

Appointment of Judges in the Higher Judiciary of Bangladesh-Legal Framework: Lessons from India and UK

Md. Milan Hosssain*

Abstract

The paper has focused on the appointment procedures of judges in Bangladesh in comparison with the UK and India- with an aim to make a proposition upon the vacuum of a legal framework in detail regarding the appointment of judges in the higher judiciary of Bangladesh from the lessons of these two countries. The aim of such a study is also to analyze what procedures and criteria are followed in other countries, particularly in India and the UK, and what procedures should be followed in appointing a judge to the judiciary, particularly to the higher judiciary in Bangladesh is the matter of research. From the study, it is revealed that the governments of the UK and even India follow rigorously their established laws, processes, and practices to select the best candidate on the basis of merit and integrity for the purpose of appointment to the higher Judiciary; in doing so they cannot deviate from following any established procedures, rules and laws and practices; and therefore, they cannot select a candidate for their own interest which may affect the independence of the judiciary whereas in Bangladesh case the study has found a complete different scenario on the issue. Under this context, a proposal is drawn for a specific detailed law incorporating the provisions of the selection process, criteria, academic qualification, experiences, the establishment of higher judiciary appointment commission or committee, their functions and powers to ensure the independence of the Judiciary and the rule of law of the Country.

Keywords: Appointment of Judges, Legal Framework, Bangladesh, Lessons, India, UK

Introduction

Appointment of judges is a sensitive issue which is mostly connected with the independence of judiciary (A. Mashraf, 2016) deemed as an important aspect of judicial independence (S.A. Akkas, 2004) where the independence of judiciary connotes to the judiciary to be free from all sorts of direct and indirect influences and pressures and interference of the executive and

* Associate Professor, Department of Law and Justice, Bangladesh University of Business and Technology (BUBT)

Appointment of Judges in the Higher Judiciary

legislative. So, the judges should be appointed impartially and without considering any political status. If the appointment of judges is done based on political consideration, it may presume that some judgments may be delivered on behalf of political parties or leaders considering political views or philosophy which may also cause injustice (G. Appleby 2014, Dec. 9). It is a common view that if a judge is appointed in considering political background, generally he/she may be weak to that political party by whom he is appointed and may give an influenced judgment in a political case which may produce injustice to others. Therefore, in order to raise public confidence in the judiciary, the judges should be selected by means of a recognized process following transparency, which is an essential element of judicial independence (S.A. Akkas, 2004, p.109). And, it is also essential to have neutrality in appointing a judge where the merit-based appointment system for the judiciary should be followed (A. Z. Chowdhury, 2012, April). In Bangladesh, the merit principle and quota system are followed in appointing judges to the Subordinate Courts but due to the absence of specific details rules regarding the appointment of judges to the higher judiciary except few basic criteria like citizenship of Bangladesh and minimum duration of experience as an advocate the Supreme court of Bangladesh or judicial officer of Bangladesh stated in article 95 of Bangladesh Constitution, seniority principle and political background are strongly considered (though it is open secret) in appointing judges to the higher judiciary (Mollah, M. A. H., 2012). The merit principle refers to the applicant's education, skills, experience, and legal knowledge to be a judge (S.A. Akkas, 2004, p.111). The principle of seniority denotes the practicing age of a lawyer or judge where the most senior lawyer or judge may be appointed as a judge of the High Court Division (hereafter HCD), Appellate Division (hereafter AD), or as a Chief Justice of Bangladesh. Due to the absence of specific law in detail setting out either qualifications or the criteria for the appointment of judges to the higher judiciary, more than last five decades from the independence, many controversies give rise in each government in case of appointment of judges to the HCD; the rule of seniority principle is often superseded in case of appointment of judges to the AD and even to the post of Chief Justice in each government. All governments try to get the 100% advantage of the absence of a legal framework on the appointment of judges to the higher judiciary and recruit their very loyal candidates as judges deemed as continuous interference from the Executive and ignored the matter of a specific legislation on the issue (M. E. Bari 2016; T. H. Shawon & K. A. Osman 2017) though the jurists, the members of civil society always urge and even the higher judiciary gives guidelines in its pronouncements to enact detailed rules for the transparency and the selection of the best candidate for the purpose of appointment in the higher judiciary but no government could show any interest on the issue for the sake of political benefit or due to not getting suitable way or principle. Therefore, in practice, an effective separation and independence of the Judiciary are not established here (Biswas, 2012; Islam,

2014; Liton, 2018). So, the appointment procedures of the judges of other countries specifically, UK, and India are studied in the paper; the argument for selection of these two countries for comparative study with Bangladesh: In Bangladesh and India, both countries, the President as a State Head shall appoint the judges to the judiciary but in UK the Queen as State Head shall appoint the judges; In BD and India the President as a State Head shall appoint where parliamentary governments exist of which the Prime Minister is the head of the executive; In UK the Prime Minister is the executive head; The procedure of UK is studied in the paper as BD follow the common law system; most of the laws and legal systems of BD were generated from the British rulers in the Indian Sub-continent; besides, in UK the appointment procedure of judges to the higher judiciary are governed by a specific detail law name the Constitutional Reforms Act, 2005. And the procedure of judges to the higher judiciary is selected here for neighboring friend country having similarities in socio-economic conditions and appointment procedures. And an attempt is envisaged to take the lessons from the appointment procedures of these countries so that a logical proposal may be drawn for Bangladesh to remove the legal lacuna on the issue so that the concerned authority may rethink.

Appointment Procedure in UK

The Supreme Court of the United Kingdom came into existence through the Constitutional Reforms Act, 2005 (hereinafter the CRA, 2005), Article 23(1), where the Court shall consist of twelve judges appointed by the Majesty by letters patent (the CRA, 2005, art. 23 (2)). She may increase or further increase the number of judges of the court. The Act gives the Majesty to appoint one of the judges to be President and one to be Deputy President of the Court (the CRA, 2005, art. 23 (5)). The judges other than the President and Deputy President are to be termed “Justices of the Supreme Court” (the CRA, 2005, art. 23 (6)). Appointment of judge in the Supreme Court relies upon the vacancy of the Justices of the Supreme Court or the office of President or Deputy President (the CRA, 2005, art. 23 (7)) for which the Lord Chancellor must convene a Selection Commission as per the CRA, 2005, sections 26-27B and the Supreme Court (Judicial Appointments) Regulations 2013. In making selections for the appointment of judges of the Court, the commission must ensure that the proposed candidates will have knowledge of and experience of practice in the law of each part of the United Kingdom (the CRA, 2005, s. 27 (8)). To be appointed as a judge of the Supreme Court, UK, the applicant must fulfill the qualifications as stipulated in the CRA, 2005 section 25: the applicant must have experience of High judicial office at least two years where judicial office denotes judges of High Court of England and Wales; judges of the Court of Appellate of England and Wales and Judge of the Court of Session. Besides, applicants must have fifteen years’ experience being an advocate or barrister in Senior Courts of England and Wales. Lord Chancellor forms a Selection Commission of five members and sends a

Appointment of Judges in the Higher Judiciary

letter to the president of Selection Commission for examining and selecting the applicants on merit, experience of practice in each part of UK and good character (the CRA, 2005, ss. 26(5), 27(5), 27(8) & 63). Then vacancy advertisement is circulated. As part of selection process, the Commission shall consult with the Lord Chancellor, the First Minister in Scotland, the First Minister for Wales, the Northern Ireland Judicial Appointment Commission, and senior judges of the country who are not interested to be considered in the selection (the CRA, 2005, s. 27(1), and The SC (Judicial Appointments) Regulation 2013, r. 18). After consultation the commission shall submit a report to the Lord Chancellor stating who has been selected and who was consulted (the CRA, 2005, s. 27 and The SC (Judicial Appointments) Regulation 2013, r. 19). After getting such report the Lord Chancellor consults with the senior judges consulted under section 27(2) (a), any other judge consulted under section 27(3), the First Minister in Scotland, the First Minister in Wales and the Secretary of State for Northern Ireland (The SC (Judicial Appointments) Regulation 2013, rr. 18 & 19). On above circumstances, he can order to reconsider or can reject a candidate with written reasons for rejection The SC (Judicial Appointments) Regulation 2013, r20). After considering the report, the Lord Chancellor forwards it to the Prime Minister, who will send the recommendation to Her Majesty the Queen, and she finally and formally appoints the candidate as judge (*The Supreme Court of the United Kingdom*, 2016).

Appointment Procedure in India

Appointment of judges in India particularly in case of higher judiciary - Supreme Court and High Court is governed by the constitutional framework-as stated in the articles 124 and 217 of the Indian Constitution for appointment emphasizing consultative process between Judiciary and Executive; later by 'Collegium Model' –consisting of three senior most judges of the Supreme Court including the Chief Justice of India, a judicial precedent introduced in 1993 by 2nd Judges Case (Tiwari, 2010) for the purpose of making the report of recommendation of proposed candidates by the Judiciary to the President.

Constitutional Framework-Appointment of Judges in Supreme Court

The Constitution of India (hereafter the Constitution) article 124 (2) provides 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 and shall hold office until he attains the age of sixty-five years.*” Besides, in the case of appointment of a judge other than the Chief Justice, the Chief Justice of India (hereafter CJI) shall always be consulted as per article 124 (2). When the office of CJI is vacant or when the Chief Justice is, by reason of absence or otherwise, unable to perform the duties of his office, the President may appoint a judge as acting chief justice due to performing the functions of chief justice (The Constitution,

art. 126). Article 124(2) of the Constitution carries two types of consultation in case of appointment –discretionary and mandatory. First portion of the Article lies with discretionary consultation on part of the President. The President may consult in case of appointment of judges in the Supreme Court with such of the judges of the Supreme Court and of the High Courts in the States as the President may deem necessary; for this purpose, he may consult one, or ten or none judges (Neeraj,2010). But, last portion of the Article or proviso imposes mandatory consultation in case of appointment of judges other than the Chief Justice, the Chief Justice of India shall always be consulted. At the same way, Article 217(1) in case of appointment of judges to the High Court also provides for mandatory consultation on the part of the President with State Governor, Chief Justice of India and Chief Justice of the High Court (other than appointment of Chief Justice of that High Court): *“The President by warrant under his hand and seal after consultation with the Chief Justice of India, the Governor of the State and the Chief Justice of the High Court appoints every judge of a High Court (The Constitution, art. 217).”*

The Constitution, particularly Article 124 is very silent regarding the appointment of Chief Justice of India; for this purpose, by the conventional practice or by following seniority principle the post is filled, i.e., the senior most judge of the Supreme Court would become CJI but it was superseded at 1973 and 1977 and later restored the conventional practice (Neeraj,2010).

Judicial Appointment under the Collegium Model/Structure

In the appointment of judges of the High Courts and Supreme Court, the consultation on part of the President is earlier said in some cases discretionary and in some point mandatory but these approaches were changed from 1993 due to the evolution of collegium system introduced by the judicial pronouncements in three judges cases namely *S.P. Gupta v Union of India* 1981(Supp) SSC 87, *S.C. Advocates-on-Record Association v Union of India* (1993) 4SCC441 and *Special Reference No. 1(1998) 7 SCC739*; where the collegium system consisted of three members-one CJI and two senior most judges of the Supreme Court according to second judge’s case and the members of the collegium were increased to five - one CJI and four senior most judges of the Supreme Court in the third judge’s case; the collegium first would make a recommendation of suitable and best candidate considering seniority with legitimate expectation for the appointment to the High Courts or Supreme Court of India and after getting such recommendation the President shall appoint him as judge but the controversy arose regarding incompetency and irregularity of collegium system due to recommendation of corrupted and accused candidates in several cases (Singh and Singh 2017). Before this collegium system, from the very beginning of the independence of India, several times at several phases judicial appointment committees were constituted with an aim to appoint a best candidate: in 1949 the Constituent Assembly appointed an ad

Appointment of Judges in the Higher Judiciary

hoc committee of 11 members comprising the some Chief Justices of High Courts and few members of both the houses to recommend the best method of appointment of judges subject to confirmation of the nomination for a candidate by at least 7 members for recommendation to the President (Deep and Misra, 2018) ; 121 Law Commission Report, 1987 recommended a committee of 7 members for judicial appointment purpose-the last retired Chief Justice of India along with 3 senior most judges, Union Law Minister, Attorney General of India and an outstanding academician as member (Deep and Misra, 2018); The Venkatchalaiah Committee Report, 2003 proposed for National Judicial Commission which was introduced through the Constitution (98th Amendment) Bill in 2003 but it lapsed due to the dissolution of Lok Sabha; again, in 2013 the Judicial Appointments Commission (JAC) Bill, 2013 was introduced in the Rajya Shaba by the Constitution (120th Amendment) Bill 2013 but it also lapsed due to the dissolution of Lok Sabha which was withdrawn in 2014. The Parliament enacted the National Judicial Appointments Commission (NJAC) Act, 2014 through the Constitution (Amendment) Bill 2014 against which the Judiciary took a hard decision and declared the Constitution (Amendment) Bill of 2014 as void in the Supreme Court Advocates on Record Association v. Union of India (2015) 11 Scale 1 case known as 4th Judges case (Deep and Misra, 2018) due to giving more significance to the Executive than judiciary and reducing the number of senior most judges from 5 to 3 (as the collegium consisting of 5 senior most judges of the Supreme Court including the Chief Justice of India) out of total 6 members of the Commission) and opportunity of irrational objection being imposed from any two members to the recommendation by majority members (4 members out of 6). And by this judgment thus tactfully upholds the collegium structure which was judicial formula accrued in the 2nd Judges case and 3rd Judges case for the recommendation of the suitable candidate for appointment in the higher judiciary. One may criticize against such judgment that an extra-constitutional device –a collegium formula created by the members of the judiciary for their ends is upheld rather than accepting a system- National Judicial Appointments Commission- lawfully enacted by a popular elected Parliament (Deep and Misra, 2018). At the same time, the verdict has been celebrated for the fact that it has upheld the independence of the judiciary as a basic structure of the constitution (Tiwari, 2010). However, in order to make the collegium free from the evils, many people and academicians believe the followings need to ensure: (i) transparency (ii) competency of the judges (iii) secretariat and (iv) complainant mechanism (Tiwari, 2010).

Appointment of Judges in Subordinate Court

Appointments of district judges in any State of India shall be made by the Governor of the State in consultation with the High Court exercising jurisdiction in relation to such State and the posting and promotion of

district judges are also executed by the Governor of the State with the consultation of High Court (*The Constitution of India*, Art. 233 (1)). A person not already in the service of the Union or of the State shall only be eligible to be appointed a district judge if he has been for not less than seven years an advocate or a pleader and is recommended by the High Court for appointment (*The Constitution of India*, Art. 233 (2)). Appointments of persons other than district judges to the judicial service of a State shall be made by the Governor of the State in accordance with rules made by him in that behalf after consultation with the State Public Service Commission and with the High Court exercising jurisdiction in relation to such State (*The Constitution of India*, Art. 234).

Appointment Procedure in Bangladesh

In Bangladesh, higher judiciary refers to the Supreme Court of Bangladesh comprising two division-(i) Appellate Division (AD) and (ii) High Court Division (hereafter HCD) (The Constitution of the People's Republic of Bangladesh, (hereafter Bangladesh Constitution), art. 94(1)). The highest post of the Judiciary in Bangladesh is known as “the Chief Justice of Bangladesh (Bangladesh Constitution, art. 94(1));” where the Chief Justice sitting in the Appellate Division (AD) of the Supreme Court along with other judges discharging his functions independently (Bangladesh Constitution, art. 94(2), (3), (4)); he is considered as the symbol of justice and freedom (Bari, 2016). But nothing is stated regarding the qualification of the chief justice under Bangladesh Constitution except empowering the President of Bangladesh to appoint the Chief Justice and mentioning few basic qualifications regarding the appointment judges to the Supreme Court of Bangladesh: “*the Chief Justice shall be appointed by the president and the others judges shall also be appointed by the president after the consultation with the Chief Justice*” (Bangladesh Constitution, art. 95(1)). So, the criteria of qualification for the appointment of other judges of the Supreme Court are equally applicable to the appointment of Chief Justice:

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 in the territory of Bangladesh; or
- c. Has such qualifications as may be prescribed by law for appointment as a Judge of the Supreme Court (Bangladesh Constitution, art. 95).

It is apt to state that the Constitution or other statutes of the Country do not specify any 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 (Bari, 2016). The

Appointment of Judges in the Higher Judiciary

constitution or any other statute of the country is silent to impose the urge to select best suitable candidate for the higher judiciary for ensure its independence as without appointing competent judges to the judiciary, individual independence or collective independence is not possible to be established whereas it is repeated several times in earlier sections of the paper that in UK, or India there are rigid approach of law, convention and state practice to select the best candidate having experience and knowledge (merit). Rather, here the President can exercise the exclusive authority to appoint Chief Justice; actually, it is rightly said the Executive enjoys it through the President as the President has to act in accordance with advices of the Prime Minister in all cases except two cases: (i) appointment of prime minister and (ii) appointment of Chief Justice (Bangladesh Constitution, art. 48 (3)). In the mentioned case number (i) he has nothing more to give the formal appointment as the Constitution clearly species who will be called by the President to be appointed as the Prime Minister: *“The President shall appoint as Prime Minister the member of Parliament who appears to him to command the support of the majority of the members of Parliament* (Bangladesh Constitution, art. 56 (3).” But in the case number (ii), the constitution is very silent except giving the power to appoint the Chief Justice: *“The Chief Justice shall be appointed by the President, and the other Judges shall be appointed by the President after consultation with the Chief Justice* (Bangladesh Constitution, art. 95 (1).” Therefore, it can rightly be said that the Constitution gives a blank cheque of exclusive discretion to the President to appoint the Chief Justice of Bangladesh (Bari, 2016) which is actually in practice enjoyed by the government as the President has to work in accordance with advice of the Prime Minister earlier mentioned; here there is no selection committee consisting of the senior most members from the higher judiciary to select best meritorious, experienced, competent and skilled candidates; in fact here, the Ministry of Law and Justice initiates the proposal for the appointment of chief justice through the Prime Minister recommending the senior most-judge of the AD whenever vacancy arises in that post where the President generally approves the proposal (Bari, 2016). As a result, politically motivated appointments may be happened, is happened for the sake of political party interest and the rule of seniority principle may also be superseded which was being happened in each successive government after 2003; it is apt to state here that the convention or tradition of appointing the most senior judge of AD as chief justice was maintained consistently upto June 2003 (Bari, 2016). During the Regime of the BNP - Jamat Alliance (2001-2006) on June 23, 2003 Justice K.M Hasan was appointed as the Chief Justice of Bangladesh transgressing two senior most judges of AD; on 26 January 2004, Justice JR Mussadir Hossain was appointed to the same post in depriving of also two senior most judges of AD; in the Caretaker government regime (2007-2008) Justice MM Ruhul Amin was appointed in suppression of the senior most judge of the AD, Justice Fazlul Karim. Again, in the Present BAL

Government Regime (2009-to-date) in first two years-2009 & 2010 the principle of seniority was transgressed two times (Bari, 2016). On February 3, 2018 another suppression was caused by the appointment of Chief Justice Syed Mahmud Hossain superseding the senior most Judge of AD, Justice Md Abdul Wahhab Mia who discharged the duties of the acting Chief Justice after Sk Sinha Compulsory Regiment; later Justice Md Abdul Wahhab Miah resigned as an apex court judge on this issue (The Daily Star, 2018). Then another suppression was caused happened by the appointment of Chief Justice Hasan Foez Siddique superseding the senior most Judge of AD, Justice Muhammad Iman Ali on 21 June 2021. A suppression to the most senior judge of the AD to the very prestigious post of the chief justice of Bangladesh does not only causes injustice to the victim judge but also creates an opportunity to do injustice to the future litigants where the appointed government being a party (Bari, 2016). Actually, here each government wants to appoint very convenient and reliable candidate irrespective of his merit, experienced and integrity as chief justice for the sake of their interest and convenience which will never be helpful for the independence of judiciary, rule of law and democracy. Even though here, for the transgression of the seniority principle in case of the appointment of the Chief Justice of Bangladesh was first challenged in the case of *Hassan MS Azim and Three Others v. Bangladesh*, 16 (2011) BLC (HCD) 800, para. 2 in which, the petitioners in reference to Article 97, contended that it is an established constitutional convention that the senior-most judge of the Supreme Court is to be appointed as the Chief Justice of Bangladesh. Any deviation from the prescribed method will undermine the independence of judiciary and will raise questions among the public regarding its impartiality. But the petition was summarily disposed of without issuing any rule along with an observation that the President is obliged to act in accordance with the advice of the Prime Minister in case of appointment of judges to the Supreme Court though under the present provision of the constitution there is no such obligation in the case of the appointment of the Chief Justice, as the President alone has the authority to appoint the Chief Justice (Bangladesh Constitution, art. 95 (1)). However, the Court observed that while appointing judges or the Chief Justice, the President may consider taking an opinion from persons, including a commission or committee set up under the Constitution, and may take advice or assistance from others in choosing the right person for the post of Chief Justice. The Court also observed that reference of this issue to a commission made for the purpose of scrutinizing the ability of judges for appointment as Chief Justice would lead to transparency in the appointment system. The Court further observed that if the selection is made by an independent constitutional body and finally decided by the President, political interference would be minimized (Shawon and Osman, 2017). But such Commission or Committee for the purpose of making recommendation is still now not established here. It is very pertinent that the transgression of the convention of seniority does not

Appointment of Judges in the Higher Judiciary

only happen to the appointment of the Chief Justice of Bangladesh but also to the appointing judges to the AD; except 1972 to August 12, 1976, in each successive government the transgression of seniority principle was violated at regular interval (Shawon and Osman, 2017).which conveys the clear message that the executive often takes advantage due to the vacuum of specified detail distinct laws or constitutional provisions upon the matters which is deemed as continuous interference from the Executive though the jurists and the members of civil society always urge to enact detailed rules for the transparent and best candidate appointments in the higher judiciary where each government is not showing so much interest on their shake of political benefit or due to not getting suitable way or principle.

On the other hand, due to the absence of specific law in detail setting out either qualifications or the criteria for the appointment of judges to the higher judiciary, more than last four decades from the independence, many controversies give rise in each government for random appointment of judges to the HCD. All governments tried to get the 100 % advantage of the absence of a legal framework regarding the appointment of judges to the higher judiciary and set their very loyal candidates as judges of the HCD and ignored the matter of a specific legislation on the issue (Bari, 2016; Shawon and Osman, 2017). Therefore, the Judiciary's effective separation and independence are not established here. Under such circumstances, Dr. Zahidul (2012) identified many inconsistent reasons with the independence of judiciary in Bangladesh-among them, controversial appointments to the High Court Division (HCD), appointment of Chief Justice, appointment of public prosecutors, are mentionable for which questions raised among citizens regarding separation of judiciary and its independence (Biswas, 2012). As Huda (2017) claimed for effective separation of the administration of justice from the legislative and executive power for the preservation of the public liberty- for which the appointment of the judges by the executive is an extreme restraint for effective separation. Even the higher judiciary also opined on the issue and delivered several important guidelines in the case of *Idrisur Rahman v. Bangladesh* (2009) 61 DLR 523 regards the norms and process for appointment and non-appointment of judges to the Supreme Court which are also yet to be implemented:

- (i) The proposal and process for the appointment of judges in both branches of the Supreme Court should emanate from the Chief Justice of Bangladesh.
- (ii) The opinion of the Chief Justice in case of the appointment of judges in the higher judiciary is entitled to have the primacy.
- (iii) The Chief Justice shall consult with two most senior judges of both, AD & HCD to form his opinion in case of appointment of judges to the High Court Division and with three most senior judges of Appellate Division for the appointment of judges in the AD.

- (iv) The President or the government shall not have right to initiate for the appointment of judges in the Supreme Court of Bangladesh bypassing the Chief Justice but shall have right to suggest the name of judges.
- (v) The reasons of non-appointment of judges recommended shall be disclosed and communicated to the Chief Justice for his opinion. And if he gets nothing by consulting such judges, he shall again recommend and the President must adhere such recommendation.
- (vi) The President shall as a rule accept the recommendation of the Chief Justice for appointment of judges. If the recommendation of the Chief Justice could not be accepted by the President, it cannot be directly rejected and new judges cannot be appointed on the government choice rather the recommendation shall send back to the Chief Justice for reconsideration of it.
- (vii) After reconsideration if the Chief Justice may withdraw the recommendation but if he again recommends consult with the aforesaid senior most judges of the Appellate Division for appointment, the government shall be obliged to complete the process of appointment.
- (viii) If the recommendation of the Chief Justice for appointment or non-appointment of an additional judge as judge under Article 95 of the constitution is disregarded by the Executive, violates the Constitution.
- (ix) If the recommendation of chief justice is refused by the executive, the reason is to be recorded and is to send back for reconsideration on the materials and information conveyed.
- (x) After such reconsideration if he again recommends for the appointment or non-appointment, the executive shall accept it without raising any question.
- (xi) After successful completion of the period under Article 98, an additional judge shall be entitled to legitimate expectation to be appointed as permanent judge under Article 95.
- (xii) Non-appointment of petitioners under the circumstances as stated under Article 95 violates the constitution and conventions and is accordingly declared to be arbitrary, malafide, without any lawful authority and as such, of no legal effect.

Even, in 2012, the Bangladesh Law Commission recommended a full-fledged legislation and six points criteria for the appointment of Judges of the Supreme Court in pursuance of Article 95(2)(c) which is also yet to get implementation or any positive knock from the government (Yasin, 2008; Bari, 2016):

Appointment of Judges in the Higher Judiciary

- (i) A person should not be qualified to be a judge unless he/she has, for not less than ten years, been a Supreme Court advocate or held judicial office in the country. Mere enrolment as a lawyer of the Supreme Court should not be acceptable. The lawyer must practice regularly and have a record of a minimum number of successful cases.
- (ii) A lawyer considered for the position of a Supreme Court judge should have experience of conducting cases in the Appellate Division for at least two years.
- (iii) In respect of the current practice of selecting District judges as High Court judges, at least three years' experience could be made mandatory for this without any constitutional amendment. Academic results of District judges should also be examined.
- (iv) Not only practical experience but also in-depth knowledge and understanding of the theory, explanation and use of law, and perfect perception of justice are required to conduct judicial work.
- (v) This knowledge and understanding can also be achieved without a person having to work as a judge and lawyer.
- (vi) Alongside persons with excellent academic career in law, university professors or researchers who are at least 45-years old and have worked in reputed institutions can be appointed as Supreme Court judges. This exception will ensure quality of Supreme Court judges (Shawon and Osman, 2017).

Even in the recent leading case of *Raghib Rauf Chowdhury v. Bangladesh & ors*, 9 SCOB (2017) 34, the higher judiciary opined that 'merit' and 'integrity' must be considered as 'prime criteria' for appointment of judges to the higher judiciary indeed (para 50, p.49). And the court also opined in the mentioned cases citing from the case of *Ministry of Justice vs. Md. Idrisur Rahman* reported in 7 LG (2010) AD 17 that in case of appointment of judges to the higher judiciary prior consultation with the Chief Justice in the matter of appointment of Judges with its primacy is an essential part of the independence of judiciary (para 3, p.37). In this regards, it was held that the process of consultation in the appointment of Judges is needed in order to uphold the independence of judiciary for, it was realized that the independence of judiciary is not possible by only safeguarding merely by providing security tenure and other conditions of preventing influence of political pressure in making appointments (9 SCOB (2017) 42, Para-26). In the same case, it is clarified that consultation with the Chief Justice and primacy is in no way in conflict with Article 48(3) of the constitution under which the President has to act in accordance with advice of the Prime Minister. The Prime Minister in view of Article 48(3) and 55(2) cannot advice contrary to the basic feature of the constitution so as to destroy or demolish the independence of judiciary. Therefore, the advice of the Prime

Minister is subject to the other provision of the Constitution that is Article 95, 98, 116 of the Constitution (9 SCOB (2017) 42, Para-26; 29 BLD (AD) 79). In case of *Raghib Rauf Chowdhury v. Bangladesh & ors*, 9 SCOB (2017) 34, the HCD lastly gave seven-point directives as ‘eligibility criteria’ for the purpose of selection the best eligible candidate for the appointment of judges to the High Court Division so that the existing selection process may be made more effective, improved, transparent and realistic:

- a) The recommended person must be citizen of Bangladesh having sincere allegiance to the fundamental principles of the State Policy, i.e., nationalism, socialism, democracy and secularism as mentioned in Article 8 of the Constitution and also the spirit of the war of liberation.
- b) He must have brilliant academic profile, towering level of professional skill, legal acumen and integrity;
- c) Mechanism of providing Curriculum Vitae of intending persons in the website of the Supreme Court may be installed so that the Chief Justice, on initial consideration of the same, if wishes may ask a person or persons to appear before him for an interview along with his assets and liability statement—which may substantially facilitate the process of appropriate recommendation through effective, transparent and impartial impression;
- d) The minimum age of the recommended candidate should be 45 years as one may achieve professional skill and efficiency with the passage of time he spends in his professional arena—that is professional maturity comes with years’ brilliant uptake being no substitute and Judges’ maturity is an essential element;
- e) To ensure high level of quality selection the Advocates enrolled in the Appellate Division should be prioritized for recommendation by the Chief Justice.
- f) The judges working in the sub-ordinate judiciary having judicial working experience of less than three (03) years in the capacity of District & Sessions Judge should not be considered for recommendation for appointing in the higher judiciary; and
- g) The merit and integrity must be the prime criteria while recommending the persons working in the sub-ordinate judiciary. A person of high brilliance having no integrity is rather treacherous for any institution.

In addition to the above thoughts the Court also suggests to attract the brilliant lawyers for appointing in the higher judiciary. And therefore, the court said that “*the remuneration of Judges of the Supreme Court should be made as smart as possible. The monthly remuneration of a Judge of the High Court Division and the Appellate Division of our Supreme Court should be parallel to that being received by the Judges of other jurisdiction of the Sub-Continent*” (9 SCOB (2017) 51, Para-55). Lastly, in the

Appointment of Judges in the Higher Judiciary

mentioned case the Court held that the Chief Justice may consult two senior judges of AD and two of the senior most judges of the HCD for recommending a best candidate for elevation to the High Court Division which should not be disapproved by the President unless the recommended candidate was found anti-state or anti-social subversive activities (9 SCOB (2017) 51, Para-57). In case of selection of highly qualified, honest and eligible person with an aim to achieve the objective of an independent judiciary, the court held that the legislature may enact a proper law or a charter into constitution in pursuance of article 95(2)(c) of the Constitution; but the Court also argued undoubtedly for the existing process of recommending the persons to be appointed as High Court Judge by the Chief Justice as reflecting due process and transparency (9 SCOB (2017) 49-50, Para-53). The Court also reminded in the case about the fate of Indian recent establishing National Judicial Appointments Commission due to the absence of the primacy of the judiciary and predominance of the Executive which contrary to the independence of the judiciary deemed as a basic structure of the constitution not being amended (9 SCOB (2017) 48, Para-49). Despite from the continuous demands from the civil society, Law Commission Suggestion and the Higher Judiciary' Observations in several cases and constitutional convention, no detailed law regarding the qualification, skill, experiences and the process of selection is yet to be passed by the Legislature and the constitutional convention or tradition and the primacy of the judiciary on the issue is not maintained properly which gives rise to questions in the media and among the public as to whether the chief justice actually consulted (Biswas, 2012).

At the same way, in case of appointment of judges of the subordinate court, the President shall appoint judges in accordance as the rules made by him (Bangladesh Constitution, art. 115). In this regard, till 2007, there were no specific laws and rules for the appointment of judges to the subordinate courts or District level courts but in 2007, the then caretaker government enacted four sets of rules for the purpose of the separation of subordinate judicial magistrate courts from the Executive. One of them was related to the procedure of appointment of subordinate judge namely Bangladesh Judicial Service Commission Rules, 2007. Under the Rules, 2007, the Judicial Service Commission was established composed of 11 (eleven) members who are appointed under section 3 of the Bangladesh Judicial Service Commission Rules, 2007, by the President in consultation with the Chief Justice of SCB (Bangladesh Judicial Service Commission Rule 2007, s3). The commission is constituted with a judge of the AD as its chairman, two judges of the HCD, Attorney General, one member of the Law Commission, the Secretary, Ministry of Establishment, the Secretary, Ministry of Finance, the Secretary, Ministry of Law, and Justice, one of the Deans of the Faculty of Law of Dhaka University, Rajshahi University or Chittagong University, Registrar, Bangladesh Supreme Court and the district judge of Dhaka as members of the Commission. The regular

responsibility of the commission is to the selection of candidates for the appointment of judges to the subordinate judiciary.

So, now, Bangladesh Judicial Service Commission Rules, 2007 is followed to appoint subordinate judges by the separate body - Bangladesh Judicial Service Commission - as pursuance of article 115 of the Constitution. Before enacting this rule, the Bangladesh (Judicial) Civil Service Ordinance 1982 (hereinafter BCSO) was followed to appoint judges of the subordinate court which was ultra vires with the constitution where independence of judiciary is intercepted by the executive body. According to the doctrine of separation of power, the appointment of judge should be done by the judiciary or any impartial organ/body where there will be no executive interference but under BCSO the judge was appointed by the executive where magistrates (executive) were also appointed by the same body. And overall, it was totally contradictory with the constitution under article 115. It is apt to state that the present appointment rule for subordinate Judges is the consequence of famous case- *Secretary, Ministry of Finance v Masdar Hossain and others* 52 DLR (AD) 82 which is popularly known as Masdar Hossain case.

Lessons from India, and UK: Proposals upon Appointment Process in the Higher Judiciary of BD

In UK, with an aim to select a best suitable candidate for the appointment to the higher judiciary a very rigorous process, and practice is followed in making recommendation for a candidate through verification and investigation in pursuance of constitutional provisions, existing laws and conventions; a best meritorious, experienced in practice and skilled candidate is recommended from the report of the Selection Commission for the higher judiciary by the Lord Chancellor under the Constitution Reform Act, 2005—the recommendation report is sent to the Prime Minister for the further initiatives where if he is agreed with the report to be send to the King His Majesty approval. In India, there are constitutional provisions for mandatory consultation with Chief Justice of India, Chief Justice of State and state government for the appointment of a best candidate to the High Court whereas regarding the appointment of chief justice, it is conferred to the President exclusively. Later, by the judicial precedents, the doctrine of collegium consisting of five members- Chief justice of India and the senior most four judges of the higher judiciary was established for the purpose of recommending a best candidate as judge for the appointment to the higher judiciary by which the primacy of the Judiciary was established for the purpose of ensuring independence of judiciary; though the Government of India enacted an Act for establishing the National Judicial Appointments Commission which was also declared by the Court as void due to the absence of the primacy of the Judiciary and predominance of the Executive in the Commission which was deemed to affect the independence of the Judiciary- the basic structure of the Indian Constitution. Currently, the

Appointment of Judges in the Higher Judiciary

Collegium actively works to select a best candidate for recommending as a judge to the President. There the government did not violate the principle of seniority except few cases in the history what was very common to Bangladesh judiciary. It is apt to state here that in the UK and India, no compromise is generally made regarding the selection of best meritorious and experienced candidates in practice. On the contrary, in Bangladesh there is no details rules and laws stating the qualifications, experiences and skills of the candidates and selection process for recommending judges to the higher judiciary despite there is continuous urge from civil society, Law Commission and the directions from the higher Judiciary on the issue; under these circumstances, here the Executive always wants to appoint very loyal candidates to the higher judiciary on political consideration for sake of their own interest and benefit where the seniority principle is often violated, merit and experience in practice are not getting priority; though after the 15th amendment of the Constitution the President shall appoint judges to the HCD after consultation with the Chief Justice and in the appointment of the Chief Justice, the President has exclusive power, though the people believe that he cannot do nothing without advice of the Prime Minister or the executive which is contrary to the separation of the judiciary and the independence of the judiciary-both -declared basic structures and constitutional mandates (Bangladesh Constitution, arts. 7, 22, 26, 94(4) and 116A) in the several leading cases (*Anwar Hossain Chowdhury v Bangladesh*, 1989; *Secretary, Ministry of Finance v Masder Hossain and others*, 2000; *The State v Chief Editor, Manabjamin*, 2005; *Abdul Mannan Khan v Bangladesh*, 2012; *AKM Shafiuddin v Bangladesh*, 2012). From the comparative lessons, it can rightly be said that there is no alternative of details rules and law for the selection of best candidate for the appointment of judges to the higher judiciary in Bangladesh for ensuring and maintaining the independence of judiciary where the ‘merit’ and ‘integrity’ must be considered as prime criteria as Justice Kuldeep Singh of the Supreme Court of India stated “...the independence, efficiency and integrity of the judiciary can only be maintained by selecting the best persons in accordance with the procedure provided under the Constitution. These objectives cannot be achieved unless the functionaries accountable for making appointments act with meticulous care and utmost responsibility.” Another aim of the particular law in detail for the appointment of judges in Bangladesh is to maintain transparency as in Bangladesh, in spite of being democratic country the practice of democracy is very poor because of spreading corruption in every corner of the State (The Daily Star, 2018) even in judiciary also where a news covered by famous daily English newspaper stating that “When there is corruption at all layers across the country, judiciary is not a separate island where there is no corruption and everyone here is an angel,” the Chief Justice said (The Daily Star, 2016) whereas though in UK or India, the State Head or the President appoints judges to the Judiciary, the whole proceeding, selection, rejection, investigation,

interview etc. are executed through parliamentary procedure, committee, commission or Collegium where there is very little chance to hamper or intervene grossly the independence of judiciary because of their well practice of democracy. In the proposed particular law for the appointment of judges to the higher judiciary of Bangladesh, the primacy of the judiciary is to be ensured otherwise it will affect the separation and independence of judiciary and in that law, the selection process and criteria are to be incorporated according to the guidelines of the case of *Raghib Rauf Chowdhury v. Bangladesh & ors*, 9 SCOB (2017) 34; under that law a Higher Judiciary Appointment Commission may be established for the selection of the best candidate for the appointment of judges to the HCD and preparing a recommendation report to the President; such Commission may consist of the following members:

- ✓ Chief Justice of Bangladesh;
- ✓ Two Senior Most Judges of Appellate Division;
- ✓ One Most Senior Judge of High Court Division;
- ✓ Attorney General of Bangladesh;
- ✓ One most prominent senior advocate of the Supreme Court of Bangladesh.
- ✓ One most Senior law academician of the country

Under that deemed particular law, there may be a committee of five members for the selection of candidates for AD and for the post of future Chief justice:

- ✓ Chief Justice of Bangladesh;
- ✓ Two Senior Most Judges of Appellate Division;
- ✓ Attorney General of Bangladesh;
- ✓ One most senior prominent advocate of the Supreme Court of Bangladesh.

In the same way, under that proposed particular law, there may be a committee of four members for the selection of alternative two probable suitable candidates and prepare a report of recommendation for the post of future Chief justice:

- ✓ Chief Justice of Bangladesh;
- ✓ Immediate Retired Chief Justice
- ✓ Attorney General of Bangladesh;
- ✓ One most senior prominent advocate of the Supreme Court of Bangladesh.

Appointment of Judges in the Higher Judiciary

In all three cases, the Chief Justice of Bangladesh shall be the head of the Commission or Committee; the list of selected candidate will be finalized for the recommendation on the basis of the consent of majority but if the members of the Commission or Committee are equally divided, the opinion of the current Chief Justice will get priority. The seniority principle may not be considered in case of appointment to the AD or the Post of Chief justice if any probable candidate (most senior candidate) has any past bad record and professional inefficiency. The government should pass such law by focusing the primacy of the judiciary for ensuring separation of power among three organs, transparency in the appointment of higher judiciary for selecting a best candidate for the independence of judiciary and establishing the rule of law in the country.

Conclusion

The concept of judicial independence depends upon the status, ways of working of the judiciary and appointment as well as removal procedure (Bingham, 2000 cited by Bell, 2006). In this paper, the author tries to focus the present status of UK, India and Bangladesh in appointment of judges special reference to higher judiciary. In this regard, first, the general principles in appointment of judges are briefly illustrated with the reference of international treaties and conventions and regulations where most of the international instruments and jurists mandate to follow the principles of merit, non-discrimination and but not to follow the principles of political consideration because political consideration may undermine the public confidence upon the judiciary (Vieira& Gross, 1998). Then, the appointment procedures of judges to the judiciary particularly to the higher judiciary in UK, India and Bangladesh respectively are discussed and under the lessons on the issue from other three countries and considering the guidelines of the higher judiciary of Bangladesh, a particular law is proposed to be passed where the primacy of the judiciary is focused and it has been argued for detail rules regarding selection process, academic qualification, experiences, establishment of Higher Judiciary Appointment Commission, Committee along with their composition and functions to ensure the transparency in the appointment, selection best meritorious and integrated candidates with an aim to ensure the separation and independence of judiciary for establishing the rule of law and democracy of the country.

References

- Akkas, S., A., (2004). *Independence and Accountability of Judiciary: A Critical Review*, 1st Edition. Centre for Rights and Governance. Dhaka, 2004. p. 109., p.111
- Anwar Hossain Chowdhury v Bangladesh* 1989 BLD (Spl) 1(8th Amendment Case); *Secretary, Ministry of Finance v Masder Hossain and others* 20 BLD (AD) 141; *The State v Chief Editor, Manabjamine*, [2005] 57 DLR (HCD) 359; *Abdul Mannan Khan v Bangladesh* [2012] 64 DLR 169; *AKM Shafiuddin v Bangladesh* [2012] 64 DLR 508; 16th Amendment case (Civil Appeal No.06 of 2017) <http://www.supremecourt.gov.bd/resources/documents/1082040_C.A.6of17.pdf> accessed 31 August 2018; and Mobile Court Case 2017 (writ no. 8437 & 10482 of 2011, and 4879 of 2012)<www.supremecourt.gov.bd/resources/documents/382548_WP8437of2011.pdf>
- Appleby, G. (2014, Dec. 9). Appointing Australia's highest judges deserves proper scrutiny. *The Conversation*. Retrieved from <https://theconversation.com/appointing-australias-highest-judges-deserves-proper-scrutiny-35039>
- Anon (2018). *Justice Syed Mahmud Hossain takes oath as cj*. The Daily Star. available at: <https://www.thedailystar.net/frontpage/syed-mahmud-hossain-takes-oath-cj-1529488>.
- Anon (2018). *Bangladesh improves 2 notches in graft index*, Daily Star 22 February. available at <https://www.thedailystar.net/country/bangladesh-bd-improves-2-notches-corruption-perceptions-index-2017-all-over-the-world-transparency-international-bangladesh-1538449>
- Anon(2016). *Everyone not angels in Judiciary: CJ*. Daily Star, 2 April 2016. available at <https://www.thedailystar.net/city/everyone-not-angels-judiciary-cj-1203172>
- Bari, M. E. (2016). *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*. Deakin Law School Legal Studies, Deakin University, Australia. Vol. 18: 33. Retrieved from <https://ssrn.com/abstract=2920380>
- Biswas, Dr. Zahidul Islam (2012). 'Do We Have an Independent Judiciary?' 6 (9) *Forum the Daily Star* (Dhaka, September, 2012) <<https://works.bepress.com/zahid/8/download/>> .
- Chowdhury, A. Z. (2012, April). Politics of Judicial Appointment. *FORUM, A Monthly Publication of The Daily Star*. Vol.6. Issue 04. Retrieved from <https://archive.thedailystar.net/forum/2012/April/judicial.htm>
- Deep, Dr. Anurag and Misra, Shambhavi (2018). '*Judicial Appointment in India and the NJAC Judgment: Formal Victory of Real Defeat*', 3 JLL.
- Huda, Muhammad Nurul (2017). 'Independent Judiciary a must for democracy'. *The Daily Star* (Dhaka, 27 March 2017)

Appointment of Judges in the Higher Judiciary

<<https://www.thedailystar.net/opinion/straight-line/independent-judiciary-must-democracy-1381690>>

Mashraf, A. (2016, Nov.15). Appointment of the SC Judges. *The Daily Star*. Retrieved from <https://www.thedailystar.net/law-our-rights/appointment-the-sc-judges-1314727>

Mollah, M. A. H. (2012). Independence of judiciary in Bangladesh: An overview. *International Journal of Law and Management, International Journal of Law and Management*. Vol. 54 No. 1, pp. 65. Retrieved from <https://www.researchgate.net/publication/279340689> Independence of judiciary in Bangladesh An overview

Raghib Rauf Chowdhury v. Bangladesh & ors, 9 SCOB (2017) 42, Para-26, see also *Md. Shamsul Huda & others v. Bangladesh and others* reported in 17 BLT (HCD) 2009 page-109

Singh, D. K. and Singh, Amit (2017). Appointment of Judges and Overview of Collegium System in India: A Need to Reform. *International Journal of Advanced Research (IJAR)*.

Shawon, T. H. and Osman, K. A. (201&). The Judiciary in Bangladesh: A Bastion for Rights, An Institution Facing Challenges. *South Asia Judicial Barometer*. pp.119 – 168.

The Supreme Court of the United Kingdom (2016). *Appointment of Justice: Procedure for Appointing a Justice of the Supreme Court of the United Kingdom*. Retrieved from <https://www.supremecourt.uk/docs/appointments-of-justices.pdf>

Tiwari, Neeraj (2010). Appointment of Judges in Higher Judiciary: An Interpretational Riddle. Retrieved from <https://ssrn.com/abstract=1485395> or <http://dx.doi.org/10.2139/ssrn.1485395>

T. Bingham, *The Business of Judging (Oxford 2000)*, p. 55. [cited in Bell, John, *Judiciaries within Europe: A Comparative Review*, Cambridge University Press, Cambridge, New York, (2006), p. 382, available at www.cambridge.org/9780521860727

Vieira, Norman & Gross, Leonard, *Supreme Court Appointments: Judge Bork and the Politicization of Senate Confirmations*, Southern Illinois University Press, (1998), P. 251.

Yasin, Muhammad (2008). ‘No law yet to SC Judges’. *The Independent*, March 30, 2008, Available at: <http://www.theindependentbd.com/printversion/details/143559>