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Supersession of the Senior-Most Judges in Bangladesh in Appointing the Chief Justice and the Other Judges of the Appellate Division of the Supreme Court: A Convenient Means to a Politicized Bench

M. EHTESHAMUL BARI*

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ABSTRACT

The Constitution of Bangladesh has provided the President with the unfettered power to appoint the Chief Justice of Bangladesh. However, the President is required by the Constitution to act on the advice of the Prime Minister, after consulting the Chief Justice, in appointing the puisne judges of the Supreme Court—the apex court of the nation. This Article finds that in the absence of any specific constitutional provisions specifying that the senior-most judge of the Appellate Division—the higher Division of the Supreme Court—should be appointed as the Chief Justice, a convention to this effect was developed for ensuring that extraneous considerations did not play a part in the pivotal appointment of the Chief Justice. In the same vein, a convention of appointing the senior-most judges of the High Court Division, which is the lower Division of the Supreme Court, as the judges of the Appellate Division was developed. However, both these conventions have been transgressed at regular

intervals by succeeding generations of executives, particularly by the current one, for politicizing the superior judiciary of the nation, thereby undermining its credibility in the eyes of the litigants as an impartial arbitrator of disputes. Accordingly, this article concludes that in order to exclude the possibility of appointments on extraneous considerations, the principles of appointing the Chief Justice and the other judges of the Appellate Division on the basis of seniority should be inserted in the Constitution by means of an amendment.

I. INTRODUCTION

The method of appointment of judges in the higher judiciary is inextricably linked to the substantive independence of the judges. This independence allows judges to arrive at their decisions in accordance with their oath of office without submitting to any kind of internal or external pressures. As a result, judges rely upon only their own senses of justice and the dictates of law. In the words of Socrates, fair judges are required to do four things, namely, “to hear courteously, to answer wisely, to consider soberly, and to decide impartially.”¹ An erroneous appointment of an individual of doubtful competence as a judge on the basis of political or personal favoritism is bound to produce irreparable damage not only to the fair administration of justice, but also to the public’s faith in the administration of justice. Litigants come to courts of law to have their disputes adjudicated with the expectation that judges are impartial and independent and will administer justice according to law without taking into account any extraneous or irrelevant considerations. This kind of faith and trust will erode if judges are appointed on considerations other than their merit. It can hardly be expected that after a judge, appointed on the consideration of political allegiance, “takes oath, there is a sudden transformation and he forgets his past connections and turns a new leaf of life.”² In this context, the observations of Enid Campbell and HP Lee are noteworthy:

1. Justice Steven H. David, *Four Things: Socrates and the Indiana Judiciary*, 46 IND. L. REV. 871, 871 (2013) (acknowledging the Socrates quote is commonly cited in judicial readings despite an unknown original source).

2. M. Ehteshamul Bari, *The Natural Death of the Supreme Judicial Commission of Bangladesh and the Consequent Patronage Appointments to the Bench: Advocating the Establishment of an Independent Judicial Commission*, 1 INT’L REV. OF L. 1, 15 (2014) [hereinafter Bari, *The Natural Death*].

Judicial independence can . . . be subverted by the appointment of persons who do not possess an outstanding level of professional ability, intellectual capacity and experience and integrity, and who cannot shake off a sense of gratitude to the appointing authority. It is . . . in the interests of the . . . people [not] to have their judicial tribunals reduced to timorous institutions.³

Therefore, it is evident that a government has the utmost duty to ensure that individuals of the highest caliber are appointed as judges.

By following in the footsteps of most common law countries, Bangladesh has adopted the method of appointing judges of superior courts by the head of the state, which may thereby allow the intrusion of politics in the selection process. This article will first examine the provisions of the Constitution of Bangladesh relating to the appointment of the Chief Justice of Bangladesh and the judges of the Appellate Division of the Supreme Court. Subsequently, this article will discuss the establishment of the convention of appointing the senior most judge of the Appellate Division of the Supreme Court as the Chief Justice of Bangladesh and the violation of this convention on numerous occasions since June 2003. In addition, this article will explore the convention of appointing the senior most judges of the High Court Division as the judges of the Appellate Division and the violation of this on several occasions. The objective of these analyses is to demonstrate that contravention of the principle of seniority in the selection of the Chief Justice and the judges of the Appellate Division of the Supreme Court has emerged as the most convenient means for succeeding regimes, particularly the current one, to politicize the superior judiciary of Bangladesh. Finally, recommendations will be put forward for ensuring that political considerations no longer play a part in the appointment of the Chief Justice and the judges of the Appellate Division.

II. THE APPOINTMENT OF THE CHIEF JUSTICE OF BANGLADESH

Before making any comment on the method of appointing the Chief Justice of Bangladesh, it would be apposite to touch upon the manner in which the Chief Justice of the highest court is appointed in different countries of the world. The methods followed in various jurisdictions for appointing the Chief Justice can be grouped into the following four categories:

3. E. CAMPBELL & H.P. LEE, AUSTRALIAN JUDICIARY 95 (2001).

1. Appointment by the head of the state either:
 - a) unilaterally as in Ireland, Kenya, Sri Lanka, and Sudan;⁴
 - b) on the advice of the Prime Minister as in Malta and Western Samoa;⁵
 - c) on the advice of the Prime Minister after consultation with the Attorney General or the leader of the opposition, as in Fiji, and Trinidad and Tobago, respectively;⁶
 - d) on the advice of the Prime Minister after consulting the Conference of Rulers, as in Malaysia;⁷
 - e) on the advice of the Cabinet, as in Greece;⁸
 - f) with the consent of the Parliament, as in South Korea and Puerto Rico;⁹

4. BUNREACTH NA HÉIREANN [IRISH CONSTITUTION], Dec. 29, 1937, art. 35(1) (“The Judges of the Supreme Court shall be appointed by the President.”); THE CONSTITUTION OF KENYA, Aug. 27, 2010, art. 166(1)(a) (“The President shall appoint the Chief Justice . . . in accordance with the recommendation of the Judicial Service Commission. . .”); THE CONSTITUTION OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA, Sept. 7, 1978, art. 107(1) (“The Chief Justice . . . [shall, subject to the provisions of Article 41C, be appointed by the President by warrant under his hand].”); CONSTITUTION OF THE REPUBLIC OF SUDAN, July 1, 1998, art. 104(1) (“The President of the Republic shall appoint the Chief Justice and his deputies according to the law.”).

5. CONSTITUTION OF MALTA, Sept. 21, 1964, art. 95(6) (“The judges of the Superior Courts shall be a Chief Justice and such number of other judges. . .”) art. 96(1) (“The judges of the Superior Courts shall be appointed by the President acting in accordance with the advice of the Prime Minister.”); THE CONSTITUTION OF THE INDEPENDENT STATE OF WESTERN SAMOA, Oct. 28, 1960, art. 65(2) (“The Chief Justice of the Supreme Court shall be appointed by the Head of State, acting on the advice of the Prime Minister.”).

6. THE CONSTITUTION OF THE REPUBLIC OF FIJI, arts. 98, 106 (“The Supreme Court consists of the Chief Justice, who is the President of the Supreme Court—The Chief Justice is appointed by the President on the advice of the Prime Minister following consultation by the Prime Minister with the Attorney-General.”); CONSTITUTION OF THE REPUBLIC OF TRINIDAD AND TOBAGO 1976, art. 102 (“The Chief Justice shall be appointed by the President after consultation with the Prime Minister and the Leader of the Opposition.”).

7. See LAWS OF MALAYSIA FEDERAL CONSTITUTION, Aug. 31, 1957, art. 122B (incorporating all amendments up to 2006) (stating 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).

8. 1975 SYNTAGMA [SYN.] [CONSTITUTION] 90(5) (Greece) (“Promotion to the post of President or Vice President of the Supreme Administrative Court, of the Supreme Civil and Criminal Court and of the Court of Audit shall be effected by presidential decree issued on the proposal of the Cabinet, by selection from among the members of the respective supreme court, as specified by law.”).

9. 1948 DAEHANMINKUK HUNBEOB [HUNBEOB] [CONSTITUTION] July 17, 1948, art. 104(1) (S. Kor.) (“The Chief Justice of the Supreme Court is appointed by the President with the consent of the National Assembly.”); PUERTO RICO CONST. of 1952, art. V, § 8 (“Justices of the Supreme Court shall not assume office until after confirmation by the Senate and shall hold their offices during good behavior.”).

- g) on obtaining the agreement of the leader of the opposition, often called the “Minority Leader,” as in Guyana;¹⁰
 - h) on the proposal or recommendation of, or in consultation with, an independent selection body such as judicial council or national judicial commission or judicial service commission/constitutional council or high council of justice, as in Armenia, Poland, Saudi Arabia, Spain, Namibia, Nepal, and Nigeria;¹¹ or
 - i) in consultation with the judges of superior courts, as in India.¹²
2. Appointment by the parliament upon proposal or nomination or recommendation by the head of the states as in Croatia, Ethiopia, and Russia;¹³

10. CONSTITUTION OF THE CO-OPERATIVE REPUBLIC OF GUYANA, Feb. 20, 1980, art. 127(1) (“[T]he Chief Justice shall be appointed by the President acting after the consultation with the Minority Leader.”).

11. See CONSTITUTION OF THE REPUBLIC OF ARMENIA, May, 7, 1995, art. 95, § 3. (providing that the President of the Court of Appeals shall be appointed on the proposal of the Judicial Council); KONSTYTUCJA RZECZYPOSPOLITEJ POLSKIEJ Z DNIA 2 KWIECZNIA 1997 R. [CONSTITUTION OF THE REPUBLIC OF POLAND] Apr. 7, 1997, art. 144, sec. 3(1) (“The First President of the Supreme Court shall be appointed by the President of the Republic from amongst candidates proposed by the General Assembly of the Judges of the Supreme Court”); see BASIC LAW OF THE GOVERNMENT (1992), art. 52 (Saudi Arabia) (stipulating that the appointment of judges, including the Chief Justice, by Royal Decree upon a proposal from the Higher Council of Justice); see CONSTITUCIÓN ESPAÑOLA, *Boletín Oficial del Estado*, n.123(2), Aug. 27, 1978 (Spain) (providing that the President of the Supreme Court shall be appointed by the King at the proposal of the General Council of the judicial branch); see CONSTITUTION OF THE REPUBLIC OF NAMIBIA, Mar. 21, 1990, art. 82(1) (stating that the appointment of the Judge-President of the High Court shall be “made by the President on recommendation of the Judicial Service Commission.”); see NĒPĀLAKŌ SANVIDHĀNA [CONSTITUTION OF NEPAL], Sept. 20, 2015, art. 129(2) (providing that the President shall appoint the Chief Justice of Nepal on the recommendation of the Constitutional Council); CONSTITUTION OF NIGERIA (1999), art. 231(1) (“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.”).

12. See INDIA CONST. art 124(2) (providing that every judge of the Supreme Court shall be appointed by the President after consultation with “Judges of the Supreme Court and of the High Court in the States as the President may deem necessary for the purpose.”).

13. See USTAV REPUBLIKE HRVATSKE [CONSTITUTION OF THE REPUBLIC OF CROATIA] Dec. 22, 1990, art. 119 (amended 2010) (providing that the Chief Justice of the Supreme Court 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 authorized committee of the Croatian Parliament.”); CONSTITUTION OF ETHIOPIA, art. 81(1) (“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.”); see KONSTITUTSIJA ROSSIJSKOI FEDERATSII [KONST. RF] [CONSTITUTION] art. 128, § 1 (Russ.) (stipulating 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); DRUK-GI CHA-THRIMS-CHEN-MO [CONSTITUTION OF BHUTAN], art. 21(4) (“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.”); see S. AFR. CONST., 1996, art. 174(3) (stating that the President, after consulting the Judicial Service Commission, appoint the Chief Justice of the Supreme Court of Appeal).

3. Election of the Chief Justice by the judges of the Supreme Court as in Belgium, Denmark, and Ukraine;¹⁴
4. Election of the Chief Justice by the Parliament upon nomination or proposal or recommendation by the head of the state as in Georgia, Hungary, Rwanda, Serbia, and Montenegro.¹⁵

Therefore, it is evident that there are four broad modalities prevalent in different jurisdictions for appointing the Chief Justice. A large number of countries have resorted to using the specific method of appointment by the head of the state on the basis of proposal or recommendation of or in consultation with an independent judicial or advisory body. This method is followed by the procedure to appoint by the head of the state on the advice of the prime minister or cabinet or on the agreement of the leader of the opposition. Since the Chief Justice symbolizes and epitomizes the independence of the judiciary, his appointment cannot be left to the exclusive discretion of the executive, for doing so would pave the way for the intrusion of political considerations into the process. Accordingly, only a handful of countries, namely Ireland, Kenya, Sri Lanka, and Sudan, have bestowed upon the head of the state the exclusive power to appoint the head of the judiciary.

14. See 1994 CONST. art. 151, § 5 (Belg.) (providing that the Court of Cassation and the High Courts' choose within themselves their Presidents and Vice-Presidents); GRUNDLOVEN [CONSTITUTION OF DENMARK], June 5, 1953, LOV NR. 59(2) ("The High Court of the Realm shall elect a President from among its members."); See КОНСТИТУЦІЯ УКРАЇНИ [CONSTITUTION OF UKRAINE], Dec. 8, 2004, art. 128 (stating 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).

15. See SAKARTVELOS K'ONSTITUTSIA [CONSTITUTION OF GEORGIA], Aug. 24, 1995, art. 90(2) (providing that the President of the Supreme Court of Georgia shall be elected 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); see A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [CONSTITUTION OF THE REPUBLIC OF HUNGARY], Apr. 25, 2011, art. 24(8) (stating that the Parliament shall elect the President of the Supreme Court based on the recommendation and vote made by the President of the Republic); CONSTITUTION OF THE REPUBLIC OF RWANDA, June 4, 2003, art. 147 ("The President of the Supreme Court is elected by the Senate . . . from two candidates in respect of each post proposed by the President of the Republic after consultation with the cabinet and the Supreme Council of the Judiciary); see USTAV REPUBLIKE SRBIJE [CONSTITUTION OF SERBIA] art. 73(10) (stipulating that the National Assembly shall elect the president of the Supreme Court); see CONSTITUTION OF MONTENEGRO, May 21, 2006, art. 124 (stating that the President of the Supreme Court shall be elected and dismissed from duty by the Parliament at the joint proposal of the President of Montenegro, the speaker of the Parliament and the Prime Minister).

In Bangladesh, the Chief Justice, designated by the Constitution as “the Chief Justice of Bangladesh,”¹⁶ is the head of the Bangladeshi Judiciary and the paterfamilias of the judicial fraternity. The office of Chief Justice is therefore the most dignified and exalted post in the judiciary of Bangladesh, being ranked fourth in the Warrant of Precedence.¹⁷

The Chief Justice is the symbol of justice and freedom.¹⁸ Thus, the appointment of the Chief Justice 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 people must be assured that the Chief Justice is not appointed because he/she shares the political and social philosophy of the party in power, for the Chief Justice is also required to adjudicate the lawfulness of the actions of the executive.¹⁹ This, therefore, necessitates a mechanism, independent of government control, for the appointment of the Chief Justice that takes into account well-defined objective criteria. As to the importance of the selection and appointment of the Chief Justice for ensuring the independence of the judiciary, the observations of the former Chief Justice of the Pakistan Supreme Court, Saiduzzaman Siddiqui, made in *Asad Ali v. Federation of Pakistan*²⁰ are noteworthy:

The selection of a person to the high office of the Chief Justice . . . 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 . . . the Constitution.²¹

These realities were indeed ignored and disregarded in 1972 when the Constitution of Bangladesh originally provided that “[t]he Chief Justice shall be appointed by the President.”²² Thus, the power to appoint the Chief Justice was an executive power vested in the President, who, as the constitutional head, was duty-bound to exercise this power under Article 48(3) “in accordance with the advice of the Prime Minister.” Later, however, the Constitution (Twelfth Amendment) Act of 1991 freed the President

16. CONSTITUTION OF THE PEOPLE’S REPUBLIC OF BANGLADESH, Nov. 4, 1972, art. 94(2) [hereinafter BANGLADESH CONSTITUTION].

17. *Warrant of Precedence*, BANGLAPEDIA, (Feb. 5, 2015), http://en.banglapedia.org/index.php?title=Warrant_of_Precedence.

18. The Chief Justice sits only in the Appellate Division, which is one of the two divisions (the other being the High Court Division) of the highest court of law in Bangladesh, i.e. the Supreme Court. See BANGLADESH CONSTITUTION, *supra* note 16, art. 94(3).

19. For a general explanation of the realities of judicial independence and accountability, see generally Atchison et al, *Judicial Independence and Judicial Accountability: a Selected Biography*, 72 S. CAL. L. REV. 723, 740–806 (1999)

20. *Malik Asad Ali v. Federation of Pakistan*, (1998) 50 PLD (SC) 161 (Pak.).

21. *Id.* at 189.

22. BANGLADESH CONSTITUTION, *supra* note 16, art. 95(1).

from the obligation of consulting with the Prime Minister in appointing the Chief Justice of Bangladesh.²³

As a result, the President of Bangladesh has been given a blank cheque of unfettered discretion to appoint the Chief Justice of Bangladesh. This discretion ignores the benefit of shared responsibility: responsibility preferably shared between the President and a selection committee consisting of majority members from the superior judiciary, in order to prevent a politically motivated appointment for improper motives.

There are no specific qualifications listed in the Constitution of Bangladesh for the appointment of the Chief Justice. Therefore, the qualifications laid down in the Constitution for the appointment of judges of the High Court Division (HCD) and AD 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 provided 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.²⁴

The Constitution thus provided 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 qualifications mentioned above.

Ordinarily, an advocate who has practiced before the subordinate courts in Bangladesh for a period of two years may be enrolled as an advocate of the Supreme Court²⁵ and would subsequently be eligible for appointment as a judge of the Supreme Court after practicing before the Supreme Court for a period of not less than 10 years. In 1977, the provisions for appointing an advocate having the experience of practicing before the subordinate

23. *See id.*, amended art. 48(3) (amended 1991) (“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.”).

24. *Id.* art. 95(2).

25. *See* Bangladesh Legal Practitioners and Bar Council Order, 1972, art. 21(2).

courts for not less than 10 years and of exercising the powers of a district judge for not less than three years, was done away with by an amendment to the Constitution.²⁶ Furthermore, that same amendment replaced the requirement of acting as a district judge with the stipulation of serving as a judicial officer for at least 10 years for appointment as a judge of the Supreme Court. Therefore, under the existing arrangement of the Constitution, an advocate having 10 years in practice before the Supreme Court or a judicial officer having not less than 10 years of experience shall be qualified for a berth in the apex court of the country.

It is noticeable that the Constitution does not prescribe any guidelines as to the academic qualification, professional ability, reputation, or integrity necessary for the selection of the Supreme Court advocates and judicial officers as judges of the Supreme Court. Consequently, any Supreme Court advocate having no standing practice (for example, those who only kept his enrollment updated by paying the prescribed fees without going to the Court or those having no experience of handling crucial cases, but rather only moved simple matters like bail or stay petitions) can be appointed as a judge of the Supreme Court. In the same vein, the Constitution is silent as to the criteria (for example, seniority, disposal of cases in an efficient manner, maintenance of good relationship with colleagues and the bar), which should be kept in mind in appointing a judicial officer as a judge of the Supreme Court. Thus, any judge of a subordinate court who has served the court for at least 10 years without being appointed as a district judge — the head of a District Court—can theoretically be appointed as a judge of the Supreme Court.²⁷ However, no one below the rank of a district judge has so far been appointed as a judge of the Supreme Court.

In 1977, clause (c) was added to Article 95(2) of the Constitution, which empowered the Parliament to prescribe by law any other qualifications as alternatives to the 10-year requirement as a Supreme Court advocate or a judicial officer for appointment as a judge of the Supreme Court.²⁸ To date, no such law has been enacted. Subsequently, in the absence of any constitutional provision specifying that the Chief Justice is to be appointed from amongst the judges of the AD, it can strongly be argued that any advocate of the Supreme Court or any judicial officer having fulfilled the

26. See CONSTITUTION OF THE PEOPLE'S REPUBLIC OF BANGLADESH, *amended by* The Constitution (Tenth Amendment) Act, 1990.

27. In this context, it is noteworthy that for the appointment of a district judge, a judicial officer requires at least ten years of experience including three years' experience as a joint district judge or both as a joint district judge and additional district judge. See Bangladesh Civil Service Recruitment (1995 Amendment) Rules, 1981, Ordinance No. 087, pt. XXII.

28. See CONSTITUTION OF THE PEOPLE'S REPUBLIC OF BANGLADESH, art. 95(2)(c), *amended by* The Constitution (Tenth Amendment) Act, 1990.

qualifications laid down in Article 95(2) of the Constitution can directly be appointed as the Chief Justice of Bangladesh.

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 AD, e.g. 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 that initiates the proposal through the Prime Minister, recommending the senior-most judge of the AD for the appointment as the Chief Justice whenever vacancy occurs in that office. The President ordinarily approves the proposal, and this convention of appointing the senior-most judge of the AD as the Chief Justice was consistently observed in Bangladesh until June 2003, with the exception of an abortive attempt made by the former President H. M. Ershad in January 1990.

After the retirement of Chief Justice Badrul Haider Chowdhury, President Ershad appointed the senior-most Judge of the AD, Justice Shahabuddin Ahmed, as the Acting Chief Justice instead of appointing him as the regular Chief Justice under Article 97 of the Constitution.²⁹ This appointment evoked sharp reactions from the Supreme Court Bar Association (SCBA).³⁰ The SCBA demanded an immediate return to the tradition of appointing the senior most Judge of the AD to the office of the Chief Justice of Bangladesh.³¹ After thirteen days, Justice Shahabuddin Ahmed was appointed as the sixth regular Chief Justice of the country.³²

III. VIOLATION OF THE CONVENTION OF SENIORITY IN APPOINTING CHIEF JUSTICE OF BANGLADESH

The convention or tradition of appointing the senior-most judge of the AD as the Chief Justice of Bangladesh has been violated by the regimes of the Bangladesh Nationalist Party (BNP)–Jamaat-e-Islami Alliance (2001–2006), the Non-Party Caretaker Government (2006–2008), and the Bangladesh

29. See M. Ehteshamul Bari, *The Substantive Independence of the Superior Judiciary Under the Constitutions of Bangladesh and Malaysia: A Comparative Study* 123 (2011) (unpublished L.L.M. Thesis, University of Malaya) (on file with author and the Ahmad Ibrahim Library, University of Malaya) [hereinafter Bari, *The Substantive Independence of the Superior Judiciary*].

30. *Id.*

31. *Id.*

32. *Id.*

Awami League (2009-to-date). An attempt will now be made to critically examine these instances of supersessions.

A. Supersession During the Regime of the BNP-Jamaat Alliance (2001–2006)

The convention of seniority was first violated on June 23, 2003, by the regime of the BNP-Jamaat Alliance when Justice K.M. Hasan was appointed as the Chief Justice of Bangladesh in supersession of two fellow colleagues, Justices Md. Ruhul Amin and Md. Fazlul Karim. It should be pointed out that both Justices Amin and Karim had been elevated to the AD superseding Justice Hasan, the senior-most judge of the HCD, by ignoring the recommendation of the Chief Justice.³³ The Government justified the supersession of Justices Amin and Karim in appointing the Chief Justice by terming it as a corrective measure aimed at providing redress to the earlier injustice that had been perpetrated on Justice Hasan.

The next violation took place after the retirement of Chief Justice Hasan on January 26, 2004, when Justice JR Mudassir Husain was appointed as the Chief Justice of Bangladesh on January 27, 2004, in preference to the same two judges—Justices Amin and Karim—who had also superseded him in getting berth on the AD.³⁴ This supersession was also justified in the same vein as it had been done on the previous occasion.

However, contrary to the justifications put forward by the regime, it seems the objective behind these supersessions was to secure the appointment of Justice Hasan as the head of the Non-Party “Care-taker” Government, which, in pursuance of the Constitution, would have been formed in October 2006, following the dissolution of the Parliament.³⁵ Immediately following the

33. See *KM Hasan new CJ*, 4 THE DAILY STAR 26 (June 23, 2003) (explaining how Justice KM Hasan had been superseded twice by the Awami League Government during 1996–2001: first on January 9, 2000, in elevating Justice Rabbani and Justice Ruhul Amin, and again on May 15, 2001 in elevating Justice Md. Fazlul Karim to the AD. Staff Correspondent), <http://archive.thedailystar.net/2003/06/23/d3062301033.htm> (last accessed Nov. 4, 2016).

34. Bari, *The Substantive Independence of the Superior Judiciary*, *supra* note 29, at 124.

35. The Chapter on “Non-Party Care-taker” Government was inserted in the Constitution of Bangladesh through an amendment, i.e., the Constitution (Thirteenth Amendment) Act, 1996, due to the distrust that exists between the two main political parties, i.e. the BNP and the BAL, with regard to conducting a free, fair and impartial general election under the supervision of a political government. It was expected that a Non-Party “Care-taker” Government, headed by the last retired Chief Justice and 10 Advisers appointed by the President among eminent citizens of the country, due to its neutral character would have no incentive to manipulate the results of a general election. Consequently, the elections held under the supervision of “Care-taker” governments in 1996, 2001 and 2008 were widely lauded as free and fair. BANGLADESH CONSTITUTION, *supra* note 16, former

retirement of Chief Justice Hasan, the retirement age of Supreme Court judges was raised by the regime from 65 to 67. This maneuver ensured that Justice JR Mudassir Husain would continue as the Chief Justice beyond the general election scheduled for January 2007, thereby making Justice Hasan the first option to head the Care-taker Government in his capacity as the last retired Chief Justice of the country. The ruling party went to great lengths to ensure that Justice Hasan was constitutionally destined to head the next Care-taker Government, perhaps on the belief that he would be willing to unduly influence the outcome of the election in the party's favor due to his past ties.³⁶

B. Supersession During the Non-Party Care-taker Government (2007–2008)

During the regime of the Non-Party Care-taker Government, due to Justice Hasan's refusal to accept the position of the Chief Adviser amidst the violent opposition that the Bangladesh Awami League (BAL) had staged to oppose his appointment,³⁷ and subsequently by Dr. Fakhruddin,³⁸ President Iajuddin Ahmed, appointed Justice M.M. Ruhul Amin as the 16th Chief Justice of Bangladesh in supersession of the senior-most judge of the AD, Justice Fazlul Karim.

The President of the SCBA, Barrister Shafique Ahmed, expressed his dissatisfaction and disapproval of such supersession:

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-detection of the government.³⁹

arts. 58C(1), 58C(2)–(3), 58D(2); and 123(3), as had been inserted by the Constitution (Thirteenth Amendment) Act, 1996. . . .

36. Justice K.M. Hasan had served as the International Affairs Secretary of the BNP in 1979 and was subsequently appointed as an Ambassador to Iraq during the first regime of the BNP. *KM Hasan Was Involved in BNP Politics*, 5 THE DAILY STAR 825 (Sept. 21, 2006), <http://archive.thedailystar.net/2006/09/21/d6092101022.htm>.

37. Shakhawat Liton, *President sworn in as Chief of Caretaker Govt*, 5 THE DAILY STAR 851 (Oct. 30, 2006), <http://archive.thedailystar.net/2006/10/30/d6103001011.htm>.

38. *Head of New Bangladesh Interim Government Sworn in*, ABC NEWS (Jan. 12, 2007, 6:16 AM), <http://www.abc.net.au/news/2007-01-13/head-of-new-bangladesh-interim-government-sworn-in/2171380>.

39. Bari, *The Substantive Independence of the Superior Judiciary*, *supra* note 29, at 125.

Consequently, the SCBA broke its tradition of welcoming the new Chief Justice when it refrained from felicitating Justice M.M. Ruhul Amin on his first appearance in the Court on June 1, 2008 as the Chief Justice.⁴⁰

C. Supersession During the Present BAL Government (2009-to-date)

Within two years of entering office, the present BAL Government violated the principle of seniority in appointing the Chief Justice on two occasions: first in December 2009 and then again in September 2010. On December 23, 2009, President Zillur Rahman appointed Justice Md. Tafazzul Islam⁴¹ as the Chief Justice of Bangladesh in supersession of the senior-most judge of the AD, Justice Mohammad Fazlul Karim.⁴² Thus, Justice Karim became the victim of supersession for the fourth time. It is ironic that the then-President of the SCBA who, as pointed out above in III.B, in May 2008 had criticized and disapproved the appointment of Justice M.M. Ruhul Amin as the Chief Justice of Bangladesh during the regime of the Non-Party Care-taker Government in supersession of the senior-most judge of the AD, Justice Karim, had a complete change of heart as the Minister for Law, Justice and Parliamentary Affairs of the regime of the BAL when he proposed Justice Islam's appointment as the Chief Justice of Bangladesh, thereby ignoring the same senior judge.

The President again violated the principle of seniority on September 26, 2010, when he appointed Justice A.B.M Khairul Haque, succeeding Justice Fazlul Karim, as the 19th Chief Justice of the country ahead of his two senior colleagues in the AD.⁴³ Justice Haque had: a) been appointed as an additional and regular judge of the HCD in 1998 and 2000 respectively by the then BAL Government, b) upheld a lower court's verdict sentencing 15 killers of *Bangabandhu* Sheikh Mujibur Rahman and his family as one of the members of the Death-Reference Bench of the HCD, c) delivered, as a judge of the HCD, the judgment declaring the *Constitution (Fifth Amendment) Act, 1979*, which was passed to ratify and confirm all the actions of the first Martial Law Regime (1975–1979) unconstitutional, and

40. *Id.*; *New CJ Takes Oath*, THE DAILY STAR (June 2, 2008), http://archive.thedailystar.net/newDesign/latest_news.php?nid=39301.

41. Justice Md. Tafazzul Islam headed the five-member special bench of the AD that pronounced the landmark verdict in the *Bangabandhu Sheikh Mujibur Rahman* (former President of the country and father of the present Prime Minister) *murder case*, which upheld the death sentences imposed by the HCD for 12 of the accused. *Tafazzul New Chief Justice*, THE DAILY STAR (Dec. 16, 2009), http://archive.thedailystr.net/newDesign/print_news.php?nid=117925.

42. *Outgoing CJ Slated at Farewell*, THE DAILY STAR (Sept. 30, 2010 12:00 AM), <http://www.thedailystar.net/news-detail-156579>.

43. *Justice Khairul Haque new chief justice*, THE DAILY STAR (Sept. 27, 2010), <http://www.thedailystar.net/news-detail-156149>.

d) been elevated to the AD in July 2009 by the present BAL regime.⁴⁴ In light of these factors, Chief Justice Khairul Haque's appointment had been stigmatized and branded as a politically motivated appointment by legal and political circles.⁴⁵ The President and the Secretary-General of the SCBA also maintained its tradition of protesting and criticizing the supersession of the two senior judges, who considered it dignified to go on leave.⁴⁶ In fact, they termed the "appointment as politically motivated," which had the effect of tarnishing "the image of the apex court"⁴⁷

Furthermore, it can be argued that, by appointing a judge who was ranked third in the seniority list as the Chief Justice, the Government might have had two hidden agendas, namely, an immediate plan and an ultimate plan. The immediate plan was to secure the administration of oath to the two additional judges who were accused of committing serious offences in the past—one was the prime-accused in a murder case while the other had allegedly kicked on the door of the Chief Justice's office on November 30, 2006.⁴⁸ Chief Justice Haque's predecessor, Chief Justice Fazlul Karim, had declined to do so citing "unavoidable reasons."⁴⁹ This plan was executed in November 2010 when Chief Justice Haque administered oath to the previously mentioned judges in discharge of his "constitutional obligation."⁵⁰

The ultimate plan was to secure the declaration of the Constitution (13th Amendment) Act, 1996, which had inserted the provisions concerning the Care-taker Government into the Constitution, unconstitutional, so as to ensure that the general election scheduled for January 2014 was held under the BAL's supervision.⁵¹ This plan came to fruition when an appeal was preferred against the decision of the HCD in *M. Saleem Ullah v. Bangladesh*,⁵² upholding the validity of the insertion of the provisions concerning the

44. *Id.*

45. M. Abdul Latif Mondal, *Averting controversy in appointment of Chief Justice*, THE DAILY STAR (Oct. 10, 2010), <http://www.thedailystar.net/news-detail-157772>.

46. *Id.*

47. *Id.*

48. *See Murder Case Against Ruhul Quddus Stayed*, THE DAILY STAR (July 27, 2010), <http://www.thedailystar.net/news-detail-148395>; *see also Controversial 2 Left Out of Oath*, THE DAILY STAR, Apr. 18, 2010, http://archive.thedailystar.net/newDesign/print_news.php?nid=134740.

49. Ashutosh Sarkar, *4 HC Judges Sworn in: Oath of 2 Angers Pro-BNP Lawyers*, THE DAILY STAR (Nov. 5, 2010), <http://www.thedailystar.net/news-detail-161341>.

50. *Id.*

51. *See SC Sets Aside Caretaker Gov't System*, BANGLADESH LAW HOUSE (June 10, 2011), <http://bdlawhouse.blogspot.com.au/2011/06/sc-sets-aside-caretaker-govt-system.html>.

52. *M. Saleem Ullah v. Bangladesh*, (2005) 57 DLR 171 (HCD), 171, 173.

Care-taker Government by the above amendment into the Constitution. It should be stressed here that the HCD had reasoned that, instead of affecting or destroying any basic structure or feature of the Constitution, the incorporation of the Chapter on Care-taker Government had strengthened democracy through the facilitation of three free and fair general elections in the years 1996, 2001 and 2008 respectively.⁵³ However, on appeal, Chief Justice Haque, in delivering the majority judgment in *Abdul Mannan Khan v Bangladesh*,⁵⁴ prospectively declared the constitutional amendment concerning the Care-taker Government unconstitutional notwithstanding its effectiveness in promoting democracy in Bangladesh, which is evident from the above credible elections held under its supervision. Instead of the full judgment, a “short order” of Justice Haque,⁵⁵ which was merely one-page long, was issued on May 10, 2011, eight days before he went into retirement. Furthermore, the precise reasoning for this decision was not contained in the short order. However, contrary to the decision of declaring the amendment to be unconstitutional, the order also recommended the holding of the general elections scheduled for 2014 and 2019 under the supervision of Non-Party Care-taker Governments in pursuance of the provisions inserted by the Thirteenth Amendment on the basis of the “old age principles,” namely, *quod alias non est licitum, necessitas lecitum facit* (necessity makes lawful what is otherwise considered unlawful) and *salus populi suprema lex* (the safety of the people is considered the supreme law).⁵⁶ It seems that this recommendation was given by Chief Justice Haque in order to keep open the door for himself to head the next Care-taker Government as he would have been the last retired Chief Justice before the 2014 general election.

The short order of Justice Haque had a profound adverse impact on the political landscape of the country. The government of BAL, in overlooking the recommendation of retaining the system of Care-taker government for the supervision of next two general elections, focused solely on the declaration of the Thirteenth Amendment as being ultra vires the Constitution. Subsequently, without considering it wise to wait for the release of the full judgment to contemplate on the reasoning put forward by the court, the BAL within 53 days of the publication of the short order, on July 3, 2011, used its overwhelming majority in the Parliament to get the Constitution (Fifteenth Amendment) Act of 2011 passed, which repealed the Chapter

53. See *Abdul Mannan Khan v. Bangladesh*, C.A. No. 139/2005 with C.P. No. 596/2005, 535, 641, 720, 722.

54. See *id.* at 349, 747.

55. See *SC Sets Aside Caretaker Gov't System*, *supra* note 51.

56. See *id.*

on “Non-Party Care-taker Government” contained in the Constitution.⁵⁷ This amendment subsequently facilitated the holding of a virtually voterless and one-sided election in January 2014, thereby perpetuating BAL’s grip on power.⁵⁸ The BNP, the principal opposition party, and its allies boycotted the election over their concern that it would be rigged in the absence of a neutral caretaker regime overseeing the electoral process.⁵⁹ Secondly, due to opposition boycott, the BAL and its allies had managed to win unopposed 154 seats out of the total 300, thereby holding the simple majority required to return to power and depriving, in the process, approximately 48 million registered voters in these electorates their right to vote.⁶⁰ Following the elections in the remaining 146 seats, wherein only around 20 percent⁶¹ of the registered voters turned out to vote, the BAL had managed to win a total of 234 seats on its own. Subsequently, the BAL persuaded General HM Ershad’s Jatiya Party (JP), which was one of its principal allies in the Grand Alliance that it had formed before the general election in 2008 and which had won 34 seats, to act as the opposition party in the parliament.⁶² However, the credibility of the JP as an effective opposition party is undermined by the fact that three of its lawmakers are cabinet ministers while its head, Ershad, is the special envoy to the Prime Minister enjoying the rank and status of a cabinet minister.⁶³ Thus, in light of these facts, it is evident that the parliament resultant from the 2014 general election is not only devoid of any real opposition but is also subservient to the executive as it is the only parliament in the world where members of the opposition are also members of the executive branch.

The full judgment of the Court was written by Justice Haque more than a year after he had retired as the Chief Justice of Bangladesh and was

57. See CONSTITUTION OF THE PEOPLE’S REPUBLIC OF BANGLADESH, art. 21, *amended* by The Constitution (Fifteenth Amendment) Act 2001.

58. *Q&A: Bangladesh General Elections*, BBC NEWS (Jan. 3, 2014), <http://www.bbc.com/news/uk-25584962>.

59. *Id.*; *Clashes and Boycott Mar Bangladesh Election*, BBC NEWS (Jan. 5, 2014), <http://www.bbc.com/news/world-asia-25602436>; Ellen Barry, *Low Turnout in Bangladesh Elections Amid Boycott and Violence*, N.Y. TIMES (Jan. 5, 2014), <http://www.nytimes.com/2014/01/06/world/asia/boycott-and-violence-mar-elections-in-bangladesh.html>.

60. Barry, *Low Turnout in Bangladesh Elections*, *supra* note 59, at A4.

61. ALI RIAZ, AN INTRODUCTION TO SOUTH ASIAN POLITICS 68 (Neil DeVotta ed., 2016).

62. *Id.*

63. *See id.* at 70.

subsequently made public on September 16, 2012⁶⁴—16 months after the issuance of the short order. Paradoxically, this judgment was devoid of any reference to the earlier recommendation contained in the short order underlying the necessity of holding the elections of 2014 and 2019 under the supervision of the Non-Party Care-taker governments.⁶⁵ Rather, it was stated that the future general elections should be supervised by caretaker governments comprising of elected representatives.⁶⁶ This deviation from the short order was sought to be justified on the basis that the Thirteenth amendment permitted a group of unelected individuals to run the affairs of the country during the interim period between the dissolution of the Parliament and the general elections, which was not only undemocratic but was also contradictory to the basic structure of the Constitution.⁶⁷

To this end, Justice Haque relied on the preamble and Article 56 of the Constitution. The preamble of the Constitution lists the “absolute trust and faith” in democracy as one of the driving forces behind the war for national independence from former West Pakistan.⁶⁸ In addition, Article 56 of the Constitution provides that if the necessity arises in the interim period between ‘a dissolution of Parliament’ and the next general elections for the appointment of the Prime Minister and other members of the Cabinet, such appointments should be made only from those persons who were members of the Parliament “immediately before the dissolution.”⁶⁹ Thus it seems that Justice Haque had written the majority judgment in a manner very much in line with the changes brought forth by the regime of BAL through the Fifteenth Amendment Act of 2011. It is further evident that the deletion of the Care-taker Government, on the basis of Justice Haque’s contention that it went against the democratic fiber of the Constitution, has facilitated Bangladesh’s lapse into a one-party dictatorship.

On July 23, 2013, 10 months after the publication of the full judgment in the Thirteenth Amendment case, the government appointed Justice Haque as the Chairman of the Law Commission for a period of three years with the rank, status, salary, allowance, and other benefits equivalent to those

64. *See Full Judgment of 13th Amendment Published*, BDNEWS24.COM (Sept. 16, 2012), <http://bdnews24.com/bangladesh/2012/09/16/full-judgment-of-13th-amendment-published>.

65. *See generally* Abdul Mannan Khan v. Bangladesh, C.A. No. 139/2005.

66. *See id.* at 14.

67. *See id.* at 383.

68. THE CONSTITUTION OF THE PEOPLE’S REPUBLIC OF BANGLADESH, Nov. 4, 1972, (Bangl.).

69. Abdul Mannan Khan v. Bangladesh, Civil Appeal No. 139 of 2005 with Civil Petition for Leave to Appeal No. 596 of 2005, 385 (Bangl.).

of the Chief Justice of the country.⁷⁰ This appointment gave the impression to the politically-conscious citizens of the country that Justice Haque was being rewarded for his services in ensuring that the BAL had perpetuated its grip on power.

The violation of the principle of seniority in appointing the Chief Justice not only causes injustice to the superseded judges by shattering their legitimate expectation⁷¹ of becoming Chief Justice, but also makes room for further injustices likely to be meted out in the future against the litigants, particularly in cases where the government is a party. This also has 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 resign in protest or take leave until retirement, as had occurred in India when the senior-most judge of the Supreme Court, Justice Hans Raj Khanna, resigned from office in 1977 as a mark of protest upon being superseded by the regime of Mrs. Indira Gandhi for appointment as the Chief Justice of India,⁷² the country will be deprived of the service of the senior, experienced, and competent judges. It can hardly be expected, especially in 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 to save the apex court from political clout and controversy.

IV. APPOINTMENT OF JUDGES OF THE APPELLATE DIVISION (AD) OF THE SUPREME COURT

The AD is the higher division of the Supreme Court that hears and determines appeals against judgment, decrees, orders, and sentences of the

70. *Ex CJ Khairul Haque Reappointed as Law Commission Chair*, THE DAILY STAR (July 1, 2016), <http://www.thedailystar.net/city/ex-cj-khairul-haque-reappointed-law-commission-chair-1248835>.

71. The doctrine of legitimate expectation, which was introduced for the first time by Lord Denning, in the field of judicial review, in *Schmidt and Murranti v. Secretary of State of Home Affairs* [1969] 1 All ER 904; and reiterated in the case of *Attorney General of Hong Kong v. Ng Yuen Shiu* [1983] 2 ALL ER 346.

72. Anil B. Divan, *Cry Freedom*, THE INDIAN EXPRESS (Mar. 15, 2004), <http://archive.indianexpress.com/oldStory/42937/>. It is noteworthy that Justice Khanna was superseded for his dissenting judgment in *Additional District Magistrate, Jabalpur v. Shivakant Shukla* (popularly known as the *Habeas Corpus Case*).

HCD, the lower division of the Court.⁷³ The judges (along with the Chief Justice) appointed to the AD (the maximum number of which has neither been determined by the Constitution nor has the Parliament been empowered to fix the number of judges) sit only in that division.⁷⁴ It is the President of the Country who has been invested by the Constitution with the power of ascertaining the number of the judges of the Supreme Court on the advice of the Prime Minister.⁷⁵ Accordingly, the number of judges to be appointed in the AD was initially fixed at five, which was later in 2002 increased to 7 by the President during the regime of the BNP (2001–2006).⁷⁶ Finally, on July 9, 2009, then-President Zillur Rahman increased the number of judges in the AD from seven to 11.⁷⁷ President Rahman did not specify any reasons for increasing the number of judges, such as an increased number of cases or the necessity of speedy disposition of cases in order to reduce backlog.

There is also neither any provision in the Constitution of Bangladesh nor any Constitutional convention requiring the President to consult the Chief Justice 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 AD.

With regard to the appointment of the judges of the Supreme Court, the Constitution of Bangladesh provides that “[t]he . . . judges [of the Supreme Court] shall be appointed by the President after consultation with the Chief Justice.”⁷⁸ After consulting the Chief Justice, the President is required under

73. THE CONSTITUTION OF THE PEOPLE’S REPUBLIC OF BANGLADESH, Nov. 4, 1972, art. 103(1) (Bangl.). 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.

74. *Id.* art. 94(3).

75. *Id.* arts. 94(2) and 48(3).

76. See Bari, *The Natural Death*, *supra* note 2, at 8 (“In October 2001, the Bangladesh Nationalist Party came to power and the next year it raised the number of judges in the Appellate Division from five to seven.”)

77. Staff Correspondent, *SC Appellate Division gets 5 more judges*, THE DAILY STAR (July 14, 2009, 11:00PM), <http://www.thedailystar.net/newDesign/news-details.php?nid=96998>.

78. THE CONSTITUTION OF THE PEOPLE’S REPUBLIC OF BANGLADESH, Nov. 4, 1972, art. 95(1) (It is noteworthy that this stipulation concerning the consultation with the Chief Justice had been done away with by the first BAL regime on January 25, 1975 through the Constitution (Fourth Amendment) Act, 1975. Subsequently, the Martial Law regime of 1975 issued the Second Proclamation (Seventh Amendment) Order, 1976 on May 28, 1976, which restored the stipulation of consultation only to have it removed on November 27, 1977 through the Second Proclamation (Tenth Amendment) Order, 1977. The changes brought to Article 95(1) of the Constitution by the Martial Law regime were reaffirmed and validated by the Constitution (Fifth Amendment) Act, 1979. Almost 34 years later in July 2011, the present BAL regime restored the original stipulation in Article 95(1) of

Article 48(3) of the Constitution to exercise his power of appointing judges of both the divisions of the Supreme Court in accordance with the advice of the Prime Minister.⁷⁹ It is evident that this procedure resembles the British method of appointing judges of the higher judiciary which was prevalent until the enactment of the Constitutional Reforms Act of 2005 and whereby the Crown appoints the judges by convention on the advice of the Prime Minister after consulting the Lord Chancellor⁸⁰ in his capacity as the head of the judiciary.⁸¹

It is noteworthy that in the Subcontinent, Bangladesh is not the first nation to have adopted the method of appointment of judges of superior courts after consultation with the Chief Justice. Rather it is the Constitution of India of 1950, which, for the first time, provided for this stipulation. Article 124(2) provides that the President of India shall consult 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 necessary⁸² in appointing judges of the Supreme Court. Subsequently, the 1956 and 1962 Constitutions of Pakistan, which were abrogated in 1958 and 1969 respectively, 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 was not required to consult such of the judges of the Supreme Court and of the High Courts in the States in his discretion.⁸³

consultation with the Chief Justice in appointing judges of the Supreme Court through the Constitution (Fifteenth Amendment) Act 2011.).

79. *Id.* art. 48(3).

80. OWEN H. PHILIPS & PAUL JACKSON, O. HOOD PHILLIPS’ CONSTITUTIONAL AND ADMINISTRATIVE LAW 380–81 (7th ed. 1987).

81. The Lord Chancellor used to sit as the Chief Justice in the Judicial Committee of the House of Lords.

82. INDIA CONST. art. 124, § 2 (providing that “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. . .”).

83. PAKISTAN CONST. art. 149, § 1 (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 of the Pakistan Constitution, like article 149 of the 1956 constitution, provided: “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.” PAKISTAN CONST. art. 50, § 1 (1962).

This method of appointing judges of the Supreme Court in consultation with the Chief Justice, as incorporated into the Constitution of Bangladesh, is very much in line with the suggestion of the International Congress of Jurists that, whatever body actually makes judicial appointment, it is desirable that the Judiciary should itself cooperate or at least be consulted.⁸⁴

Since the President (as a layman) could have no knowledge about the legal acumen, legal expertise, independence and firmness, ability to handle cases and personal conduct of advocates or subordinate judicial officers, the requirement of consulting the Chief Justice who would have expert knowledge about the ability, competency and suitability of an advocate or a judicial officer for judgeship, was provided for ensuring 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 in II, 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 AD without being a judge of the HCD. But in practice, no such advocate or judicial officer, except HCD judges, has yet been appointed directly as a judge of the AD of the Supreme Court. Rather a convention has developed to provide flesh to clothe the dry bone of the Constitution to the effect that the appointment of judges to the AD of the Supreme Court shall be made from amongst the judges of the HCD on the basis of seniority.

V. VIOLATION OF THE CONVENTION OF SENIORITY IN APPOINTING JUDGES OF THE AD

The convention of following seniority in appointing judges of the AD was consistently followed for about four years from December 16, 1972 to August 12, 1976. But since August 13, 1976, this convention has been transgressed at regular intervals by successive governments. These instances of contravention of the principle of seniority can be grouped under two categories, namely, supersession during Martial Law and autocratic regimes and supersession during civilian regimes. It would be evident from this discussion that political considerations only became a motivating factor

84. NORMAN S. MARSH, INTERNATIONAL COMMISSION OF JURISTS, THE RULE OF LAW IN A FREE SOCIETY: A REPORT ON THE INTERNATIONAL CONGRESS OF JURISTS 1, 12 (1959), <http://icj2.wpunet.edu/wp-content/uploads/1959/01/Rule-of-law-in-a-free-society-conference-report-1959-eng.pdf>.

for superseding senior judges of the HCD in elevating judges to the AD during the tenure of the second BAL regime (1996–2001) following the restoration of parliamentary democracy in Bangladesh in 1991.

A. Contravention of the Principle of Seniority in Appointing Judges of the AD During Martial Law and Autocratic Regimes

An attempt will now be made to examine the instances of supersession of the senior most judges of the HCD in appointing judges to the AD of the Supreme Court during the Martial Law regimes of 1975 and 1982, and the autocratic regime of 1990.

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

Martial law was declared for the first time in the history of Bangladesh on August 15, 1975⁸⁵ following the assassination of the President of the country, Sheikh Mujibur Rahman. President Rahman had initially assumed the office of Prime Minister on January 11, 1972, only to use his party's (BAL) transcending majority in the Parliament to get the Constitution (Fourth Amendment) Act of 1975 passed on January 25, 1975. This Fourth Amendment, *inter alia*, replaced parliamentary democracy with a presidential form of government centering on all-powerful president who had the power to declare Bangladesh a one-party state (Bangladesh was in fact declared a one-party state on February 25, 1975).⁸⁶ This declaration came at a time when the country had already been in a state of emergency imposed on December 28, 1974, by President Mujib.⁸⁷ Martial law was proclaimed as a precautionary measure as emergency powers were not considered enough for obviating any public resistance and for meeting any possible threats to the newly established regime.

The convention of the principle of seniority in appointing judges to the Supreme Court was violated for the first time in the history of Bangladesh when the President and Chief Martial Law Administrator, Justice Sayem, elevated Justice Debesh Chandra Bhattachari to the AD superseding the

85. *Proclamation of Martial Law*, Aug. 20, 1975, second preambular para. (Bangl.).

86. CONST. amend. IV, act II, §§ 4, 12, 15, 16, 19, 23 (1975) (Bangl.) (amended 2011).

87. *Proclamation of Emergency*, GAZETTE OF BANGLADESH EXTRAORDINARY, No. 3 (50)/74-CD (CS) (Dec. 28, 1974) (Bangl.).

senior-most judge of the HCD, Justice Ruhul Islam.⁸⁸ Although the first martial law regime set in motion the disturbing practice of superseding senior-most judges of the HCD in appointing judges of the AD, no political or other motivation was apparent behind this lone instance of supersession during the life of this regime.

Bangladesh returned to civilian rule on April 6, 1979, at the initiative of President Ziaur Rahman, who was the founder of the BNP. During the rule of the BNP from April 6, 1979 to March 23, 1982, there were no violations of the principle of seniority in appointing judges of the AD.

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

Bangladesh's return to civilian rule was short-lived. President Zia was assassinated on May 30, 1981 by a handful of members of the armed forces⁸⁹ and Zia's successor, Justice Abdus Sattar, who had won in a landslide the Presidential ballot on November 27, 1981, was eased out of power merely four months and four days after his election on March 24, 1982, in a bloodless coup.⁹⁰ This time, the armed forces were under the leadership of the Chief of Army Staff, Lt. General H.M. Ershad, who placed the entire country under martial law and suspended the operation of the Constitution.⁹¹ This declaration of martial law belied the assertion of Prime Minister Shah Azizur Rahman made in the Parliament on March 2, 1982, merely 20 days before the proclamation of martial law, that there was no possibility of imposing martial law in Bangladesh as "democracy has found firm roots in the soil of Bangladesh."⁹²

After the declaration of martial law, the convention of seniority in appointing judges to the AD from the judges of the HCD was violated on two occasions, in April 1982 and December 1985. On April 21, 1982, Ershad, as the Chief Martial Law Administrator, promoted Justice A.T.M Masud

88. List of Superseded Judges, THE DAINIK SANGBAD, Jan. 14, 2001, 1 (Bangl.) (Information collected from the official records of the Supreme Court of Bangladesh).

89. *Assassination of President Zia*, ASIAN RECORDER, Vol. XXVII, July 2–8, 1981, 16099 (Bangl.).

90. M. EHTESHAMUL BARI, SUSPENSION OF THE FUNDAMENTAL RIGHTS AND THE UNRESTRAINED EXERCISE OF THE POWER OF PREVENTIVE DETENTION DURING THE SUCCESSIVE PROCLAMATIONS OF EMERGENCY IN BANGLADESH: A LEGAL STUDY 291 (2015) [hereinafter BARI, SUSPENSION OF THE FUNDAMENTAL RIGHTS].

91. *Id.*

92. K. K. Thomas, *President's Address to Parliament: Martial Law Ruled Out*, 27 ASIAN RECORDER 16519 (1982).

to the AD, bypassing his senior colleague, Justice Mohsin Ali.⁹³ On December 26, 1985, as the President of Bangladesh, H. M. Ershad elevated Justice M.H. Rahman and Justice A.T.M Afzal to the AD superseding three senior HCD judges—Justices A.R.M Amirul Islam Chowdhury, Md. Habibur Rahman (CSP) and Abdul Matin Khan Chowdhry.⁹⁴ Similar to the first martial law regime, no extraneous considerations could be found for violations of the principle of seniority by the second martial law regime.

3. *Breach of the Principle of Seniority in Appointing Judges of the Appellate Division by the Civilian Regime of H.M. Ershad (1986–1990)*

More than four years after the declaration of martial law, Ershad, who was nominated by his newly established party (Jatiya Party), sought to become a civilian President by contesting and subsequently winning a controversial Presidential election on October 15, 1986.⁹⁵ Three years later in 1989, Ershad breached the convention of following seniority in appointing Justice Mustafa Kamal, a HCD Judge, as the judge of the AD ignoring his two senior fellow colleagues—Justice A.R.M. Amirul Islam Chowdhury and Justice Sultan Hossain Khan.⁹⁶

B. *Breach of the Violation of the Principle of Seniority Following the Return to Parliamentary Democracy in Bangladesh*

After more than eight years of iron-fist rule, Ershad was forced out of office on December 6, 1990, after people from all walks of life, including doctors, lawyers, university teachers, journalists, government officials and workers and employees, brought the country to a standstill demanding his resignation.⁹⁷ Following Ershad's resignation, Chief Justice Shahabuddin

93. *Hussain Muhammed Ershad*, INTERNATIONAL ECOLOGICAL SAFETY COLLABORATIVE ORGANIZATION, http://www.iesco-iesco.org/content/en-US/p2068_k913.aspx (last visited Nov. 2, 2016); *Justice Masud passes away*, THE DAILY STAR (Mar. 8, 2015 1:25 AM), <http://www.thedailystar.net/justice-masud-passes-away-573>.

94. *Justice Habibur Rahman's first death anniv. tomorrow*, THE DAILY OBSERVER (Jan. 10, 2015 12:00 AM), <http://www.observerbd.com/2015/01/10/65593.php>.

95. BARI, SUSPENSION OF THE FUNDAMENTAL RIGHTS, *supra* note 90, at 291–92 (The Presidential election of 1986 was boycotted by the BNP and BAL. Furthermore, only ten to thirty percent of the electorate turned out to vote).

96. Thomas, *President's Address to Parliament*, *supra* note 92.

97. *Bangladesh: President Ershad Resigns*, 37(2) ASIAN RECORDER, Jan. 7–13, 1991, at 21519.

Ahmed was sworn in as the Acting President and his interim government was given responsibility of holding a free and fair general election,⁹⁸ which was held on February 27, 1991.⁹⁹ The BNP formed a government after masterminding a simple majority in the Parliament with the support of the principal Islamic party of the country, Jamaat-e-Islami.¹⁰⁰ Within six months of forming a government, the BNP introduced the Constitution (Twelfth Amendment) Act of 1991, which was passed by the Parliament unanimously on August 6, 1991.¹⁰¹ This Act, among other things, reintroduced Parliamentary democracy in Bangladesh, i.e., the “executive power of the Republic” was vested in the Prime Minister,¹⁰² while the President became the ceremonial head of the state.¹⁰³

The following is a discussion of the instances of contravention of the principle of seniority in appointing the judges of the AD following the restoration of parliamentary democracy in Bangladesh during the successive regimes of the BNP and BAL.

1. Violation of the Principle of Seniority in Elevating Judges to the Appellate Division During the Civilian Regime of the BNP (1991–1996)

During the regime of BNP, President Abdur Rahman Biswas elevated Justices Abdur Rouf and Ismail Uddin Sarkar to the AD on June 8, 1995, bypassing their senior colleague, Justice ARM Amirul Islam Chowdhury, in the HCD.¹⁰⁴ Thus, Justice A.R.M Amirul Islam Chowdhury was ignored on four occasions in elevating various junior judges to the AD: twice by President H.M. Ershad and twice by President Abdur Rahman Biswas.

2. Violation of the Convention of Seniority in Appointing Appellate Division Judges During the Regime of the BAL (1996–2001)

During the second regime of the BAL, President Justice Shahabuddin Ahmed superseded two senior judges of the HCD—the most-senior Justice Md. Mozammel Haque and the second most-senior Justice Kazi Shafiuddin. President Ahmed, on three occasions, superseded senior judges of the HCD when he elevated Justice Mahmudul Amin Chowdhury on June 28, 1999;

98. *Id.*

99. Ali Riaz, *Bangladesh, in AN INTRODUCTION TO SOUTH ASIAN POL.* 58, 79 (Neil DeVotta ed., Routledge 2016).

100. ROUNAQ JAHAN, *POL. PARTIES IN BANGL.*, CPD-CMI WORKING PAPER 8, at 7 (Centre for Policy Dialogue and Chr. Michelsen Institute 2014).

101. THE CONST. OF THE PEOPLE’S REPUBLIC OF BANGL. amend. XII, Act No. 28 of 1991.

102. THE CONST. OF THE PEOPLE’S REPUBLIC OF BANGL. 1972, art. 55(2).

103. *Id.* art. 48.

104. Thomas, *President’s Address to Parliament, supra* note 92, at 16519.

Justice Kazi Ebadul Haque on January 19, 2000; and Justice Mainur Reza Chowdhury on November 28, 2000.¹⁰⁵

It seems that both Justice Md. Mozammel Haque and Justice Kazi Shafiuddin were victimized for their bold decisions in certain sensitive cases. In November 2000, Justice Haque held the preventive detention orders of four leaders of the opposition political party, BNP, as illegal and ordered the BAL Government to pay BD Taka four lac (four hundred thousand) as compensation to them for unnecessarily keeping them in preventive custody.¹⁰⁶ Justice Haque, in the contempt case of *Mainul Hosein v. Sheikh Hasina Wazed*¹⁰⁷ (*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.¹⁰⁸

The other judge, Justice Shafiuddin, had to pay a heavy price for his 1995 decision in *Anwar Hossain Khan v Speaker of Bangladesh Sangsad Bhabon and Others*¹⁰⁹ in which boycotting of eight sessions of the Parliament by the opposition members (elected from the BAL) for one hundred and one days from February 1994 to July 1995 was challenged during the regime of the BNP Government (1991–1996). Justice Shafiuddin gave an order directing the abstaining opposition members to attend the Parliament in order to perform and discharge their constitutional obligations. 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.¹¹⁰

Although Justice Haque preferred to go quietly on retirement on December 1, 2000, Justice Shafiuddin, who was supposed to retire on November 1, 2001, preferred to resign on November 9, 2000, as a mark of protest against

105. *Id.*

106. *Id.*; *HC declares the detention of four BNP leaders illegal*, THE DAINIK SANGRAM (DHAKA), Nov. 2, 2000, at 1.

107. 53 DLR (2001) 138 (HCD 2000).

108. *Id.* at 142.

109. 47 DLR (1995) 42, 43 (HCD 1994).

110. *Id.* at 53.

his supersession on three occasions. In an interview with one of the national dailies, Justice Shafiuddin claimed that he might have been superseded for his above decision given against the BAL in the *Anwar Hossain Case* when he held that their boycotting of the sessions of Parliament was illegal.¹¹¹

Notwithstanding the controversies surrounding the political overtones in the above instances of elevations, the convention of seniority was violated for the fourth time by President Justice Shahbuddin Ahmed on January 10, 2001. President Ahmed appointed as judges of the AD: a) Justice Golam Rabbani in preference to his senior colleague in the HCD, Justice K.M. Hasan, and, b) Justice Ruhul Amin bypassing his senior colleague, Justice J.R. Mudassir Husain. Furthermore, these instances of supersession took place in spite of the Chief Justice's recommendation that all of these four senior judges should be elevated to the AD and that seniority should be respected in elevating them.

The appointment of these judges, who were ranked second and fourth respectively in the list of four senior judges of the HCD who were recommended by the Chief Justice,¹¹² disregarded time-honored and established practice and led to an unprecedented protest by 13 senior lawyers and other lawyers of the Supreme Court mainly belonging to the BNP. A meeting between the President of the SCBA, Barrister Mainul Hosein, senior lawyers, and former presidents and secretaries of the SCBA was held at the SCBA office on January 10, 2001.¹¹³ In the meeting, a decision was taken to form a new forum, the Supreme Council of Lawyers, with Barrister Ishtiaque Ahmed, a very distinguished and reputed lawyer, as its Convener.¹¹⁴ This new forum would also include other senior lawyers, namely, Dr. Kamal Hossain, Barrister Mainul Hosein, Abdul Malek, and Dr. M. Zahir, as its members to "unite all lawyers to protect the judiciary from interference and keep its independence."¹¹⁵ It was further agreed that the two superseded judges, Justices Hasan and Husain, who were in the "list of senior judges" submitted by the Chief Justice, should be appointed to the AD. The five-member Committee was given the task of pursuing the matter with the relevant authorities. Accordingly, the Committee met President Ahmed on January 13, 2001, and requested that he take the necessary measures for elevating

111. *An interview with Justice Kazi Shafiuddin*, THE DAINIK MANAB ZAMIN, Nov. 11, 2000, at 1.

112. 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 JR Mudassir Husain and 4) Justice Ruhul Amin. *The Government is against the proposal to appoint two more Judges to the Appellate Division*, THE DAINIK SAMBAD, *supra* note 106.

113. *Promotion of two HC judges takes lawyers by surprise*, THE DAILY STAR, Jan. 11, 2001, at 1.

114. *Id.*

115. *Id.*

the two superseded HCD Judges to the AD. The President told 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.”¹¹⁶

Realizing that they were knocking on the wrong door, the members of the Committee sought an appointment to meet with Prime Minister Sheikh Hasina. But the Prime Minister refused to meet the members of the Committee, which showed how committed she was to her position. Subsequently, on January 15, 2001, the Minister of Law, Justice, and Parliamentary Affairs made a statement before the parliament stating that the appointment of judges to the AD was not a matter of promotion and, as such, seniority was not the only criterion for making the appointment.¹¹⁷ Rather, in appointing judges to the AD, competence, knowledge of law, and commitment to the rule of law were also to be taken into account.¹¹⁸

Notwithstanding the explanation put forward by the Law Minister, a group of lawyers of the Supreme Court (considered “pro-opposition” lawyers) urged the Chief Justice not to administer the oath to the elevated Justices Rabbani and Amin.¹¹⁹ But Chief Justice Rahman proceeded with the scheduled oath taking ceremony, which was attended by all the judges of the Supreme Court.¹²⁰ The ceremony took place on January 10, 2001, at his Chamber instead of the Judges’ Lounge due to a demonstration organized by the lawyers intended to voice their displeasure.¹²¹ The judges were confined there for more than two hours by the agitating lawyers.¹²² The lawyers forced suspension of the Supreme Court’s functioning on January 11, 2001. Consequently, a case was filed against 16 “Pro-Opposition” Lawyers, including BNP law-makers Barrister Nazmul Huda and Khandaker Mahbub Uddin Ahmed, under the *Public Safety Act of 2000*¹²³ for their involvement in the demonstration at the Supreme Court.¹²⁴

116. *Agitating lawyers decide to suspend action*, THE DAILY STAR, Jan. 14, 2001, at 1.

117. Bari, *The Substantive Independence of the Superior Judiciary*, *supra* note 29, at 150.

118. *Id.* at 150.

119. *Id.*

120. *Id.*

121. *Id.*

122. THE DAILY STAR, *supra* note 113.

123. SALAHUDDIN AHMED, *BANGLADESH: PAST AND PRESENT* 247 (2004.) The Public Safety Act 2000 was repealed by the Parliament during the regime of the BNP-Jamaat Alliance on April 2, 2002.

124. *Demonstration at Supreme Court: PSA case against Nazmul Huda, Kh Mahbub, 14 other lawyers and Morshed Khan*, THE DAILY STAR, Jan. 17, 2001, at 1.

Furthermore, it seems that Justice Ruhul Amin was not elevated to the AD solely based on the criteria, as had been proffered by the Law Minister in the Parliament, but rather as a reward for his verdict (although a split one) upholding of the death penalties of 10 of the 15 accused in the *Bangabandhu Sheikh Mujibur Rahman* (Father of the Prime Minister) *Murder Case* as a member of the Death-Reference Bench of the HCD.¹²⁵ Conversely, Justice K.M. Hasan, the senior most judge of the HCD, was victimized for feeling embarrassed to act as a member of the Death-Reference Bench.¹²⁶ A further motive in not elevating Justice Hasan to the AD was his previous connection with the BNP as had been divulged by the Prime Minister herself in a public address given in Sitakunda on January 17, 2001, when she said that the BNP wanted their former party leader, International Affairs Secretary, and ex-Ambassador, elevated to the AD for politicizing the court, which had duly been frustrated.¹²⁷

Within a few months, the elevations of Justices Rabbani and Amin as judges of the AD in supersession of two of their senior colleagues in the HCD were challenged by a junior advocate of the Supreme Court and the Secretary General of an NGO, the Bangladesh Human Rights Commission, before the HCD in the case of *SN Goswami, Advocate v Bangladesh*.¹²⁸ This was the first time in the history of Bangladesh that an instance of supersession of senior judges in the appointment of judges to the AD was challenged before a court of law. Justice Syed Amirul Islam, who delivered the judgment on June 3, 2001, upheld the legality of the said appointments. 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 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

125. *Mujib's Killers Case: A Chronology of Events*, THE HINDU (Nov. 19, 2009), <http://www.thehindu.com/news/international/mujibs-killers-case-a-chronology-of-events/article51163.ece> [hereinafter *Mujib's Killers Case Article*].

126. Justice Hasan felt embarrassed as one of the accused in the case was his relative.

127. *BNP appointed an individual who had kicked on the door of the Chief Justice as a Judge: Prime Minister in a Public Rally in Sitakunda*, THE ITTEFAQ, Jan. 18, 2001, at 1.

128. 55 DLR (2003) 332, 333 (HCD, 2001).

on the advice of the Prime Minister, this Court cannot cause an inquiry as to the reason of appointing that person as a Judge.¹²⁹

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 the appointment of judges of both the divisions of the Supreme Court. Thus the Constitution itself has not provided for any specific criteria, such as: a) number of cases disposed of as a HCD judge, thereby demonstrating merit and quality; b) handling of complex cases particularly involving constitutional issues; and c) analytical ability and professional standard which are in higher demand for an AD judge than a HCD judge. Furthermore, there is no provision for the advertisement of vacant posts in the AD and selection of candidates by a judicial committee consisting of majority members from the apex court of the land. Therefore, contrary to the learned judge's claim, the appointment of judges to the AD from amongst the HCD Judges appears to be in essence promotion rather than appointment.¹³⁰

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

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.¹³¹

Thus it is evident that the convention, as pointed out above in section IV, of respecting seniority in elevating judges of the AD from amongst the judges of the HCD was unknown to the learned Justice Syed Amirul Islam. However, he expressed his opinion by way of guidance as to the matters to be taken into consideration in elevating a judge of the HCD to the AD. As he observed:

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

129. *SN Goswami*, 55 DLR at 342.

130. *Id.*

131. *Id.* at 343–44.

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.¹³²

It is very difficult to agree with the above observations, for manifestation of merit and its objective assessment are very difficult to ascertain. If the President is to decide these, then it can be said in the words of same judge who in *State v Chief Editor, Manabjabin*¹³³ observed that:

[C]an 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.¹³⁴

In the same vein, if the Chief Justice alone is given the task of evaluating the merits of the judges of the HCD, there is again the possibility of the following apprehension, which was articulated by the same judge in the previous case:

[A]fter 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.¹³⁵

However, during the pendency of the *SN Goswami Case*, and 17 days before the pronouncement of the judgment, President Ahmed once again contravened the principle of seniority in appointing a judge of the AD.¹³⁶ On May 15, 2001, President Ahmed elevated Justice Md. Fazlul Karim, who due to a split decision of the two-member Death Reference Bench of the HCD in the *Bangabandhu Murder Case*, had delivered the final judgment as the third judge in a second bench confirming death sentences of 12 of the accused, to the AD in supersession of three senior judges of the HCD,

132. *Id.* at 349.

133. 31 CLC 3805 (HCD, 2002) (Bangl.); 31 CLC 3806 (HCD, 2002) (Bangl.).

134. *Id.* para. 253.

135. *Id.* para. 248.

136. Adib Shamsuddin & Sheikh Amena Jahan, *A Long Way Gone*, THE DAILY STAR (June 28, 2016, 12:00 AM), <http://www.thedailystar.net/law-our-rights/long-way-gone-1246612>.

namely, Justices K.M. Hasan, Syed JR Mudassir Husain and Abu Sayeed Ahmed.¹³⁷

Thus, the convention of seniority in appointing judges of the AD from amongst the HCD judges was violated on five occasions during the Government of the BAL, and Justices Hasan and Husain became the victim of supersession on two occasions.

3. *Contravention of the Convention of Seniority in Appointing Judges of the AD During the BNP Regime (2001–2006)*

The BNP Government, which came into power in October 2001 and remained in power until October 2006, adhered to the convention of following seniority in elevating judges to the AD from amongst the HCD judges for about two years. Justice K.M. Hasan, who had been superseded twice, was elevated to the AD on January 20, 2002.¹³⁸ About two months later, on March 5, 2002, Justice Syed JR Mudassir Husain, who had also been superseded twice, and Justice Abu Syed Ahmed, who had been bypassed once, were appointed to the AD. Justices Kazi A.T.M Monowaruddin, Fazlul Hoque and Md. Hamidul Hoque were also appointed to the AD on June 25, 2002, July 17, 2002 and June 29, 2003, respectively, without any deviation from the principle of seniority.¹³⁹

But the BNP regime departed from the convention of following seniority for the first time on July 13, 2003, when Justice MM Ruhul Amin was appointed to the AD in supersession of Justice Syed Amirul Islam, who had given the judgment in the *SN Goswami's Case*, opposing the seniority rule in elevating judges to the AD.¹⁴⁰ Justice Islam was superseded for the second time the very next month, on August 27, 2003, when Justice Md. Tofazzal Islam was appointed as a judge of the AD.¹⁴¹ He was superseded for the third and fourth times while appointing Justices M.A. Aziz and Amirul Kabir Chowdhury to the AD on January 7, 2004, and February 26, 2004, respectively.¹⁴² When Justice Aziz received appointment as the Chief

137. See *Mujib's Killers Case Article*, *supra* note 125.

138. *KM Hasan New CJ*, THE DAILY STAR (June 23, 2003), [http:// archive.thedailystar.net/2003/06/23/d3062301033.htm](http://archive.thedailystar.net/2003/06/23/d3062301033.htm).

139. Bari, *The Substantive Independence of the Superior Judiciary*, *supra* note 29, at 155.

140. *Id.*

141. *Id.*

142. *Id.* at 155–56.

Election Commissioner on May 23, 2005,¹⁴³ Justice Md. Joynul Abedin succeeded him to the AD in supersession of three senior judges of the HCD—Justices Syed Amirul Islam, Md. Hassan Ameen, and A.K. Badrul Hoque.¹⁴⁴

Thus, it appears that Justice Syed Amirul Islam, who in *SN Goswami*'s case had upheld the instance of supersession in appointing judges to the AD supposedly due to the absence of any “constitutional provision or convention” to that effect and had maintained that appointment should be made on the basis of “seniority-cum-merit” for instilling a sense of competitiveness among the judges, failed to make an impression on his appointing authority during the BNP regime on five occasions, to use his own words, as ‘the most meritorious’ judge for moving “ahead the less meritorious.”¹⁴⁵ However, it can be argued that his repeated supersessions might have finally made him realize that in most cases of supersession, political considerations or affiliations instead of merits have been the dominant factors.¹⁴⁶

4. *Contravention of the Convention of Seniority in Appointing Judges of the AD During the Present BAL Regime (January 2009-to-date)*

The Supreme Judicial Commission, which was established on March 16, 2008, through a Presidential Ordinance during the regime of the Care-taker Government for selecting and recommending “competent persons for appointment as judges of the Supreme Court,” in its first meeting held on October 17, 2008, recommended four senior-most judges of the HCD, namely, Justices Shah Abu Nayeem Mominur Rahman, Md. Abdul Quddus, Md. Abdul Aziz and Bijan Kumar Das, for filling two vacant posts in the AD.¹⁴⁷ Although the life of the Supreme Judicial Commission came to an abrupt end in February 2009 as the newly elected regime of the BAL did not place the ordinance concerning its formation for approval before the Parliament,¹⁴⁸ the President on March 4, 2009, appointed Justices Shah Abu Nayeem Mominur Rahman and Md. Abdul Aziz, both recommended

143. Shakhawat Liton, *Justice Aziz Becomes CEC*, THE DAILY STAR (May 24, 2005), <http://archive.thedailystar.net/2005/05/24/d5052401011.htm>.

144. Bari, *The Substantive Independence of the Superior Judiciary*, *supra* note 29, at 156.

145. *Id.*; *SN Goswami v. Bangladesh*, 55 DLR (HCD) 332, 343–49 (2003).

146. Bari, *The Substantive Independence of the Superior Judiciary*, *supra* note 29, at 156.

147. Bari, *The Natural Death*, *supra* note 2, at 9, 13; *10 New HC Judges to be Appointed*, THE DAILY STAR (Oct. 31, 2008), <http://www.thedailystar.net/news-detail-61184>.

148. The life of an ordinance is always contingent on it receiving approval of the parliament. Although the BAL regime had placed 54 Ordinances promulgated by the President during the regime of the “Care-taker” Government before the Parliament in February 2009, the Supreme Judicial Commission Ordinance was one of the 68 ordinances which were dropped by the regime. *See* Bari, *The Natural Death*, *supra* note 2, at 14.

by the Commission, as judges of the AD.¹⁴⁹ After increasing the number of posts of judges in the AD of Supreme Court from seven to 11 on July 9, 2009, President Rahman on July 14, 2009, appointed four senior-most judges of the HCD, Justices Bijan Kumar Das, ABM Khairul Haque, Md Muzzammel Hossain and Surendra Kumar Sinha, as judges of the AD.¹⁵⁰ The principle of seniority was also observed in the elevation of Justices MA Wahab Miah, Nazmun Ara Sultana, Syed Mahmud Hossain and M Imman Ali to the AD on February 23, 2011.¹⁵¹

Thus, it seems that the present regime of the BAL, which has the previous track record of violating the convention of seniority in appointing the Chief Justice of Bangladesh and judges of the AD on numerous occasions,¹⁵² had initially complied with the convention of seniority in appointing judges from the HCD to the AD,¹⁵³ perhaps keeping in mind the SCBA's persistent and assiduous demand for conforming to the principle of seniority in the "promotion process."¹⁵⁴ However, the regime returned to its previous tradition of overlooking senior judges of the HCD in making appointments to the AD approximately eight months prior to the completion of its tenure in office.¹⁵⁵ On March 28, 2013, the President elevated four judges, Justices Mohammad Anwarul Haque, Siddiqui Rahman Miah, Hasan Foez Siddique and AHM Shamsuddin Chowdhury Manik, of the HCD to the AD.¹⁵⁶ Of these four, the principle of seniority was followed only in respect of the appointment of Justice Haque. Justice Miah was promoted in supersession of three of his colleagues in the HCD while Justices Siddique and Manik were elevated

149. *SC Appellate Division gets 2 New Judges*, THE DAILY STAR (Mar. 5, 2009, 12:00 AM), <http://www.thedailystar.net/news-detail-78543>.

150. *SC Appellate Division gets 4 More Judges*, THE DAILY STAR (July 15, 2009), http://archive.thedailystar.net/newDesign/print_news.php?nid=96998.

151. *SC gets 1st Woman Judge*, THE DAILY STAR (Feb. 23, 2011, 12:00 AM), <http://www.thedailystar.net/news-detail-175201>.

152. Aminul Hoque & Kawser Ahmed, *Rekindling an Old Debate: How Effective a Caretaker Government can Be?*, THE DAILY STAR (Dec. 5, 2004), <http://archive.thedailystar.net/law/2004/12/01/opinion.htm>.

153. *SC Appellate Division gets 2 New Judges*, *supra* note 149; *SC Appellate Division gets 4 More Judges*, *supra* note 150.

154. Ashutosh Sarkar, *SC May get New Judges Next Month*, THE DAILY STAR (Dec. 23, 2010, 12:00 AM), <http://www.thedailystar.net/news-detail-167079>.

155. *See SC Gets 4 more Judges*, THE DAILY STAR (Mar. 29, 2013, 12:00 AM), <http://www.thedailystar.net/news/sc-gets-4-more-judges>.

156. *SC Gets 4 More Judges*, THE DAILY STAR (Mar. 28, 2013, 10:58 PM), <http://www.thedailystar.net/news/sc-gets-4-more-judges>.

in supersession of an astounding 38 senior judges.¹⁵⁷ Both Justices Siddique and Manik had received their initial appointments as Additional Judges of the HCD in 2001 when the BAL was in power. The SCBA maintained its tradition of protesting the supersession of senior judges of the HCD in appointing the judges of the AD.¹⁵⁸ It arranged for demonstration on the walkway of the first floor of the Supreme Court Building where the said judges were administered oath on March 31, 2013.¹⁵⁹

It should be stressed here that among the above four appointees, the appointment of Justice Manik was the most controversial. First, Justice Manik, during his tenure as a judge of the HCD, made public political statements and also sided with the ruling party during a TV talk show in April 2010, in contravention of the Code of Conduct for Judges of the Supreme Court of 2000,¹⁶⁰ which was in force at the time prohibiting judges from expressing their views in public on political matters.¹⁶¹ Second, he used his bench, which also included a junior judge, as an avenue for persecuting academicians, civil society members, journalists, and lawyers on account of their political opinions which went against the party in power. For instance, Justice Manik ordered the arrest of MU Ahmed, a Pro-BNP Lawyer and a former Assistant Attorney General, for allegedly obstructing the law enforcement agencies from performing their duties during a scuffle that

157. *Skip Oath to 4 New SC Judges: Outgoing Bar President Urges CJ*, THE DAILY STAR, Mar. 31, 2013, last page; *Controversial Appointment of Judges in the Appellate Division of the Supreme Court: Bad Precedent has been Created*, NEWS FROM BANGLADESH.NET (Apr. 1, 2013, 02:10pm), <http://newsfrombangladesh.net/new/readers-opinion/11293-controversial-appointment-of-judges-in-the-appalate-division-of-the-supreme-court-bad-precedent-has-been-created>.

158. *See 4 SC Judges Take Oath*, THE DAILY STAR (Apr. 1, 2013, 12:00 AM), <http://www.thedailystar.net/news/4-sc-judges-take-oath>.

159. *Id.*

160. The former clauses (2), (3), (4), (5) and (6) of Article 96 of the Constitution of Bangladesh 1972 read together stipulated that a judge of the Supreme Court could only be removed from office by the President upon recommendation by the Supreme Judicial Council, which was composed of the Chief Justice and the two next senior judges of the AD, to that effect after a formal inquiry.

The Constitution in Article 96(4)(a) also empowered the Council to “prescribe a Code of Conduct to be observed by the Judges”. Accordingly, on May 7, 2000, the Council headed by then Chief Justice Latifur Rahman formulated a Code of Conduct for the Judges of the Supreme Court. However, the BAL after returning to power through the controversial election of 2014 used its overwhelming majority in the Parliament to get the Constitution (Sixteenth Amendment) Act 2014 passed, which replaced the provisions concerning the Supreme Judicial Council in Article 96 of the Constitution with provisions which gave the Parliament the *carte blanche* power to recommend the removal of judge of the Supreme Court from office. BANGL. CONST. art. 96 (amended 2014).

161. Judge A.F.M. Abdur Rahman, *Code of Conduct for the Judges*, BANGL. L. HOUSE, r.6 [no longer in force] (Oct. 1, 2011), <http://bdlawhouse.blogspot.com/2011/10/code-of-conduct-for-judges.html>.

broke out between the Pro-BNP and Pro-BAL Lawyers before his bench after he had remarked that the BNP Chairperson and former Prime Minister Begum Khaleda Zia's statement about the adverse impact of the Fifteenth Amendment Act of 2011 on the Constitution was "tantamount to sedition" during a hearing on August 2, 2011.¹⁶²

In pursuance of the order, Ahmed was arrested in the early hours of August 11, 2011. He was allegedly tortured in police custody to the extent that within 5 hours of his arrest he suffered a massive heart attack. Although he was admitted to a local hospital for medical treatment, he passed away on August 26, 2011, 15 days after his arrest.¹⁶³ The arrest and subsequent death of Ahmed outraged the legal fraternity. The SCBA passed a resolution blaming Justice Manik for his death.¹⁶⁴ However, Justice Manik's response to this was not befitting the high office he was holding at the time. For he once again, in contravention of the Code of Conduct of 2000, which not only required judges to maintain a degree of aloofness consistent with the dignity of their office but also prohibited them from making their views public on matters "that are pending or are likely to arise for judicial determination,"¹⁶⁵ participated in a TV talk-show and claimed that Ahmed died of his pre-existing physical condition and not due to police persecution.¹⁶⁶

Seven months later, on March 5, 2012, Justice Manik's bench issued an order directing the authorities of the Bangladesh Open University to file a criminal complaint against a number of academics for allegedly distorting the history of the Liberation War in two of the University's textbooks on

162. *Supreme Court Lawyer Died in Police Custody: Severe Torture Alleged, Judicial Probe Demanded*, BANGL. L. HOUSE (Aug. 26, 2011), <http://bdlawhouse.blogspot.com.au/2011/08/supreme-court-lawyer-died-in-police.html>; Ashutosh Sarkar, "Constitutional Hurl" Threat, Object Thrown at HC Judges, THE DAILY STAR (Aug. 11, 2011, 12:00 AM), <http://www.thedailystar.net/news-detail-197020>.

163. *Supreme Court Lawyer Died in Police Custody: Severe Torture Alleged, Judicial Probe Demanded*, BANGL. L. HOUSE (Aug. 26, 2011), <http://bdlawhouse.blogspot.com.au/2011/08/supreme-court-lawyer-died-in-police.html>.

164. Ehsanul Haque Jasim, *Unprecedented Departure of Justice Shamsuddin: No Farewell by AG Office SCBA*, NEW NATION (Sept. 19, 2015), <http://thedailynewnation.com/news/67594/unprecedented-departure-of-justice-shamsuddin.html>.

165. Judge A.F.M. Abdur Rahman, *Code of Conduct for the Judges*, BANGL. L. HOUSE, r.5, 6 (Oct. 1, 2011), <http://bdlawhouse.blogspot.com/2011/10/code-of-conduct-for-judges.html>.

166. *Editor Mahmudur Seeks Removal of Justice Shamsuddin*, NEW AGE, Sept. 26, 2012, at 1; *No greetings for SC judges: Bar leaders protest death of pro-BNP leaders*, THE DAILY STAR (Oct. 10, 2011, 12:00 AM), <http://www.thedailystar.net/news-detail-205906>.

Civics and Sociology respectively.¹⁶⁷ These academics included the former Vice-Chancellor of the University, M. Ershadul Bari, who was a Professor of Law and was not involved in the writing of either of the said books.¹⁶⁸ It seems that he was sought to be implicated in the complaint solely because of his political ideology. In this context, it is noteworthy that mentioning Major General Ziaur Rahman, the founder of the BNP, instead of *Bangabandhu* Sheikh Mujibur Rahman as the proclaimer of independence of Bangladesh from then West Pakistan in the said textbooks, *inter alia*, was construed as constituting distortion of history. To this end, these books relied on the two declarations made by General Zia which were broadcast on *Biplobi Betar Kendra* [Revolutionary Radio Station], Chittagong on March 27 and 28, 1971, respectively. First, declaring the independence of Bangladesh from Pakistan in his capacity as the provisional “President and Commander-in-Chief of the Bangladesh liberation army” and subsequently making the same declaration the very next day but this time on behalf of Mujib.¹⁶⁹ However, in June 2009, a bench of the HCD comprised of Justices Haque and Ahmed, relying on the Proclamation of Independence, which was issued by the Provisional Government of Bangladesh¹⁷⁰ on April 10, 1971, and which stated that Mujib had made “a declaration of independence” on March 26, 1971,¹⁷¹ declared that it is Mujib who had proclaimed the independence of Bangladesh.¹⁷² It seems that Justice Manik had relied on this decision for issuing the above order against the academics. But in doing so he overlooked the facts that the said textbooks were initially published in 2002 and later reprinted in the years 2005 and 2009, and Article

167. U.S. DEP’T OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS AND LABOR, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2012: BANGLADESH 13 (2012), <http://www.state.gov/j/drl/rls/hrrpt/2012/humanrightsreport/index.htm?dclid=204395&year=2012#wrapper>; *DU, BOU Teachers to Face Criminal Charge*, THE DAILY STAR, (Mar. 7, 2012, 12:00 AM), <http://www.thedailystar.net/news-detail-225298>.

168. *Id.*

169. *Bangladesh Reports Death of President Ziaur Rahman*, N.Y. TIMES (May 30, 1981), <http://www.nytimes.com/1981/05/30/world/bangladesh-reports-death-of-president-ziaur-rahman.html>; Julfikar Ali Manik & Ashutosh Sarkar, *It’s Bangabandhu, not Zia: HC Rules Sheikh Mujib Declared Independence*, THE DAILY STAR, (June 21, 2009), <http://www.thedailystar.net/news-detail-93650>.

170. The Provisional Government was formed by the leaders of the BAL on April 10, 1971 for coordinating Bangladesh’s war of independence. *Provisional Government of Bangladesh*, MUJIBNAGAR PORTAL (last visited Nov. 1, 2016), <http://www.mujibnagar.com/mujibnagar-government/provisional-government-of-bangladesh>.

171. THE PROCLAMATION OF INDEPENDENCE [CONSTITUTION] Apr. 10, 1971, (Bangl.), http://www.docstrangelove.com/uploads/1971/sbbk/documents/Proclamation%201971_M_Dalil_Vol_03_MMR.pdf.

172. Manik & Sarkar, *supra* note 169.

35(1) of the Constitution of Bangladesh expressly prohibits the retrospective use of laws to criminalize conduct.¹⁷³

Third, Justice Manik, during his time as a judge of the HCD, did not write the judgments of many cases. He also did not deliver judgments in a number of cases. These omissions on the part of Justice Manik, which were also at odds with the Code of Conduct of 2000,¹⁷⁴ significantly disadvantaged litigants as they were deprived of the opportunity to institute appeal petitions before the AD.¹⁷⁵ In light of these, it is evident that Justice Manik was elevated to the AD not because of his record as a judge of the HCD but rather on political considerations.¹⁷⁶

Following the retirement of Justices Mohammad Anwarul Haque, Siddiqui Rahman Miah and Shamsuddin Chowdhury Manik, the President on February 7, 2016, elevated Justices Mirza Hussain Haider, Md. Nizamul Huq, and Mohammad Bazlur Rahman of the HCD to the AD.¹⁷⁷ The principle of seniority was not adhered to in respect to the appointment of any of these judges. Justice Haider was elevated in supersession of the senior-most judge of the HCD, Justice Dastagir Hossain, while Justices Huq and Rahman were elevated in supersession of 28 senior judges.¹⁷⁸ It should be stressed here that Justice Huq was previously the Chairman of the International Crimes Tribunal, which was established for investigating war crimes committed during the War of Independence from Pakistan.¹⁷⁹ In December 2012, the

173. The Constitution of the People's Republic of Bangladesh, 1972, art 35(1) states: No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than, or different from, that which might have been inflicted under the law in force at the time of the commission of the offence.

BANGL. CONST. art. 35(1).

174. Bangladesh's Judicial Code of Conduct provided that "[A] judge should dispose promptly the business of the court including avoiding inordinate delay in delivering judgments/orders." Judge A.F.M. Abdur Rahman, *Code of Conduct for the Judges*, BANGL. L. HOUSE, r.5 (Oct. 1, 2011), <http://bdlawhouse.blogspot.com/2011/10/code-of-conduct-for-judges.html>.

175. *No Farewell to Justice Shamsuddin Manik*, DAILY OBSERVER (Sept. 18, 2015, 12:00 AM), <http://www.observerbd.com/2015/09/18/111307.php>.

176. *See id.*

177. *Chief Justice Swears in Three Judges to the Appellate Division*, BDNEWS24.COM (Feb. 8, 2016), <http://bdnews24.com/bangladesh/2016/02/08/chief-justice-swears-in-three-judges-to-the-appellate-division>.

178. *Id.*

179. *Id.*; *Trying War Crimes in Bangladesh: The Trial of the Birth of a Nation*, ECONOMIST, Dec. 15, 2012, <http://www.economist.com/news/briefing/21568349-week-chairman-bangladesh-international-crimes-tribunal-resigned-we-explain>.

Economist published the transcript of conversations between Justice Huq and a Belgium-based lawyer of Bangladeshi origin through Skype and email.¹⁸⁰ It revealed that Justice Huq had constant contacts with executive branch of the government, which had been unduly pressurizing him to deliver guilty verdicts against the leaders of *Jamaat-e-Islami*, who were charged with the commission of war crimes during the Liberation War rather hastily.¹⁸¹ It was further revealed that in lieu of these verdicts, he was promised a promotion to the AD.¹⁸² Few days after the publication of this sensitive news, on December 11, 2012, Justice Huq resigned as the Chairman of the Tribunal and returned to the HCD.¹⁸³ It seems that the promise made to Justice Huq in 2012 was finally fulfilled by the regime through his elevation to the AD.¹⁸⁴

With these appointments, the regime of BAL has so far contravened the principle of seniority six times in elevating judges of the HCD to the AD, thereby surpassing the previous record of supersession on five occasions, which had been jointly held by the previous BNP (2001–2006) and BAL (1996–2001) regimes. In doing so, the BAL has been able to pack the higher division of the apex court of the nation with judges, who had received their initial appointment to the HCD during its tenure in office from 1996 to 2001. It is also noteworthy that most of these judges are expected to remain in office for another five to seven years. For example, Justice Mirza Hussain Haider is expected to retire from office on February 28, 2021, Justice Syed Mahmud Hossain on December 30, 2022, Justice Mohammad Bazlur Rahman on April 11, 2022, Justice Md. Iman Ali on December 31, 2022, and Justice Hasan Foez Siddique on September 25, 2023.¹⁸⁵ Thus, it is evident that the BAL has proceeded in a calculated manner in contravening the principle of seniority for composing an AD of its choice, thereby undermining the court's status as an independent and impartial tribunal which is indispensable for a society proclaiming the rule of law.

180. *Trying War Crimes in Bangladesh: The Trial of the Birth of a Nation*, *supra* note 179.

181. *Id.*

182. *See id.*

183. *See id.*

184. *See id.*

185. This information has been compiled on the basis of Article 96(1) of the Constitution of Bangladesh 1972 and the biographical details of these judges as contained in the website of the Supreme Court of Bangladesh. See Constitution of Bangladesh, which in Article 96(1) stipulates that the judges of the Supreme Court of Bangladesh are to remain in office until they attain the age of 67 years. BANGL. CONST. art. 96(1); *Judges' List: Appellate Division*, SUP. CT. BANGL. (last visited Nov. 10, 2016), http://www.supremecourt.gov.bd/nweb/?page=judges.php&menu=11&div_id=1.

VI. CONCLUSION

First, the foregoing discussion reveals that although Article 95 of the Bangladesh Constitution does not provide for the appointment of the senior-most judge of the AD of the Supreme Court as the Chief Justice of Bangladesh, a convention to this effect had been developed following Bangladesh's independence.¹⁸⁶ This convention has been contravened at regular intervals since June 2003 on extraneous considerations.

Although it is quite possible that in a given case the inflexible rule of seniority can lower judicial performance as the senior most judge might not be the most suitable choice or might not be able to live up to the highest standard expected of him, the rule of seniority must be adhered to in appointing the Chief Justice for the following reasons:

- a) There is a greater safety in appointing the senior-most judge as the Chief Justice, the *sentinel qui vive* of the independence of the judiciary. Doing so would deprive the President from picking and choosing among the judges on the basis of extraneous considerations, e.g. political or personal favoritism.
- b) The supersession of the senior-most judge in appointing the Chief Justice of Bangladesh will hurt his dignity and self-respect as the cause list is printed in accordance with the seniority of the judges and the judges sit in that order. He might also feel belittled in the eyes of others as an incompetent and inefficient judge. Consequently, he may take retirement or take leave until retirement, thereby creating a vacuum of experienced and competent judges in the AD.
- c) The appointment of the Chief Justice by seniority will prevent a scramble among judges of the Supreme Court for the highest office. This scramble would be nothing but a competition to show who has better imbibed the gospel of the ruling party so as to capture the eye and ear of the appointing authority whenever a vacancy arises. Even the junior-most judge may think that by giving a decision in favor of the executive in a case and by cultivating good relation with it, he would stand a good chance of becoming the Chief Justice of Bangladesh, which in turn has the disturbing impact of ruining the highest institution of justice and shattering public confidence in it.

The Constitution of Bangladesh provides for the appointment of a regular Chief Justice and an 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.¹⁸⁷ Unlike the Constitution of

186. BANGL. CONST. art. 95.

187. BANGL. CONST. art. 95, 97.

India, which, in Article 126,¹⁸⁸ has empowered the President to appoint any judge of the Supreme Court irrespective of seniority as acting Chief Justice “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 97¹⁸⁹ unequivocally provides for following the mechanical rule of seniority by the President in appointing the acting Chief Justice of Bangladesh when a vacancy arises in the office or when the Chief Justice is unable to perform his functions due to absence, illness or any other cause. It seems that the expression “[i]f the office of the Chief Justice becomes vacant” used in Article 97 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, illness or any other unforeseen reasons.¹⁹⁰ In the case of an unexpected vacancy, the Constitution of Bangladesh provides that the President will appointment an Acting Chief Justice solely on the basis of seniority, which negatives the possibility of a patronage appointment. It can strongly be argued that a similar approach should be adopted for appointing the regular Chief Justice of Bangladesh through the introduction of an amendment to Article 95 of the Constitution to the effect that the President shall appoint only the senior-most judge of the AD of the Supreme Court as the Chief Justice of Bangladesh.

In this context, the recommendation of the Arrears Committee, appointed by the Government of India in 1989 to examine large arrears in the High Courts and to suggest remedies, made in its Report is noteworthy: “The Committee . . . 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.”¹⁹¹

Second, the discussion in this Article also reveals that the executive branch has been granted the authority by the Constitution to increase the number of judges of the AD on its subjective satisfaction, which in turn provides it with significant leeway to pack the bench with judges who share

188. INDIA CONST. art. 126.

189. The Bangladesh constitution states in article 97 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.

BANGL. CONST. art. 97.

190. *Id.*

191. Arrears Comm. Rep. 1989, ¶ 7.20 (India).

its political philosophy. Therefore, in order to prevent the practice of packing of the AD with the judges having similar political allegiance and ideological outlook after increasing the number of judges in accordance with executive's 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 upon a request of the Supreme Court as provided for by the Constitution of the Commonwealth of Puerto Rico.¹⁹²

Third, it is also evident that since August 13, 1976, the convention of appointing the judges of the AD from amongst the judges of the HCD based on seniority after consultation with the Chief Justice has been violated both by the civilian and martial law regimes on numerous occasions. In this context, the example set by Justice Syed Mahboob Morshed, the then Chief Justice of the East Pakistan (Dacca) High Court, is noteworthy. Justice Morshed in 1967 had recommended Mr. Tayyabuddin Talukder for appointment as the judge of the High Court. The Chief Justice of Pakistan, Justice A.R. Cornelius, for unknown reasons did not support his recommendation and, because of this, the president did not make the appointment. In protest of the flouting of his recommendation, Justice Morshed resigned from the office of the Chief Justice of the High Court of East Pakistan on November 15, 1967,¹⁹³ thereby setting a shining example in the judicial history of former East Pakistan (now Bangladesh) for upholding the dignity and authority of the office of the Chief Justice and for demonstrating his conviction in effective and meaningful consultation with the said office. However, no Chief Justice of Bangladesh has ever stepped into the shoes of Justice Morshed in similar circumstances. Furthermore, it has not been kept in mind that the violation of the established convention of appointing the senior most judge of the HCD as the judge of the AD is obviously a breach of his legitimate expectation. The obligation of the bar¹⁹⁴ in resisting any encroachment of the convention of seniority in appointing judges of the AD on political considerations has made them controversial, which in turn has had the disastrous impact of lowering public

192. Puerto Rico's constitution at article 5 provides that "[T]he number of Justices [of the Supreme Court] may be changed only by law upon request of the Supreme Court." P.R. CONST. art. V, § 3.

193. *Quoted in Al-Jehad Tr. v. Pakistan*, 1996 PLD (SC) 324, 384.

194. Canons of Professional Conduct and Etiquette of the Bar Council 1969, c. 3, art. 7 (Bangl.) (casts an obligation upon the members of the Bar to resist any attempt to appoint a person as a judge on political considerations).

faith, confidence, and trust in the highest seat of justice as the impartial adjudicator of disputes. Since the selection of judges is of critical importance in ensuring quality justice, keeping the public confidence unshaken in the bench, and protecting the Supreme Court from disrepute, the principle of appointing the senior-most puisne judge of the HCD to the judgeship of the AD as a mandatory provision should also be inserted in Article 95(1) of the Constitution by means of an amendment.

It should also be pointed out here that, unlike the constitutions of some of the democratic nations, such as the constitutions of the United States of America¹⁹⁵ and Australia,¹⁹⁶ both of which provide for complex procedures to amend the Constitution, the Constitution of Bangladesh provides for a relatively simple procedure for amending its provisions.¹⁹⁷ Thus, all that is required is for the politicians of the country to come to the realization “that the interest of the community requires that neither political nor personal patronage nor a desire to placate any section of a society, should play any part in making judicial appointments.”¹⁹⁸

195. U.S. CONST. art. V (“The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided [that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and] that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate”).

196. *Australian Constitution* s. 128 (requires any proposed amendment to be passed: a) by an absolute majority of both Houses of the Federal Parliament or by one House twice, and, b) at a referendum by a majority of the people as a whole and by a majority of the people in a majority of states).

197. BANGL. CONST. art. 142(a)(ii) (any proposed bill for amendment to the Constitution can be passed by the votes of “two-thirds of the total number of members of the Parliament.”).

198. Harry Gibbs, *The Appointment of Judges*, 61 AUSTL. L.J. 7, 11 (1987).