nine judges. On 9 February 1994, the President appointed nine additional judges of the High Court Division after consulting the Chief Justice, dropping two of the original nine names (one of them was the then Law Secretary who hailed from the village of the Chief Justice) and replacing them with two new names (Md. Hamidul Haque and MM Ruhul Amin). The new notification for the first time, as an official recognition of the convention of consultation with the Chief Justice, spoke about the appointment of the judges to the High Court Division by the President in consultation with the Chief Justice.⁴⁶⁷

In June 2001, the nature, binding force and primacy of constitutional consultation was for the first time examined by Justice Syed Amirul Islam in *S. N. Goswami, Advocate v Bangladesh*.⁴⁶⁸ As he held that:

⁴⁶⁶ Justice Amirul Islam in *State v Chief Editor, Manabjamin*, 31 CLC (HCD) (2002), Part 2, para 222 <http://clcbd.org/judgments/18-criminal-law/3806-state-vs-chief-editor-manabjamin-and-others-2002-31-clc-hcdpart-two.html> (accessed on 10 December 2010).

⁴⁶⁷ Notification S/R.O. No. 54- Law/94, Ministry of Law, Justice and Parliamentary Affairs (People's Republic of Bangladesh), Justice Section-4, 9 February 1994.

⁴⁶⁸ *Supra* note 412.

In making appointment of a Judge of the Supreme Court the President is under no obligation, legal or constitutional, to consult Chief Justice.... after the 4th Amendment of the Constitution.... [The] conventional consultation... has no binding force, for it is not a rule of law. This sort of consultation cannot have primacy.⁴⁶⁹

But the same Justice in 2002 *State v Chief Editor, Manabjain*⁴⁷⁰, which was a Criminal Miscellaneous Contempt Case (of 2000) concerning a news item published in the newspaper as to whether that undermined the authority of the Supreme Court, entered into an uncalled for academic discussion as to the importance of consulting the Chief Justice in appointing judges to the Supreme Court. As he observed that

The concept of independence of judiciary cannot be ensured unless the exclusion of the final say of the Executive in the matter of appointment of judges is done away.... and to find out the suitable persons for such appointments the expertise for that purpose is only available with the judiciary.... the process of consulting the Judiciary is to enable the appointments to be made of persons not merely qualified to be Judges, but also those who would be the most appropriate to be appointed, then the said purpose would be defeated if the appointing authority is left free to take its “our final” decision by ignoring the advice of the judiciary....⁴⁷¹

Then in defining the nature and binding effect of consultation, Justice Amirul Islam used the words which are exact reproduction (without acknowledging the author) of the observations of Justice Kuldip Singh in *Supreme Court Advocates-on-Record Association v Union of India*.⁴⁷² As he held: “The “consultation”, therefore, is between a layman (the Executive) and a specialist (the judiciary). It goes without saying that the advice of the specialist has a

⁴⁶⁹ Ibid.

⁴⁷⁰ Supra note 385.

⁴⁷¹ Ibid., at para 247.

⁴⁷² (1993) 4 SCC 441.

binding effect.’⁴⁷³ He further laid down the manner in which the Chief Justice should form his opinion which shall have primacy:

we are of the firm conviction that in the matter of appointment of judges of the High Court Division of this Court a prior consultation with the Full Court [“Meeting of all the Judges of the Supreme Court”] is a must and their opinion must have a primacy and be finding on the Executive.... Therefore the consultation with the judiciary is not only mandatory but the Executive is bound by the advice given in the process of consultation by the Chief Justice on recommendation of the Full Court.⁴⁷⁴

Justice Amirul Islam summarised his views regarding the matter of consultation with the Chief Justice in the matter of appointment of judges of the Supreme Court thus:

In conclusion we would like to say our social needs dictate:

Like the Pope, enjoying supremacy in the ecclesiastical and temporal affairs, the resolution of the Full Court being the highest judicial opinion, has a Tight of primacy, if not supremacy to be recorded, affairs concerning the highest judiciary.... a right step.... that... alone will ensure optimum benefits to the society by ensuring rule of law.⁴⁷⁵

This like the majority view in the case of the *Supreme Court Advocates-on Record Association v Union of India*⁴⁷⁶, Justice Amirul Islam held that the opinion of the Chief Justice must have a primacy. But unlike the majority view in that case, in which the Chief Justice was required to form his opinion in consultation with two senior most judges of the (Indian) Supreme Court⁴⁷⁷, he observed that the Chief Justice, who according to him (in fact, the words are of Dr. B. R. Ambedkar who said in a debate on the judiciary in the Constituent Assembly), ‘is a man with all the failings, all the sentiments and all the prejudices which we

⁴⁷³ See for comparison *ibid.* at p. 165 and *supra* note 471.

⁴⁷⁴ *Supra* note 471.

⁴⁷⁵ *Ibid.*, at para 252.

⁴⁷⁶ *Supra* note 471.

⁴⁷⁷ *Ibid.* at pp. 701-2.

as common people have and therefore we think that the matter should not be left in the hands of the learned Chief Justice alone.⁴⁷⁸ The Chief Justice is required to form his opinion in the matter of appointment of judges in the Full Court Meeting of the Supreme Court- the meeting of all the judges of the High Court Division and Appellate Division of the Supreme Court. The learned Justice failed to appreciate that, unlike the Indian Constitution, the word ‘consultation’ has deliberately been omitted twice from Articles 95(1) and 98 of the Bangladesh Constitution. Therefore, to interpret the conventional consultation to mean that the Chief Justice’s opinion in the matter of appointing judges of the Supreme Court is to be formed in the full meeting of the Supreme Court and the opinion thus formed must have primacy tantamount to rewriting these two Articles. It seems that to indulge in interpreting an important constitutional issue out of the way and collaterally is a sheer judicial activism. As the Supreme Court of Bangladesh in *Kudrat-E-Elahi Panir v Bangladesh*⁴⁷⁹ 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.⁴⁸⁰

To the same effect, Thomas M. Cooley more forcefully said:

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

⁴⁷⁸ Supra note 472.

⁴⁷⁹ 44 DLR (AD) 319.

⁴⁸⁰ Ibid.

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 when a case arises which cannot be otherwise disposed of, and which consequently renders a decision upon such question necessary.⁴⁸¹

However, ultimately in March 2009, Justice Md. Joynul Abedin of the Appellate Division of the Supreme Court in *Bangladesh and Justice Syed Md. Dastagir Hossain v Md. Idrisur Rahman, Advocates and others*⁴⁸² the observation of Justice Syed Amirul Islam, that in the matter of appointment of judges to the superior judiciary the opinion of the judiciary expressed through the Chief Justice of Bangladesh has primacy, terming it as an unsound proposition of law.⁴⁸³

In *Md. Idrisur Rahman, Advocate and others v Secretary, Ministry of Law, Justice and Parliamentary Affairs, Government of the People's Republic of Bangladesh*⁴⁸⁴ the non-appointment of ten additional judges by the President as permanent judges to the High Court Division of the Supreme Court despite favourable recommendation of the Chief Justice was challenged. Justice Md. Abdur Rashid of the Special Bench (consisting of three learned Judges) while issuing direction on 17 July 2008 to the Government to appoint them (ten additional judges), as permanent judges (later on appeal, it was overruled), observed that: 'Absence or omission of the requirement for consultation with the Chief Justice could not be pleaded as a defence of any arbitrary exercise of power of appointment.... of Judges in the

⁴⁸¹ Thomas M. Cooley, *A treatise on the constitutional limitations which rest upon the legislative power of the states of the American union* (Boston: Little, Brown, and Company, 1878) at p. 163.

⁴⁸² 38 CLC (AD) 2009.

⁴⁸³ *Ibid.*, at para 75.

⁴⁸⁴ 37 CLC (HCD) 2008.

Supreme Court'⁴⁸⁵ and, that, 'Existence of guidelines or norms of general application excludes any arbitrary exercise of discretionary powers.'⁴⁸⁶ Therefore, Justice Md. Abdur Rashid arrived at 12 conclusions as to the norms and process for appointment and non-appointment of Judges to the Supreme Court of which six are relating to consultation with the Chief Justice of Bangladesh by the President in the matter of appointment of regular judges to the High Court Division and Appellate Division, and four are concerning consultation in the context of appointment or non-appointment of an additional judge to the High Court Division of the Supreme Court. The six guidelines as to the import and scope of consultation with the Chief Justice in the matter of appointment of regular judges of the Supreme Court are:

(ii) the opinion of the Chief Justice of Bangladesh in the matter of appointment of Judges to the Supreme Court is entitled to have the primacy;

(iii) in case of appointment to the High Court Division, the Chief Justice shall consult with two senior most Judges of the Appellate Division and equal number of Judges of the High Court Division to form his opinion and he shall also consult senior members of the Supreme Court Bar and the Attorney-General; and in the case of appointment of Judges to the Appellate Division, he shall consult with three senior-most Judges of the Appellate Division to form his opinion;

(iv) the President or the Government shall have no right to directly initiate the process for appointment of Judges to the Supreme Court bypassing the Chief Justice of Bangladesh but the President/ Government shall have the right of suggesting the names of suitable candidates for consideration of the Chief Justice for appointment to the Supreme Court;

(v) the non-appointment of anyone recommended, on the ground of unsuitability, must be for good reasons, disclosed and conveyed to the Chief Justice with the reasons, materials and

⁴⁸⁵ Ibid., at para 94.

⁴⁸⁶ Ibid.

information to enable him to reconsider and withdraw his recommendation. If the Chief Justice after consultation with the above Judges in respect of particular appointments in the Division concerned, does not find it necessary to withdraw and again recommended, then the President must adhere to such recommendation;

(vi) the President as a rule shall accept the recommendation of the Chief Justice for appointment of Judges. If the recommendation of the Chief Justice for appointment or non-appointment of any person as a Judge either to the High Court or the Appellate Division could not be accepted by the Government, it cannot outright, reject such recommendation and go ahead with appointment of persons of its own choice. The Government in such case shall send the recommendation back to the Chief Justice for reconsideration on the reasons supported by materials and information conveyed by the Government;

(vii) after consideration of the reasons of the Government along with the materials and the information conveyed, the Chief Justice may withdraw his recommendation. But if he again recommends the same recommendation after consultation with the aforesaid senior-most Judges of the Appellate Division for appointment, the Government shall be obliged to complete the process of appointment.⁴⁸⁷

The following four norms deal with the import of consultation in the frame of reference to appointment or non-appointment of an additional judge:

(viii) appointment or non-appointment of an Additional Judge as Judge under Article 95 of the Constitution by the executive disregarding the recommendation of the Chief Justice violates the Constitution;

(ix) when the executive may not accept such recommendation of the Chief Justice for reasons to be recorded, it may request the Chief Justice for reconsideration on the materials and information conveyed;

⁴⁸⁷ Ibid., at para 152.

(x) the Chief Justice shall then reconsider the case on the materials and information furnished, and if after such reconsideration, he again recommends for appointment or non-appointment, the executive would be left with no choice but to complete the process of appointment of such an Additional Judge on the basis of such recommendation;

(xi) after successful conclusion of the period under Article 98, an Additional Judge acquires legitimate expectation and he becomes entitled to be considered for appointment under Article 95 of the Constitution in the absence of positive valid reason(s) to be recorded by the Executive.⁴⁸⁸

Thus Justice Abdur Rashid accorded primacy to the opinion of the Chief Justice of Bangladesh in the matter of appointment of judges to the Supreme Court, which seems to be tricky as there are no other constitutional functionaries mentioned in Articles 95(1) and 98 of the Constitution over whose opinions the opinion of the Chief Justice shall have primacy. In fact, he might have meant that the President would be bound by the opinion of the Chief Justice. Thus the exclusive power of the President to appoint judges of the Supreme Court as 'royal privilege' has virtually been taken away to maintain the cardinal feature of independence of judiciary so that no appointee judge bears a particular stamp for the purpose of changing the cause of decisions 'bowing to the dictate of his appointing authority.' The Chief Justice was required to form his opinion by stifling his individual voice, in case of appointment to the High Court Division consultation not only with two senior most judges of the Appellate Division and two judges of the High Court Division but also with senior members of the Supreme Court Bar and the Attorney General. Thus the element of plurality in the formation of opinion of the Chief Justice is to be achieved not only by obtaining the views of two senior most judges of each of the two Divisions of the Supreme Court but also with one or more from the 'broad band' of members of the Supreme Court Bar and the

⁴⁸⁸ Ibid.

principal law officer of the Government, the Attorney General. In neither of the Indian Supreme Court's decision in the *Supreme Court Advocates-on Record Assn v Union of India*⁴⁸⁹ (the Second Judges' Case) and *Special Reference No. 1 of 1998*⁴⁹⁰ (the Third Judges' Case), to which Justice Abdur Rashid adhered to in formulating his norms, the Chief Justice was required to travel beyond the four corners of the Supreme Court, i.e. fellow judges of the Court, in the formation of his opinion as an 'inbuilt check against his likelihood of arbitrariness or bias, even subconsciously.' However, in case of appointment of judges to the Appellate Division, the zone of consultees has not been so stretched out; the Chief Justice in forming his opinion was required only to consult three senior most judges of the Appellate Division. Thus it is evident that the Special Bench of three judges did not keep in mind that the right conferred on the Chief Justice by Article 95(1) and 98 of the Constitution of Bangladesh to be consulted in the matter of appointment of judges of the Supreme Court by the President has deliberately been dispensed with twice- first on 25 January 1975 and after its restoration in May 1976 again on 27 November 1977 and even in the original Articles there was no provision for plurality of consultation by the Chief Justice in the formation of his opinion. Thus, there is hardly any scope of giving such a wide the connotation to ex gratia or conventional consultation with the Chief Justice in appointing judges of the apex court. Unlike the Indian and Pakistani Supreme Courts, which interpreted constitutional consultation (mentioned in Articles 124(2) and 217(2) of the 1949 Indian Constitution and Articles 177 and 193 of the 1973 Pakistani Constitution) in *S.P. Gupta v Union of India*⁴⁹¹, *Supreme Court Advocates-on Record Assn v Union of India*⁴⁹², *Special Reference No. 1 of 1998*⁴⁹³ and *Al-Jihad Trust v Federation of Pakistan*⁴⁹⁴ respectively, the Supreme Court of

⁴⁸⁹ Supra note 472.

⁴⁹⁰ (1998) 7 SCC 739.

⁴⁹¹ (1981) Supp SCC 87.

⁴⁹² Supra note 472.

⁴⁹³ Supra note 490.

⁴⁹⁴ PLD 1996 SC 324.

Bangladesh has interpreted consultation which is no longer a star of the Constitution of Bangladesh. Accordingly, on appeal in *Bangladesh and Justice Syed Md. Dastagir Hossain v Md. Idrisur Rahman, Advocates and others*⁴⁹⁵, Justice Joynul Abedin of the Appellate Division of the Supreme Court of Bangladesh has rightly struck down those norms as they have not been deduced on construction of the provisions of Articles 95 and 98 of the Constitution. As he observed that:

The learned Judges of the Special Bench have laid down as many as 12 norms or guidelines describing them as conclusions for appointment and non-appointment of Judges to the Supreme Court. These are guidelines in the guise of norms intended to be followed as legal principles by the Government for making appointment. But these norms or guidelines cannot partake the character of law as they are not discernible within the parameter of the Constitution. It would therefore be hazardous to lay down any such guidelines in this behalf as they are hit by Article 65 of the Constitution inasmuch as these guidelines are not deduced on construction of the relevant provisions of the Constitution, namely Articles 95 and 98. It would also not be wise to attempt laying down guidelines on one's impressions about the working of the selection and appointment process. These norms are therefore disapproved and struck-down as erratic and illegal being contrary to the scheme of the Constitution.⁴⁹⁶

Another Judge, Justice Abdul Matin, who delivered the main judgment of the Court, also did not approve norms (i) and (iii) to (xi) (relating to the procedure of appointment of judges), Norm (ii), which provided that 'the opinion of the Chief Justice of Bangladesh in the matter of appointment of judges to the Supreme Court is entitled to have primacy', was approved 'with modification that the opinion of the executive will have dominance in the matter of

⁴⁹⁵ Supra note 482.

⁴⁹⁶ Ibid., at para 92.

antecedent of the candidate only.’⁴⁹⁷ The short order of the Court (passed on 2 March 2009) elaborates the matter thus:

In the matter of selection of the Judges the opinion of the Chief Justice should be dominant in the area of legal acumen and suitability for the appointment and in the area of antecedents the opinion of the executive should be dominant. Together, the two should function to find out the most suitable candidates available for appointment through a transparent process of consultation.⁴⁹⁸

Maintaining that the convention of consultation with the Chief Justice for appointment of judges in the superior judiciary ‘has been fairly engrained in Articles 95 and 98 of the Bangladesh Constitution’⁴⁹⁹, and ‘should be taken to be imperative’⁵⁰⁰ Justice Md. Joynul Abedin shed further light on the nature, significance and object of consultation with the Chief Justice thus:

... the President... and the Chief Justice of Bangladesh shall have full and conclusive deliberation as to the qualification of a candidate for judgeship to the superior Judiciary....they may consult each other by correspondence or by sitting across the table.... The Chief Justice is the most competent person to evaluate the merit and efficiency of a person recommended for the judgeship. The President namely the executive is the proper authority who through the executive agency available to him may be able to report about the local position of the person proposed for judgeship, his character and integrity, his affiliations and the like which have a considerable bearing on the working of a person proposed for appointment as a Judge. It cannot be said that the Chief Justice has been given any position of primacy or supremacy between him and the President. Though the opinion of the Chief Justice as *paterfamilias*, head

⁴⁹⁷ Ibid. at para 269. It should be pointed out that legal norms are not legal principles; they do not bind anybody unless declared law by the court and direction is given by the Court to obey them.

⁴⁹⁸ Ibid. at para 270.

⁴⁹⁹ Ibid. at para 71.

⁵⁰⁰ Ibid. at para 72.

of the Judiciary, is entitled to great respect and weight the President is not bound by the opinion of the Chief Justice.⁵⁰¹

Thus the short order of the Supreme Court and the observation of Justice Md. Joynul Abedin have given the conventional courtesy of consultation with the Chief Justice an appropriate and apposite interpretation following the decision of the Pakistan Supreme Court in *Al-Jihad Trust's Case*⁵⁰²; the President is not bound to act according to the views of the Chief Justice. That does not mean his opinion, articulated as the 'most competent and well equipped' person, can be brushed aside as a hollow formality. The Chief Justice's opinion is entitled to carry great weight. As the Supreme Court's short order of 2 March 2009 given in the case of *Bangladesh and Justice Syed Md. Dastagir Hossain v Md. Idrisur Rahman, Advocates and others*⁵⁰³, speaks of according the opinion of the Chief Justice due weightage in the area of legal acumen and suitability and of the President in the area of antecedents. Thus a consensus oriented decision is to be arrived at so that 'the most suitable candidates available' could be found for appointment as Judges of the Supreme Court of Bangladesh. This interpretation of consultation, by not replacing it with 'concurrence' or 'consent', can be considered as a fair and balanced interpretation of the word in view of the fact that the words 'concurrence' and 'consent' were known to the Constitution-makers when they deliberately preferred to use the word 'consultation' to them in original Article 95(1) and 98 of the 1972 Constitution of Bangladesh. For, they did not intend to vest in the Chief Justice of Bangladesh the power of having the final say regarding the matter of judicial appointment.

As to Norm iii which deals with the formation of opinion by the Chief Justice of Bangladesh regarding the matter of appointment of judges of the Supreme Court in consultation with a 'collegium', Chief Justice M.M. Ruhul Amin rightly disagreed with such a concept thus:

⁵⁰¹ Ibid. at paras 72, 74 and 75.

⁵⁰² Supra note 494.

⁵⁰³ Supra note 482.

We did not agree with the learned Judges of the High Court Division that there should be a collegium of Judges and the Chief Justice of Bangladesh will consult with them when he recommends the candidates for appointment as Judges.... [But] there is also no bar for the Chief Justice to discuss with his colleagues who are best persons to adjudge the legal acumen of the persons for appointment as Judges and in fact the Chief Justice discusses with his colleagues before he recommends the names of the candidates for appointment as Judges.⁵⁰⁴

But Justice Matin took a pragmatic and realistic approach in disapproving 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 established through a Supreme Court's opinion proffered in *Special Reference No. 1 of 1998*⁵⁰⁵ (the Third Judges' Case). As he held:

.... the concept of collegium is neither in our Constitution nor it has developed as a convention. If there is really any wisdom in the concept of collegium, that can be provided for only by Constitutional reform and not otherwise. Foreign system can advise but cannot command.⁵⁰⁶

Moreover this system is not working in India which is evident from the report of the Law Commission of India.... (Report No. 214 dated 21.11.2008).⁵⁰⁷

Thus the Supreme Court of Bangladesh followed the footmark of the Pakistani Supreme Court which in *Al-Jihad Trust's Case*⁵⁰⁸ did not hold that the opinion of the Chief Justice in the matter of appointment of judges to the Supreme Court could not be merely his individual opinion rather it was to be formed in consultation with the collegium of certain number of senior most judges of the Court. Nevertheless, although the President of Bangladesh, as a

⁵⁰⁴ Ibid. at para 10.

⁵⁰⁵ Supra note 490.

⁵⁰⁶ Supra note 498, at para 264.

⁵⁰⁷ Ibid. at para 235.

⁵⁰⁸ Supra note 494.

Constitutional head under the existing parliamentary form of democracy, is required under Article 48(3) of the Constitution to perform his functions ‘in accordance with the advice of the Prime Minister’ and (unlike India) under Article 55(2) of the Constitution the executive power of the Republic is vested in the Prime Minister, it has been held in *Bangladesh and Justice Syed Md. Dastagir Hossain v Md. Idrisur Rahman, Advocates and others*⁵⁰⁹ that the Prime Minister cannot advise the President contrary to the opinion of the Chief Justice in the matter of appointment of judges to the Supreme Court (as the independence of Judiciary is a basic structure of the Constitution). As Justice Matin observed:

We find no existing provision of the Constitution either in Articles 98 or 95 of the Constitution or any other provision which prohibits consultation with the Chief Justice. Therefore consultation with the Chief Justice and primacy is in no way in conflict with Article 48(3) of the constitution. The Prime Minister in view of Article 48(3) and 55(2) cannot advise contrary to the basic feature of the constitution so as to destroy or demolish the independence of judiciary. Therefore the advice of the Prime Minister is subject to the other provision of the Constitution that is Articles 95, 98, 116 of the constitution.⁵¹⁰

Chief Justice M.M. Ruhul Amin and Justice Md. Tafazzul Islam almost echoed the views of Justice Abdul Matin; as both of them observed that the Prime Minister cannot advise contrary to the basic feature of the Constitution.⁵¹¹ Thus unlike the case of *Supreme Court Advocates-*

⁵⁰⁹ Supra note 482.

⁵¹⁰ Ibid. at para 162.

⁵¹¹ As Chief Justice M.M. Ruhul Amin observed: ‘Since in Articles 98 or 95 or other provisions of the Constitution, there is no prohibition in respect of consultation with the Chief Justice, and such consultation with the Chief Justice and its primacy being not in contrast with the provisions of Articles 48(3) and 55(2), the Prime Minister cannot advise contrary to the basic feature of the Constitution. Therefore, it appears that the independence of Judiciary being a basic structure of our Constitution, consultation with the Chief Justice in the matter of appointment of Judges with its primacy is an essential part of the independence of Judiciary.’ Ibid. at para 9.

Justice Md. Tafazzul Islam held that ‘accordingly the Prime Minister, on the basis of Articles 48 (3) and 55(2) of the Constitution, cannot advise contrary to the basic feature of the Constitution so as to destroy or demolish the independence of judiciary and as such consultation with the Chief Justice with primacy of his opinion is an

*on Record Association v Union of India*⁵¹², in which it was observed that the President in appointing judges of the Superior Courts is not required to act on the advice of the Council of Minister (Justice Tandan)⁵¹³ the Council of Minister would be bound by the opinion of the Chief Justice of India (Justice Verma)⁵¹⁴, the above three Judges of the Bangladesh Supreme Court have placed limitation on the exercise of the Prime Minister's- on whom, not on the President, the executive power of the Republic is vested- exclusive and unfettered power of advising the President regarding the appointment of regular judges and additional judges to the Supreme Court. It is difficult to agree with Justice Matin's assertion that 'the advice of the Prime Minister is subject to the other provision of the Constitution that is Articles 95, 98, 116 of the Constitution', when there is no such explicit or implicit provision in the Constitution. It is clear why the learned Justice has referred to Article 116, after Articles 95 and 98, which speaks of the President's power to control and discipline the subordinate judicial officers and magistrates exercising judicial functions in consultation with the Supreme Court, not with the President's power of appointing judges to the Supreme Court. However, to deprive the Prime Minister from the right of advising the President contrary to the opinion of the Chief Justice concerning suitability of candidates for judgeship does not at all fit in with the present constitutional scheme particularly when there is no mention of consultation with the Chief Justice in amended Articles 95 and 98 of the Constitution in the context of appointing regular and additional judges of the Supreme Court. The consultation with the Chief Justice in the matter of appointment of judges under Articles 95 and 98 of the Constitution is presently a mere convention, to use the language of Justice Abdul Matin, 'matured into a rule of law having been recognized and acted upon by all the "actors" in the

integral part of independence of judiciary which is ingrained in the very concept of the independence of judiciary embedded in the principle of Rule of Law.' Ibid. at para 34.

⁵¹² Supra note 472.

⁵¹³ Ibid. at p. 564.

⁵¹⁴ Ibid. at p. 695.

matter.⁵¹⁵ It is pertinent to mention here that, if the opinion given by the Appellate Division of the Supreme Court ‘after such hearing as it thinks fit’ on a question of law having public importance under Article 106 of the Constitution of Bangladesh does not have binding force on the President, it can strongly be argued that the individual opinion given by the Chief Justice in pursuance of conventional consultation with him regarding the fitness of candidates for appointing as judges to the Supreme Court cannot have primacy in the sense that the Prime Minister cannot advise contrary to his (the Chief Justice’s opinion) opinion.

Therefore, it may respectfully be submitted that however convincing it may sound about the necessity of an independent judiciary, a basic structure of the 1972 Constitution of Bangladesh, manned by right type of persons who would dispense justice without fear or favour, ill will or affection, the imposition of limitation on the Prime Minister’s power of advising the President under Article 48(3) regarding appointment of judges by way of judicial construction cannot be accepted as a just and fair interpretation. For, neither the Chief Justice nor the Supreme Court has been empowered by the Constitution to appoint judges of the apex court or to advise the President in the exercise of his power. In the interpretation of the conventional consultation with the Chief Justice by the President vis-a-vis the Prime Minister’s power (under Article 48(3)) of advising the President, the judges should have been more careful, restrain and objective in observing that the Prime Minister cannot advise the President contrary to the Chief Justice’s opinion in the matter of appointments to the Supreme Court. It is widely believed that many things which are not written in the Constitution or deliberately deleted from the Constitution can be interpreted to read into it by means of convenient judicial construction particularly if the matter relates to the powers of the judiciary as the judges have the sole power to interpret the constitution; no formal

⁵¹⁵ Supra note 482 at para 269.

amendment of the Constitution is required. Thus what judges have wrought is a *coup d'état*, slow-moving and genteel, but a *coup d'état* nonetheless. In this context, the timeless and unfading remarks of the US Supreme Court Judge Benjamin N. Cardozo are worth quoting:

Judges have, of course, the power, though not the right, to ignore the mandate of a statute, and render judgment in despite of it. They have the power, though not the right, to travel beyond the walls of the interstices, the bounds set to judicial innovation by precedent and custom. None the less, by the abuse of power, they violate the law.⁵¹⁶

However, keeping in mind the manner in which the Constitutional head is required to exercise his powers conferred on him either by the Constitution or law, only Justice Joynul Abedin kept himself within constitutional bounds and exercised judicial restraint when he held that the President is required to exercise his power of appointment of judges to the Supreme Court under Articles 95 and 98 of the Constitution on the advice of the Prime Minister (under Article 48(3)) after a full and effective consultation with the Chief Justice, but the President is not bound by his (the Chief Justice) opinion. As he held:

The power or the act of an appointment of a Judge to the Supreme Court under Articles 95 and 98 of the Constitution is an executive power or act vesting in the President. The President is bound to act in this regard on the aid and advice of the Prime Minister or for that matter the Council of Ministers. In other words, the President shall exercise this power of appointment under Articles 95 and 98 subject to Article 48(3) of the Constitution. The appointment of Judges to the Supreme Court is made by the President in consultation with the Chief Justice subject to the aid and advice of the Prime Minister making the appointment as one with the sanction of the people inasmuch as the Council of Ministers represent the people in a

⁵¹⁶ Benjamin N. Cardozo, *The Nature of the Judicial Process* (New Haven: Yale University Press, 1921) at pp 129, 135.

Parliamentary form of Government. To hold otherwise would amount to rewriting the Constitution and is therefore not acceptable.⁵¹⁷

Justice Joynul Abedin further added that:

There should not be any apprehension that merely because the power of appointment is with the President meaning the executive, the independence of judiciary would become impaired. The true principle is that after such appointment the executive should have no scope for interference with the work of the Judge or for that matter judiciary.⁵¹⁸

B. Supreme Judicial Commission of Bangladesh

B.1. Background

The 1972 Constitution of Bangladesh 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. 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 nominate objectively names of such advocates or judicial officers who would be most suitable for appointment as judges of the Supreme Court. But the Constitution (Fourth Amendment) Act, passed on 25 January 1975, dispensed with 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 the first Martial Law Regime of Bangladesh restored on 28 May 1976 the Constitutional provision of consultation with the Chief Justice by the President in making appointment of the judges of the Supreme Court.

⁵¹⁷ Ibid. at para 76.

⁵¹⁸ Ibid. at para 77.

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 is claimed that he himself developed the convention of consulting the Chief Justice of Bangladesh in appointing the puisne judges of the Supreme Court.⁵¹⁹ Thus the power to appoint the judges of the Supreme Court is an executive power vested in the President who is duty bound, as a constitutional head, to exercise this power under Article 48(3) 'in accordance with the advice of the Prime Minister' after consulting the Chief Justice of Bangladesh.

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 indeterminate⁵²⁰, 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 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 for the time being be increased then the President may under Article 98 of the Constitution appoint Additional Judges to the said Division for a period of two years. The successive governments have taken advantage of this lacuna to pack the Supreme Court with judges of political allegiance with the hope that they would support their action, omission and legislation if challenged. When the Government of Awami League succeeded the Bangladesh Nationalist Party 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

⁵¹⁹ Supra note 381.

⁵²⁰ As Article 94(2) of the Constitution of Bangladesh 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.

Division remained the same. The Awami League Government altogether appointed 40 additional judges to the High Court Division.⁵²¹ In October 2001, the Bangladesh Nationalist Party came to power and next year it raised the number of judges in the Appellate Division from five to seven (on 9 July 2009, President Zillur Rahman raised the number of posts of Judges in the Appellate Division of the Supreme Court from seven to 11 under Article 94(2) of the Constitution⁵²²). When the BNP Government relinquished power in October 2006 the number of judges in the High Court Division was 72 and it appointed altogether 45 judges.⁵²³ In order to prevent 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’⁵²⁴, the President Iajuddin Ahmad on 16 March 2008 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. The Ordinance was issued during the regime of the Non-Party Care-taker Government (consisting of the Chief Advisor and ten other nominated Advisors) which is an interim government established within 15 days of dissolution of the Parliament⁵²⁵ that have only the mandate to carry on ordinarily the routine functions of the government and is destined to ‘give to Election Commission all possible aid

⁵²¹ Staff Correspondent, ‘HC verdict on judges’ appointment stayed for three weeks’, *New Age*, 30 July 2008 < <http://newagebd.com/2008/jul/30/front.html#12>> (accessed on 10 December 2010).

⁵²² Ashutosh Sarkar, ‘Appellate Division: Number of posts of judges raised to 11’, *The Daily Star*, 10 July 2009 < <http://www.thedailystar.net/story.php?nid=96265>> (accessed on 10 December 2010).

⁵²³ Staff Correspondent, ‘10 new HC judges to be appointed’, 31 October 2008 < <http://www.thedailystar.net/newDesign/news-details.php?nid=61184>> (accessed on 10 December 2010). After 2004, the B.N.P Government did not appoint any additional judges to the High Court Division.

⁵²⁴ First preambular paragraph to the Supreme Judicial Commission Ordinance, 2008.

⁵²⁵ Article 58C(2), the Constitution of the People’s Republic of Bangladesh, 1972.

and assistance for holding the general elections of members of parliament peacefully, fairly and impartially.⁵²⁶

B.2. 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.⁵²⁷ Thus among the members of the Commission three were judicial members (including the Chief Justice) while the non-judicial members, six in number, made up the majority. Since the Commission was established for a cautious, informed, professional and non-political search for the best persons for the judgeship of the Supreme Court, based on first-hand professional knowledge of each of the candidate's knowledge of law, balanced mind, integrity and 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 Minister (a politician) and 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 for appointment as judges of the Supreme Court the best potential candidate for maintaining the quality of the Bench. Although both the President of the Supreme Court Bar Association and the Attorney General (principal and Constitutional Law Officer of the Government) are preeminently suited to evaluate the advocates of the Supreme Court for appointment as judges, their inclusion into

⁵²⁶ Article 58D (2), *ibid.*

⁵²⁷ Section 3(2), the Supreme Judicial Commission Ordinance, 2008.

the Commission might not be conducive to check patronage appointment. For, they are under the distressing influence of either party in power or opposition political parties and, as such, are highly politically charged. Furthermore, out of the nine members of the Commission, the provision for including only three judges of the Supreme Court- the Chief Justice and two senior most judges of the Appellate Division- into the Commission evinced the domination of six non-judicial members in the selection process. Since the predominance of the judicial members in 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 only three months after the promulgation of the Ordinance, on 16 June 2008, the Supreme Judicial Commission (Amendment) Ordinance, 2008 was issued to introduce changes in the composition of the Commission by which the provision of appointing two members of Parliament (one from the ruling party and other from the opposition) and the Secretary of the Ministry of Law as the Commission's members were deleted and provision was made 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 amendment, the Commission would consist of the Chief Justice as its ex-officio Chairman and 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, Attorney General and the President of the Supreme Court Bar Association, altogether eight, as ex-officio members. Thus unlike Malaysia, the Prime Minister or President of Bangladesh was not given any authority to appoint any imminent person, jurist or supreme court judge, close to the regime, as members of the Commission. It is noticeable that the majority of the members of the Commission- six out of nine- are ex-officio members of the Commission from the Judges of the High Court Division and

Appellate Division of the Supreme Court. Thus the majority judicial members having expert knowledge about the candidate's acumen and suitability dominate the selection process of judges for appointment to the highest judicial office. The other three members- the Law Minister, Attorney General and 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 in the vacancies in the Supreme Court. However, the inclusion of the two senior most judges of the High Court Division into the Supreme Judicial Commission may be considered as a positive development in the sense that the large number of lawyers appear before them and only a small fraction of the lawyers having a good length of practice and better reputation and standing (generally not interested to become a judge) appear before the Appellate Division of the Supreme Court.

Unlike the Judicial Appointments Act of Malaysia, 2009, there is no provision in the Supreme Judicial Commission Ordinance, 2008 to fill in casual vacancies as all the members of the Commission were ex-officio members.

B.3. Selection Process

Unlike the Judicial Appointments Commission of Malaysia, the Supreme Judicial Commission of Bangladesh was not given any discretion to advertise in the Commission's website or in any other medium the Commission deems appropriate to fill in any vacancy in the office of a judge of the Supreme Court. Thus any citizen having the experience of practising before the Supreme Court for a period not less than 10 years or a 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.⁵²⁸ The Law Ministry could propose minimum three and maximum five names for each vacancy to the Commission for its consideration to recommend for appointment by the President as additional judges and judges of the High Court Division and the judges of the Appellate Division.⁵²⁹ It is obvious that candidates sharing ideological views of the party in power would have better prospects of getting nomination from the Law, Justice and Parliamentary Affairs Ministry for the consideration of the Supreme Judicial Commission of Bangladesh. 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, Justice and Parliamentary Affairs Ministry or it could select any competent person outside the names proposed by the Law, Justice and Parliamentary Ministry.⁵³⁰ Such a candidate, if selected and recommended, would have the least chance of getting appointment for not having political patronage. Thus non-recognition of plurality of sources of proposing candidates from outside the Ministry of Law, Justice and Parliamentary Affairs 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 taking interviews of the candidates at its discretion⁵³¹ as against the previous system of appointing judges of the Supreme Court which was cloaked with secrecy and devoid of any transparency. But unlike the Malaysian Judicial Appointments Commission Act, the Supreme Judicial Commission Ordinance of Bangladesh did not contain any provision as to screening of the antecedents of the candidates by the Independent Anti-Corruption Commission, Police Forces or Tax Ombudsman of Bangladesh in respect of their educational qualification, tax payment record, credit history as to arrest and conviction, integrity etc.

⁵²⁸ Section 6(1), *ibid.*

⁵²⁹ Section 6(2), *ibid.*

⁵³⁰ Section 6(3), *ibid.*

⁵³¹ Section 5(7), *ibid.*

B.4. Functions and Selection Criteria

The authority of the Commission was confined only to select and recommend candidates for appointment as regular and additional judges of the High Court Division and of regular judges of the Appellate Division of the Supreme Court. But unlike the Judicial Appointments Commission of Malaysia, it was not given the jurisdiction to recommend candidates for appointment as the Chief Justice of Bangladesh. It was also not given any authority to discuss about the disposal of cases and improving the performance of the Supreme Court Judges. The Supreme Judicial Commission Ordinance has provided for different sets of criteria for the consideration of candidate's by the Commission for the appointment of additional judges in the High Court Division and Judges in 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) in recommending for the appointment as additional judges of the High Court Division.⁵³² On other hand, for recommending any judge of the High Court Division of the Supreme Court for appointment to the Appellate Division, his seniority, judicial skill, integrity and reputation (along with other subsidiary matters) were to be taken into account by the Commission.⁵³³

B.5. Selection Meeting of the Commission

The Supreme Judicial Commission of Bangladesh was required to sit at least once in six months.⁵³⁴ But the Chairman of the Supreme Judicial Commission, the Chief Justice, would immediately convene the meeting of the Commission if he was requested to do so for selecting and recommending the names by the President or by the competent authority (i.e. Ministry of Law, Justice and Parliamentary Affairs under the Rules of Business) for the

⁵³² Section 5(6), *ibid.*

⁵³³ Section 5(5), *ibid.*

⁵³⁴ Section 4(5), *ibid.*

appointment of judges of the Supreme Court.⁵³⁵ It was stressed that the Commission first would strive at to take a unanimous decision, perhaps taking into account the importance of appointing the most qualified and suitable persons as judges, for maintaining the quality of the Bench. If that was not possible the decision was to be taken by a majority of the members present.⁵³⁶ The presence of five members out of nine would constitute quorum of the meeting and a decision to recommend names for appointment could be taken by a majority of the members present which implied that a decision of the Commission might be taken by the support of three members if only five members attended the meeting.⁵³⁷ Unlike the Malaysian Judicial Appointments Commission, it did not say that the quorum would include the Chairman. But like the Malaysian Judicial Appointments Commission, 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.⁵³⁸ 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 as the Members of the Commission were precluded from taking part in its meeting without assigning any reason whatsoever (for example, if he was being considered for selection).⁵³⁹ However, the Commission was required to select and recommend two candidates for each vacancy of the Supreme Court judge (that was the usual practice) without the requirement of any mention of the order of preference.⁵⁴⁰

⁵³⁵ Section 4(6), *ibid.*

⁵³⁶ Section 4(7), *ibid.*

⁵³⁷ Proviso to sub-section (4) to Section 4, *ibid.*

⁵³⁸ *Supra* note 535.

⁵³⁹ Section 4(9), *ibid.* Added by the Supreme Judicial Commission (Amendment) Ordinance, 2008.

⁵⁴⁰ Section 5(2), *ibid.*

B. 6. Consideration of Report by the President

The Supreme Judicial Commission of Bangladesh was required to send its recommendation to the Ministry Law, Justice and Parliamentary Affairs for forwarding it to the President.⁵⁴¹ Ordinarily the President would appoint the judges of the Supreme Court in accordance with the recommendation of the Commission.⁵⁴² In case of differing with the recommendation of the Commission, the President would send the recommendation back to the Commission for its reconsideration.⁵⁴³ After receipt of any request from the President for reviewing any recommendation, the Commission would promptly reconsider the recommendation and would send either its modified recommendation or earlier recommendation with recorded reasonable grounds to the President.⁵⁴⁴ The President was given the right to ignore and reject the recommendation of the Commission by recording appropriate reasons.⁵⁴⁵

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

B.7. Whether the Supreme Judicial Commission Ordinance was a Valid Piece of Legislation?

The Ordinance making power of the President of Bangladesh, conferred on him by Article 93 of the Constitution as a legislative function, is a relic of the Government of India Act, 1935⁵⁴⁶ which is of the nature of an emergency power, to meet ‘circumstances’ that ‘render

⁵⁴¹ Section 7, *ibid.*

⁵⁴² Section 9(1), *ibid.*

⁵⁴³ Section 9(2), *ibid.*

⁵⁴⁴ Section 9(3), *ibid.*

⁵⁴⁵ Section 9(4), *ibid.*

⁵⁴⁶ Section 42, the Government of India Act, 1935.

immediate action necessary' when 'Parliament stands dissolved or is not in session',⁵⁴⁷ to secure the enactment of necessary legislation instantly. Apart from 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 i) which could not lawfully be made under this [the Bangladesh] Constitution by Act of Parliament; ii) for altering or repealing any provision of this Constitution.⁵⁴⁸ 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 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 Care-taker Government established after the dissolution of the Parliament in 2007 as a stopgap arrangement 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 their 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.⁵⁴⁹ 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 in accordance with which he is required to exercise his power of appointing 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

⁵⁴⁷ Article 93(1), the Constitution of the People's Republic of Bangladesh, 1972.

⁵⁴⁸ Proviso to Article 93(1), *ibid*.

⁵⁴⁹ Article 58D (1), *ibid*.

not at all provide for the enactment of any law setting up a mechanism like the Supreme Judicial Commission for selecting candidates in the matter of appointment of judges to the Supreme Court by the President. Unlike the Constitutions of Algeria, France, Italy, Namibia, Sudan and Rwanda,⁵⁵⁰ the Constitution of Bangladesh even does not empower the legislative authorities to enact law/promulgate ordinance regulating the organisation, powers and functioning of the Commission. Article 95(2)(c) of the Constitution of Bangladesh empowers the Parliament only to pass law providing for an alternative requisite qualification (e.g. a distinguished jurist) for the appointment of judges to the Supreme Court and, as such, an ordinance if at all necessary, could only be promulgated in this regard. Instead, the Supreme Judicial Commission Ordinance, apart from providing for detailed provisions concerning the composition, functions and procedure of the Commission, 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 the appointment of the High Court Division as well as the Appellate Division Judges. Therefore, it can be argued that the Supreme Judicial Commission Ordinance, 2008, providing for the establishment of a Supreme Judicial Commission, was not promulgated within the parameters of Articles 95, 98 and 65⁵⁵¹ of the Constitution of Bangladesh and, as such, is ultra vires of the Constitution of Bangladesh.

⁵⁵⁰ Article 155 of the Constitution of Algeria, 1989, provides that ‘The High Council Magistracy decides, within the conditions defined by the law, the appointment, transfer and the progress of the magistrate’s careers.’ Article 65 of the Constitution of France states that ‘An institutional Act shall determine the member in which this article [dealing with the jurisdiction and powers of the High Council of the Judiciary concerning appointment and disciplining the judges and public prosecutors] is to be implemented.’ Article 105 of the Constitution of Italy, 1947, lays down that ‘The superior council of the judiciary, as defined by organizational law, has the exclusive competence to appoint, assign, move, promote and discipline members of the judiciary.’ Article 102(2) of the Constitution of Sudan, 1998, provides that ‘The Judiciary shall have a council to be known as the “the Supreme Council of the Judiciary”, its composition and functions shall be prescribed by law.’ Article 158 of the Constitution of Rwanda, 2003 stipulates that ‘An organic law shall determine the organization, powers and functioning of the Supreme Council of the Judiciary.’

⁵⁵¹ Article 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.’

B. 8. Functioning of the Supreme Judicial Commission

However, for the first time in the history of Bangladesh the President on 12 November 2008 appointed the seven new additional judges to the High Court Division for two years on the recommendation of the Supreme Judicial Commission⁵⁵² of which one regretted to accept the offer of judgeship due to his ill-health. The Commission also recommended in its first meeting, held on 16 October 2008, four senior most judges of the High Court Division for the two vacant posts of the Appellate Division.⁵⁵³

B.9. Natural Death of the Supreme Judicial Commission

It is ironical that Bangladesh Awami Lawyers Association, a platform of pro-Awami League lawyers, demanded on 26 July 2008 the repeal of the Supreme Judicial Commission Ordinance, 2008.⁵⁵⁴ After coming to power by obtaining a landslide victory in the General Elections, held on 29 December 2008, the Awami League placed 54 out of 122 Ordinances promulgated by the Non- Party Caretaker Government for the approval of the Parliament. But, as expected, the Supreme Judicial Commission Ordinance was not placed before the newly elected House of the Nation (the Parliament) for its passing into law. Therefore it met a natural death⁵⁵⁵ as the life of an ordinance is always subject to the approval of the Parliament. Since it is the same political party which deleted from the Constitution on 25 January 1975 the provision concerning consultation with the Chief Justice by the President in appointing judges of the Supreme Court and, as such, it is quite natural that it cannot afford to

⁵⁵² Ashutosh Sarkar, 'Appellate Division running with few judges for long', *The Daily Star*, 18 December 2008, 1.

⁵⁵³ Ibid.

⁵⁵⁴ Staff Correspondent, 'No UZ elections before JS polls: AL Awami Ainjibi Parishad to form human chains Aug 7', *The Daily Star*, 27 July 2008 < <http://www.thedailystar.net/story.php?nid=47643> > (accessed on 10 December 2010).

⁵⁵⁵ Rakib Hasnet Suman, 'Public interest ignored in picking CG's ordinances', *The Daily Star*, 24 February 2009, 1.

experience the luxury of seeing the embargo of following a detailed and time-consuming procedure by the executive in the appointment of judges of the highest court of the land.

A comparative study of the methods of appointment of judges of the superior courts in Malaysia and Bangladesh, which is the ultimate aim and objective of the present Dissertation, shall be carried out in the next chapter.