Chapter IV:

Comparative Study of the Methods of Appointment of Superior Court Judges in Malaysia and Bangladesh

As common law countries, both Malaysia and Bangladesh have adopted the method of appointing judges of superior courts by the Heads of the State, following the British practice obtaining prior to the enactment of the Constitution Reform Act, 2005, with striking variations regarding consulting and recommending entities in order to minimise intrusion of politics in the appointment process. There is no dispute about the fact that the appointment of judges as contemplated in the Constitutions of both the countries is an executive act. For, the final order of appointment is passed in the name of the Head of the State and consequently notification is to be issued under the law and Rules of Business. However, on the basis of discussion made in Chapters II and III, the following comparison can be drawn between the methods of appointment of superior court judges in Malaysia and Bangladesh:

A. Method of Appointment of the Chief Justice

The Constitution of the Federation of Malaya, 1957 empowered the Head of the State- the Constitutional Monarch Yang di-Pertuan Agong- to appoint in his discretion the Chief Justice of the Supreme Court only after consulting the Conference of Rulers (consisting of nine Rulers-monarchial heads of the component States of the Federation of Malaysia and four Governors) and considering the advice of the Prime Minister. But the Constitution Amendment Act, 1960, passed within three years of the coming into effect of the Constitution, took away the discretionary power of the Yang di-Pertuan Agong to appoint the Chief Justice of the Supreme Court after consulting the Conference of Rulers and considering the advice of the Prime Minister. Under the new arrangement, the Yang di-Pertuan Agong was required to act on the advice of the Prime Minister (thus the real authority passed from

the Head of the State to the Head of the Government) in appointing the Chief Justice after consulting the Conference of Rulers. The Constitution (Amendment) Act, 1963, as amended in 1965 and 1994, retained the same method of appointing the Chief Justice of Malaysia, the head of the Federal Court and paterfamilias of the judicial fraternity. The Chief Justice of the Federal Court shall be appointed by the Yang di-Pertuan Agong 'acting on the advice of the Prime Minister, after consulting the Conference of Rulers.'[556] The Judicial Appointments Commission Act, 2009, which provides for the establishment of a Judicial Appointments Commission as a step forward to 'improve the process of appointing judges', empowers the Commission, *inter alia*, to evaluate and vet right candidates for recommending to the Prime Minister for consulting the Conference of Rulers before putting forward their names to the Yang di-Pertuan Agong for appointment as the Chief Justice of Malaysa.

On the other hand, the 1972 Constitution of Bangladesh originally empowered the President to appoint the Chief Justice of Bangladesh without consulting any other designated Constitutional functionary except to act under Article 48(3) as a Constitutional Head, 'in accordance with the advice of the Prime Minister.' But unlike Malaysia, the Constitution (Twelfth Amendment) Act, 1991, passed unanimously by the Parliament of Bangladesh (an unprecedented event in the history of Bangladesh) for referring the matter to the referendum, freed the President even from the obligation of consulting the Prime Minister in appointing the Chief Justice of Bangladesh. Furthermore, unlike the Malaysian Judicial Appointments Commission, the Supreme Judicial Commission of Bangladesh established in March 2008

[556] But the Federal Constitution of Malaysia, 1963 provides for further consultation with other functionaries by the Prime Minister in giving advice to the Head of the State for the appointment of the heads of the two other superior courts- the President of the Court of Appeal and the two Chief Judges of the High Courts. The Prime Minister is additionally required to consult the Chief Justice of the Federal Court before tendering his advice to the Yang di-Pertuan Agong for appointing a Federal Court Judge to the post of the President of the Court of Appeal. In appointing the Chief Justice of the High Court of Malaya, he is, in addition, needed not only to consult the Chief Justice of the Federal Court but also to consult the Chief Judge of Sabah and Sarawak and vice versa. But if the appointment is for the post of the Chief Judge of Sabah and Sarawak, the Prime Minister is also obligated to consult the Chief Minister of each of the States of Sabah and Sarawak.

under a Presidential Ordinance and met natural death in early 2009 as it was not placed before the Parliament for its approval, was not empowered to select and recommend candidates to the President for appointment as the Chief Justice of Bangladesh. Thus the President enjoys unfettered discretion to appoint the Chief Justice of Bangladesh, involving the great risk of intrusion of political consideration into the appointment process.

B. Method of Appointment of the Puisne Judges

The Constitution of the Federation of Malaya, 1957 empowered the Yang di-Pertuan Agong to act, after consulting the Conference of Rulers and considering the advice of the Prime Minister, on the recommendation of the Judicial and Legal Service Commission in appointing the other judges of the Supreme Court. Although the principles on the independence of judiciary (adopted by various international and regional organisations in the 1980s) favour the appointment of judges of superior courts, on the recommendation, proposal or advice of with a representative judicial body[557] which has thereafter been accepted by many constitutions of the world[558], the Constitution of the Federation of Malaya, as back as in 1957, used the more weighty word of recommendation (instead of consultation) of the body dominated by the judicial members-the Judicial and Legal Service Commission[559] in order to ensure the appointment of the most suitable candidates as judges of the Supreme Court. But this provision was abolished three years later on 31 May 1960 when the Constitution (Amendment) Act, 1960 was passed. Under the new arrangement, the Yang di-Pertuan Agong was obligated to act on the advice of the Prime Minister in appointing other judges of

[557] See Article 3, the Text of the Lagos Conference of the International Commission of Jurists, 1961, Article 10(d), the Principles and Conclusions on the Independence of the Judiciary in the LAWASIA Region, 1982, Article 3(a), the International Bar Association's Minimum Standards of Judicial Independence, 1982, Article 2.14(b), the Universal Declaration on the Independence of Justice, 1983, Article 10, the UN Basic Principles on the Independence of the Judiciary, 1985, Article 14, Beijing Statement of Principles on the Independence of the Judiciary in LAWASIA Region, 1995 and Article II(1), the Latimer House Guidelines for Parliamentary Supremacy and Judicial Independence in the Commonwealth, 1998.

[558] Ibid.

[559] The majority of (at least) five members of the Judicial and Legal Service Commission were from the Judges of the Supreme Court including the Chief Justice.

the Supreme Court after consulting the Conference of Rulers and considering the advice of the Chief Justice. Thus the new element of considering the advice of the Chief Justice was introduced replacing the previous arrangement of acting on the recommendation of the Judicial and Legal Service Commission headed by the Chief Justice of Malaysia. But the Constitution (Amendment) Act, 1963 as amended in 1965 and 1994[560] provides that the other judges of the Federal Court, the Court of Appeal and the High Courts shall be appointed by the Yang di-Pertuan, acting on the advice of the Prime Minister, after consulting the Conference of Rulers. But the Prime Minister is always obligated to consult the Chief Justice of the Federal Court before tendering his advice to the Yang di-Pertuan Agong regarding the appointment of all the judges of the three superior courts- the Federal Court, the Court of Appeal and the two High Courts (the High Court of Malaya and the High Court of Sabah and Sarawak). The Prime Minister has an additional constitutional duty to consult the President of the Court of Appeal in respect of the appointment of the judges to the Court of Appeal before tendering his advice to the Head of the State. He is also enjoined to consult the Chief Judge of the High Court concerned before presenting his advice to the Yang di-Pertuan Agong regarding the appointment of judges to the High Court. Thus after obtaining the opinion of the designated constitutional functionaries, the Prime Minister transmits his advice to the Yang di-Pertuan Agong for the appointment of judges of the three superior courts and the Constitutional Head has no choice but to accept and act on his advice.

On the other hand, like Malaysia, where since 1960 consultation with the Chief Justice of Malaysia has been in existence in respect of the appointment of the puisne judges of the apex court (the Supreme Court/Federal Court), in Bangladesh the 1972 Constitution originally provided for (in Article 95(1)) consultation with the Chief Justice by the President in appointing puisne judges of the High Court Division and Appellate Division of the Supreme

[560] The Constitution Amendment Act, 1994 renamed the Supreme Court as the Federal Court and the High Courts- the lowest tier of the three tier superior courts.

Court. But the Constitutional provision of consulting the Chief Justice as an essential prerequisite in appointing judges of the Supreme Court was first omitted in January 1975 and then it was restored on 28 May 1976 by the fist Martial Law regime (1975-1979). But after only one and a half year, on 27 November 1977, the appointment of judges of the Supreme Court in Bangladesh was again made a matter of pleasure vested in the President freeing him from Constitutional obligation of consulting the Chief Justice. Thus unlike Malaysia, there is no limitation or restriction in Bangladesh on the power of the Head of the State to appoint the judges of the apex court. However, the convention of consulting the Chief Justice in appointing judges of the Supreme Court by the President, as established in 1978 by the then President and Chief Martial Law Administrator Ziaru Rahman, has been in vogue.

C. Judicial Interpretation of Consultation

In Malaysia, the word (Constitutional) 'consultation' was given literal/lexicon meaning in 2002 in *Re Dato' Seri Anwar Ibrahim*[561], the first case in which the Court of Appeal examined in 2002 the Constitutional provisions concerning appointment. As Lamin PCA observed: 'To consult means to refer a matter for advice, opinion or views.... To "consult" does not mean to "consent".... He [the consultant] may consider the advice or opinion given but he is not bound by it.'[562]

Unlike Malaysia, in Bangladesh conventional consultation with the Chief Justice in appointing judges of the Supreme Court by the President was given to some extent an extended meaning in *Bangladesh and Justice Syed Md. Dastagir Hossain v Md. Idrisur Rahman, Advocate.*[563] As it was held that '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

[561] [2000] 2 CLJ 570.
[562] Ibid., at p. 571-b, d, f.
[563] 38 CLC (AD) 2009.

the appointment and in the area of antecedents the opinion of the executive should be dominant.'[564]

D. Establishment of an Independent Body for Selection and Recommendation of Candidates for Appointment of Judges in the Superior Courts

Keeping the Constitutional selection procedure of appointing judges of the Federal Court, the Court of Appeal and the High Courts untouched, the Parliament of Malaysia passed in December 2008 the Judicial Appointments Commission Act providing for the establishment of a Judicial Appointments Commission. The Commission is comprised of four ex-officio judicial members and five non ex-officio members to be appointed by the Prime Minister, for selecting candidates for the consideration of the Prime Minister in the matter of the appointment of judges including heads of the superior courts.

Unlike Malaysia, the President of Bangladesh, during the regime of third 'Non-Party Care-taker Government set up as an interim Government for about four months mainly to assist the Election Commission in conducting the General Elections in a free, fair and impartial manner, promulgated the Supreme Judicial Commission Ordinance, 2008 providing for the establishment of a Supreme Judicial Commission. Unlike the Malaysian Judicial Appointments Commission, which is nine-member Commission where the non ex-officio members appointed by the Prime Minister are in a majority (i.e. five in number), the Supreme Judicial Commission of Bangladesh was entirely composed of nine ex-officio members and among the ex-officio members six were from the judiciary- the Chief Justice of Bangladesh, the three senior most judges of the Appellate Division and two senior most judges of the High Court Division of the Supreme Court- who did constitute the majority. This domination of the Commission by the judicial members was more conducive to select and recommend

[564] Ibid. at para 270.

candidates objectively keeping in mind the needs of the office in view. Although the Supreme Judicial Commission was able to recommend the best candidates to the President for appointment of judges of the Supreme Court, unlike the Judicial Appointments Commission of Malaysia it was not empowered to recommend candidates for appointment as the Chief Justice of Bangladesh. However, the recommendations of both the Commissions were not given binding force on the executive taking into account the scheme of the Constitutions and the establishments of the Commissions in both the countries were provided for neither in pursuance of any provision of the Constitutions nor by amending them (the Constitutions). Nevertheless, the Supreme Judicial Commission of Bangladesh has been defunct since February 2009 as the newly elected Government of the Awami League did not place it before the first session of the newly constituted Parliament for its approval.[565]

E. Method of Appointment of Additional Judges and Judicial Commissioners

The Federal Constitution of Malaysia speaks of the appointment of additional judges only in the Federal Court by the Yang di-Pertuan Agong acting solely on the advice of the Chief Justice of Malaysia[566] (without requiring to follow the normal procedure of appointing regular judges in the Federal Court i.e. to act on the advice of the Prime Minister after consulting the Conference of Rulers) 'for such purposes or for such period of time as' the Head of the State 'may specify.' However, no additional judge has yet been appointed to the Federal Court of Malaysia.

The Federal Constitution of Malaysia, as amended in 1963, provided for the first time the provision for the appointment of judicial commissioners in the High Court of Malaya and the High Court in Sabah and Sarawak. Under the amended method of appointment of judicial

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

[566] Article 122(1A), the Federal Constitution of Malaysia, 1963.

commissioners, brought about 1994, the Yang di- Pertuan Agong, acting on the advice of the Prime Minister, after consulting the Chief Justice of the Federal Court, may appoint a judicial commissioner 'for such period or such purposes as may be specified in the order.[567] Thus unlike the appointment of regular judges of the High Courts, the Prime Minister is neither required to consult the Conference of Rulers nor the Chief Judge of the High Court concerned, who is the most competent person to express his views as to the necessity of appointing judicial commissioners and the suitability of candidates for such an appointment, before tendering his advice to the appointment of judicial Commissioners. Since no express judicial ground (i.e. in order to facilitate the disposal of cases in the Court) is provided for the appointment of judicial commissioners, the arrangement can easily be used for political consideration, i.e. as a reward for those who have rendered services to the party in power. Until August 2010, 68 Judicial Commissioners have been appointed for an initial term of two years[568], most of whom found berth as permanent judges of the High Courts.[569]

On the other hand, unlike Malaysia, where exist a difference between the method of appointment of regular and additional judges to the Federal Court and between the method of appointment of regular and additional judges (i.e. judicial commissioners) to the High Courts, in Bangladesh the same method of appointment is followed in case of appointing regular and additional judges in the High Court Division of the Supreme Court. Unlike Malaysia, where the Chief Justice of the country is always to be consulted (apart from other constitutional functionaries) as a Constitutional imperative in appointing the judges of the Federal Court, the Court of Appeal and the High Courts, the requirement of consulting the Chief Justice in

[567] Article 122AB, the Federal Constitution of Malaysia.

[568] Appointments Summary of the Judicial Appointments Commission until 13 August 2010 < http://translate.google.com.my/translate?hl=en&sl=ms&u=http://www.jac.gov.my/&ei=nyz9TKL1KY_RrQfB5qmZCA&sa=X&oi=translate&ct=result&resnum=1&ved=0CBsQ7gEwAA&prev=/search%3Fq%3Djudicial%2Bappointments%2Bcommission%2Bmalaysia%26hl%3Den%26safe%3Doff%26prmd%3Div> (accessed on 20 November 2010).

[569] Tun Dato' Seri Abdul Hamid Omar, *The Judiciary in Malaysia* (Kuala Lumpur: Asia Pacific Publications Sdn Bhd, 1994) at p. 81

Bangladesh for the appointment of judges in the Supreme Court has been conventional since 1978. Like the provision for the appointment of judicial commissioners in the two High Courts of Malaysia, the provision for appointment of additional judges in the High Court Division of the Supreme Court of Bangladesh has become a gateway to the cadre of permanent judgeship in the High Court Division under Article 95 of the Constitution as no judge till today has been appointed directly to this Court. Like Malaysia, where some of the judicial commissioners have not been appointed as regular judges of the High Courts, in Bangladesh seven out of 101 additional judges[570], appointed between 1978 and 1998 and 15 additional judges out of 29[571], appointed between 24 September 1999 and 23 August 2001, were not appointed as regular judges of the High Court Division of the Supreme Court of Bangladesh. Although non-appointment of judicial commissioners as regular judges of the High Courts in Malaysia has never been challenged in the superior courts, non-appointment of 10 additional judges as regular judges of the High Court Division under Article 95 of the Constitution was challenged in Bangladesh. In the Case of *Bangladesh and Justice Syed Md. Dastagir Hossain v Md. Idrisur Rahman, Advocates and others*[572], Justice Md. Abdul Matin observed that the additional judges 'only have the right to be considered for appointment under Article 95(1) of the Constitution'[573] and 'not beyond.'[574] In the same case, Justice Md. Joynul Abedin was more categorical about the right of an additional judge to be appointed as a permanent judge of the High Court Division of the Supreme Court when he held:

> .... the President appoints an Additional Judge for a period not exceeding two years and such appointment is not dependent on any purpose, such as to cope with any increased number of pending cases. In other words, an Additional Judge is appointed without any kind of

[570] *Md. Idrisur Rahman, Advocate and others v Secretary, Ministry of Law, Justice and Parliamentary Affairs, Government of the People's Republic of Bangladesh,* 37 CLC (HCD) 2008 at para 336.
[571] Ibid. at para 154.
[572] 38 CLC (AD) 2009.
[573] Ibid. at para 269.
[574] Ibid. at para 238.

> assurance or promise that on initial expiry of two years he will be reappointed for a further term or he will be afresh appointed as a permanent Judge. As in the case of initial appointment as Additional Judge under Article 98, so in the case of a fresh appointment after the initial tenure of two years expires, there is no legal right to be appointed nor does non-appointment give rise to any legal or constitutional infirmity so as to be the subject of judicial review.[575]

Both the Judge of the Appellate Division of the Supreme Court of Bangladesh approvingly referred to the views of the Indian Supreme Court expressed in S.P. Gupta v Union of India[576] which still holds the field in India. As Justice Bhagwati in that case held:

> the Additional Judges entered the High Court Judiciary with a legitimate expectation that they would not have to go back on the expiration of their term but they would be either reappointed as Additional Judges for a further term or in the meanwhile, a vacancy in the post of a permanent Judge became available, they would be confirmed as permanent Judges. This expectation which was generated in the minds of Additional Judges by reason of the peculiar manner in which clause (1) of Article 224 was operated, cannot now be ignored by the Government and the Government cannot be permitted to say that when the term of an Additional Judge expires, the Government can drop him at its sweet will. By reason of the expectation raised in his mind through a practice followed for almost over a quarter of a century, an Additional Judge is entitled to be considered for appointment as an Additional Judge for a further term on the expiration of his original term and if in the meantime, a vacancy in the post of a permanent Judge becomes available to him on the basis of seniority amongst the Additional Judges, he has a right to be considered for appointment as a permanent Judge in his High Court.[577]

He further held:

[575] Ibid. at para 79.
[576] 1981 Supp SCC 87.
[577] Ibid. at p. 241 (para 38).

> There can, therefore, be no doubt that an Additional Judge is not entitled as a matter of right to be appointed as Additional Judge for a further term on the expiration of his original term or as a permanent Judge. The only right he has is to be considered for such appointment and this right also belongs to him not because clause (1) of Article 224 confers such right upon him, but because of the peculiar manner in which clause (1) of Article 224 has been operated all these years.[578]

F. Strength of Judges of the Superior Courts

The original Federal Constitution of Malaya, 1957, fixed the maximum number of puisne judges (i.e. 15) of the then Supreme Court and empowered the Parliament to increase the number of other judges.[579] Ultimately the Parliament has been replaced with the Yang di-Pertuan Agong as the authority to increase the number of judges of the Federal Court (at present the total of judges in the Federal Court is 15).[580] When the Court of Appeal was established in 1994, the Constitution fixed the number of judges at 10 although the Yang di-Pertuan Agong was empowered to increase the number of judges in the Court of Appeal (the present number of judges in the Court of Appeal is 32).[581] The Federal Constitution of Malaysia, 1963 after specifying the maximum and minimum number of judges of the High Courts, empowered the Parliament to vary the number of judges to be appointed in the two High Courts. But in August 1976, this power of the Parliament was taken away and handed over to the Yang di-Pertuan Agong by introducing an amendment to the Constitution (the present strength of the judges of the High Court in Malaya is 60 and of the High Court in Sabah and Sarawak is 13).

[578] Ibid. at p. 243 (para 40).
[579] Original Article 122(1), the Federal Constitution of Malaya, 1957.
[580] The Constitution (Amendment) Act, 1976, (Act A 354), P.U.(A) 114/1982.
[581] Article 122A, the Federal Constitution of Malaysia.

Unlike the original provisions of the Federal Constitution of Malaya/Malaysia, the Constitution of Bangladesh, 1972 has neither fixed the maximum number of judges nor empowered the Parliament to fix or increase the number of judges to be appointed in the Supreme Court. Rather, the number of judges to be appointed in the Supreme Court has, in fact, been kept indeterminate. Like the amended provision of the Federal Constitution of Malaysia, the original Constitution of Bangladesh, 1972 empowered the Head of the State, the President, to determinate the number of judges to be appointed to each division of the Supreme Court (on the advice of the Prime Minister under Article 48(3) of the Constitution). For, Article 94(2) of the Constitution of Bangladesh provides that 'The Supreme Court shall consist of the Chief Justice.... and such number of other Judges as the President may deem it necessary to appoint to each division.' The successive governments have taken full advantage of this kind of stipulation. Although the number of judges in the Appellate Division of the Supreme Court was determined and increased from five to seven in 2002 and then from seven to 11 in 2010, the strength of judges of the High Court Division has never been fixed and, as such, nobody can exactly say what is the strength of judges of the High Court Division of the Supreme Court of Bangladesh. Both the Constitutions of Malaysia and Bangladesh do not contain any basis or ground whatsoever (e.g. increased number of cases, speedy disposal of cases etc) as justification for increasing the total number of judges of the Superior Court which involve the possibility of increasing the strength of judges to accommodate political or personal favourites to the detriment of the quality justice.