

# **Establishment of Judicial Commissions in Malaysia and Bangladesh to Strengthen the Constitutional Process of Appointment of Judges of the Higher Judiciary: A Comparative Study**

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## **Abstract**

In order to strengthen the constitutional process of appointment of judges in Superior Courts, Malaysia by enacting an Act in 2009 established the Judicial Appointments Commission and Bangladesh established a Supreme Judicial Commission in 2008 by promulgating an Ordinance. This Act/Ordinance was neither passed/promulgated in pursuance of any provisions of the Constitution nor by introducing any amendment to the provisions of the Constitution. The recommendations of the both the Commissions were not given binding force on the executive. The power of the executive to accept or reject the candidates recommended by the Judicial Appointments Commission/Supreme Judicial Commission at his pleasure defeats the very objective of establishing the Commission for appointing the most competent and suitable persons as judges of the superior courts in Malaysia and Bangladesh.

## **I. Introduction**

Despite the fact that the question of performing judicial functions independently by judges comes after their appointment, the method of appointment of judges is the crucial and dominant factor to ensure their substantive independence, the independence which means the independence of judges to arrive at their decisions in accordance with their oath of office without submitting to any kind of pressures- internal and external- but only to their own sense of justice and the dictates of law. For, the appointment of a judge on account of political allegiance in utter disregard to the questions of his qualifications, merit, ability, competency, integrity and earlier performance as an advocate or judicial officer may bring in, to use the words of President Roosevelt, “Spineless” Judges who can hardly be expected to dispense justice independently according to law and their own sense of justice without regard whatsoever to the wishes and desire of the government of the day. There is a great possibility that such a judge may remain “indebted to those responsible for his designation... the beneficiary is exposed to the human temptation to repay his debt by a pliable conduct of his office”<sup>1</sup> especially when the executive itself is

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<sup>1</sup> Karl Loewenstein, *Political Power and the Governmental Process* (University of Chicago Press, 1957), at page 231.

the largest single litigant before the courts. As H. J. Laski aptly said, '[i]t is not necessary to suggest that there will be conscious unfairness; but it is ...possible that such judges will, particularly in cases where the liberty of the subject is concerned, find themselves unconsciously biased through over-appreciation of executive difficulty.'<sup>2</sup>

Of the four methods of appointment of judges<sup>3</sup>, appointment by the head of the state is followed in most of the countries of the world, particularly in most of the common law countries, with striking variations, regarding consulting, recommending or confirming entities. As common law countries, Malaysia and Bangladesh have adopted the method of appointing judges of superior courts by the Head of the State involving the scope for intrusion of politics in the selection process.

The prime objective of this paper is to examine as to what extent the establishment of the Judicial Appointments Commission/ the Supreme Judicial Commission in Malaysia and Bangladesh respectively through enactment of an Act/promulgation of an Ordinance has strengthened the constitutional process of appointment in both the countries. The constitutionality of the relevant Act/Ordinance shall also be examined. Furthermore, the independence of the Malaysian Judicial Appointments Commission shall be considered.

## II. Constitutional Process of Appointment of Judges of the Superior Courts in Malaysia

The original provisions of the Constitution of the Federation of Malaya, 1957, concerning the method of appointment of judges of the superior courts have been amended first by the Constitution (Amendment) Act, 1960 and then by the Constitution (Amendment) Act, 1963. The existing procedure for the appointment of judges of superior courts in Malaysia resembled the British practice obtaining prior to the enactment of the Constitutional Reform Act, 2005.<sup>4</sup> The Constitutional head of Malaysia is circumscribed to exercise his power of appointing the heads and other judges of the three courts- the Federal Court, the Court of Appeal and the two High Courts- on the advice of the Prime Minister. The Prime Minister is always required to consult before giving his advise to the Head of the State, the Conference of Rulers<sup>5</sup> and in respect of the appointment of the judges of three superior courts, the respective heads of the courts i.e. the Chief Justice of the Federal Court, the President of the Court of Appeal and the Chief Judge of the High Court concerned.<sup>6</sup> Furthermore, in appointing the judges of the High Court in Sabah and Sarawak<sup>7</sup> the Head of the State is obligated to consult the Chief Minister of each of the two states.<sup>8</sup> It should be stressed here that each of the functionaries has a distinct and valuable role to play:

<sup>2</sup> H. J. Laski, *Studies in Law and Politics* (Transaction Publishers, 2009), at page 170.

<sup>3</sup> The four methods of appointment of judges are: 1) appointment by the executive, 2) election by the legislative, 3) election by the people, and 4) appointment by the judicial service commission.

<sup>4</sup> See O Hood Phillips and Jackson, *Constitutional and Administrative Law* (Sweet and Maxwell, 2001), at page 431; R.M. Jackson, *The Machinery of Justice in England* (Cambridge University Press, 1960), at page 232.

<sup>5</sup> The Federal Constitution of Malaysia, 1963, Art 122B(1).

<sup>6</sup> *Ibid.* Art 122B(4).

<sup>7</sup> Sabah and Sarawak are two Malaysian States on the island of Borneo.

<sup>8</sup> *Supra* note 5, Art 122B(3).

the Conference of Rulers as to the antecedents of the candidates and heads of the three superior courts as to the legal suitability of candidates for appointment. However, after consultation with the constitutional functionaries, the final word in respect of the sensitive subject of the appointment of judges of superior courts belongs to the Prime Minister on whose advice the head of the state is obliged to make the judicial appointment. Thus it appears that there is a scope of considering those with the right political patronage and right beliefs as the most suitable for appointment.

### III. Judicial Appointments Commission Act, 2009

#### A. *Background of Enacting the Act*

The 1988 judicial crisis, which is an unprecedented upheaval and turmoil in the Malaysian Judiciary, witnessed the unceremonious dismissal of the then Lord President<sup>9</sup> and two Supreme Court Judges<sup>10</sup> and their vacant posts were filled in allegedly with the favourites of the regime. For example, the then Chief Justice of Malaya and acting Lord President of the Supreme Court Abdul Hamid Omar, who chaired the First Tribunal that recommended the removal of Tun Salleh Abbas as Lord President, was appointed as the Lord President to succeed Tun Salleh Abbas on 10 November 1988 and Tun Eusoff Chin, who chaired the Second Tribunal which injudiciously recommended the removal of two of the five Judges of the then Supreme Court, was first appointed as the Chief Justice of the High Court of Malaya on 21 May 1994 and eventually as the Chief Justice of Malaysia on 23 September of the same year (and remained in that office till December 2000).<sup>11</sup> Both the justices, particularly Tun Eusoff Chin, were confronted with grave allegations<sup>12</sup> during their terms of office which had the dreadful impact of eroding the public confidence in impartiality and independence of the Malaysian Judiciary.<sup>13</sup> These kinds of improprieties in the state of affairs of the judiciary had the effect of seriously undermining and eroding the integrity and impartiality of the judges to such an extent that a reputed former Chief Justice, Tun Mohamed Suffian, deplored: “When I am asked what I thought, my usual reply is that I wouldn’t like to be tried by today’s judges especially if I am innocent.”<sup>14</sup> The Human Rights Commission of Malaysia, which was set up on 20 April 2000, recommended in 2005 for the establishment of an independent Judicial Appointments Commission to ensure transparency in the appointment process and enhance public confidence in the

<sup>9</sup> Tun Salleh Abbas.

<sup>10</sup> Tan Sri Wan Suleiman and Datuk George Seah.

<sup>11</sup> Datuk George Seah, “Crisis in the Judiciary- Part 4 & 5, the Suspension of the Supreme Court”, *INFOLINE*, 1 May 2004, at pages 46-49.

<sup>12</sup> For details of these allegations see Wu Min Aun, “The Malaysian Judiciary: Erosion of Confidence”, (1999) 1(2) *Australian Journal of Asian Law* 124. *New Strait Times*, 30 May 2000. Roger Mitton, “A Flurry of Questions about Malaysian Justice”, *Asiaweek*, July 1996.

<sup>13</sup> See Wu Min Aun, “The Malaysian Judiciary: Erosion of Confidence”, (1999) 1(2) *Australian Journal of Asian Law* 124 and *New Strait Times*, 30 May 2000.

<sup>14</sup> Centre for Public Policy Studies (CPPS), Policy Factsheet: Judiciary, available at < <http://www.cpps.org.my/downloads/factsheets/Judiciary%20factsheet.pdf>> (visited 2 February 2010).

judiciary.<sup>15</sup> But the proposal for the formation of such a Commission received a hostile and unfavourable response from a person none other than the Chief Justice of Malaysia, Tun Dato Seri Ahmad Fairuz Bin Dato Sheikh Abdul Halim (who became CJ in 2003), first in November 2005 in an International Conference held in Philippines<sup>16</sup> and then in an interview with the New Straits Times in February 2007 in Kota Baru after chairing a meeting with the Kelantan Judges.<sup>17</sup> The reasons for this antagonistic attitude of the Chief Justice towards the establishment of a Commission became distinct and crystal clear on 19 September 2007 when a video clip, recorded in 2002, showing senior lawyer V.K. Lingam's telephonic conversation with the then Chief Judge of Malaya (the Judiciary's third ranked post) Ahmad Fairuz Sheikh Abdul Halim on the urgency to get the latter appointed to the position of the President of the Court of Appeal (second in rank) and then the Chief Justice of Malaysia- the highest judicial post in the country- was made public by the People's Justice Party. The fact that the incumbent Chief Justice had been an overt beneficiary of the prevailing system of appointment was substantiated in the Report of the Royal Commission of Enquiry submitted to the *Yang di-Pertuan Agong* on 9 May 2008.<sup>18</sup> Perhaps taking into account the seriousness of the matter and its far-reaching implications on the judiciary, the then Prime Minister *Datuk* Seri Abdullah Ahmad Badawi in April 2008, one month before the submission of Report by the Royal Commission of Enquiry's on the V.K. Lingam affair, announced the decision of the Government to set up a Judicial Appointments Commission.<sup>19</sup> In order to ensure transparency in the method of judicial appointment to the superior courts, much expected Judicial Appointments Commission Bill was placed before the Parliament on 10 December 2008. The passing of the Bill by the House of Representatives within eight days of its initiation and approval by the Senate within two days of its introduction demonstrate that the Bill, concerning the establishment of an important body to ensure transparency in the judicial appointments, was not passed after adequate deliberation, thoughtful debate or meaningful discussion to maximize reasons and minimize the defects of the Bill. The Judicial Appointments

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<sup>15</sup> Report for the Universal Periodic Review on Malaysia, 4<sup>th</sup> Session, February 2009, from the Human Rights Commission of Malaysia, p 13.

<sup>16</sup> Honourable Tun Dato Sri Ahmad Fairuz Bin Dato Sheikh Abdul Halim, 'Judicial Independence, Accountability, Integrity and Competence- Some Aspects of the Malaysian Position', presented during the International Conference and Showcase on Judicial Reforms held at the Shangri-La Hotel, Makati City, Philippines from 28-30 November 2005.

<sup>17</sup> *New Straits Times*, 21 February 2007; Lim Kit Siang, "CJ Fairuz's poor taste in equating Judicial Appointments Commission to 'nudity'", 22 February 2007, available at <[http://www.malaysianbar.org.my/general\\_opinions/comments/cj\\_fairuzs\\_poor\\_taste\\_in\\_equating\\_judicial\\_appointments\\_commission\\_to\\_nudity.html](http://www.malaysianbar.org.my/general_opinions/comments/cj_fairuzs_poor_taste_in_equating_judicial_appointments_commission_to_nudity.html)> (visited 10 November 2010).

<sup>18</sup> The Royal Commission of Enquiry on the Video Clip Recording of Images of a Person Purported to be an Advocate and Solicitor Speaking on the Telephone on Matters Regarding the Appointment of Judges (2008) Report, Vol.1, pp 75-76. The Commission found evidence that several individuals, including the former Prime Minister and two former Chief Justices, were involved in the fixing of judicial appointments and judicial decisions. Other judges accepted gifts and bribes from Lingam and other key individuals. Shockingly, in one case, a judge's judgment was completely written by Lingam himself, who was a counsel for the plaintiff, Vincent Tan.

<sup>19</sup> Cabinet approves Judicial Appointments Commission, available at <[http://www.themalaysiainsider.com/index.php/malaysia/12957\\_cabinet\\_approves\\_judicial\\_appointments\\_commission](http://www.themalaysiainsider.com/index.php/malaysia/12957_cabinet_approves_judicial_appointments_commission)> (visited 10 November 2009).

Commission Act, 2009 which came into force on 2 February 2009<sup>20</sup> provides, *inter alia*, “for the establishment of the Judicial Appointments Commission in relation to the appointment of judges of the superior courts....”<sup>21</sup>

### ***B. Composition of the Commission***

The Judicial Appointments Commission Act, 2009 provides for the establishment of a nine-member Judicial Appointments Commission to be comprised of two types of members: *ex-officio* and *non ex-officio*.<sup>22</sup> The number of *ex-officio* members from the three superior courts- the Chief Justice of the Federal Court, the President of the Court of Appeal, the Chief Judge of the High Court in Malaya and the Chief Judge of the High Court in Sabah and Sarawak- is four, whereas the number of *non ex-officio* members is five to be appointed by the Prime Minister. Of the five *non ex-officio* members, one is to be a judge of the Federal Court to be appointed by the Prime Minister at his sole discretion without consulting any relevant person or authority while other four *non ex-officio* members are to be ‘eminent persons’, not being ‘members of the executive or other public service’, who are to be appointed by the Prime Minister after consultation, not concurrence, with various stakeholders in the administration of justice, namely, (i) the Bar Council of Malaysia, the Sabah Law Association, the Advocates Association of Sarawak, the Attorney General of the Federation, the Attorney General of a State legal service or any other relevant bodies.<sup>23</sup> Thus the Prime Minister appoints the majority of the members of the Commission- five out of nine- and in doing so he is more likely to be swayed by political allegiance of the persons concerned. This leaves the door wide open for selecting candidates by the Judicial Appointments Commission in deference to the Prime Minister’s covert wishes for vacancies in the superior courts and, as such, the very purpose of setting up of the Commission, independent of the Prime Minister, for a fair, independent and impartial selection tends to be defeated. The position may eventually go from bad to worse if the Prime Minister exercises, under the Act, the power of appointing “any person he deems fit to fill the vacancy ... created [out of death, conviction, bankruptcy, insanity, resignation, absence from three consecutive meetings of the Commission without leave of the Prime Minister] for the remainder of the term vacated by the member or for the interim period until a new person is appointed to the office or the position held by that member prior to his vacating the office or position.”<sup>24</sup> It seems that in order to exclude political bias in filling casual vacancy in the Commission, the Chairman of the Judicial Appointments Commission should have been given the power (of filling in casual vacancy in the Commission) as the Chief Justice of Namibia has been empowered by the Constitution to fill in any casual vacancy in the Judicial Service Commission.<sup>25</sup>

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<sup>20</sup> P. U. (B) 43/2009.

<sup>21</sup> The Judicial Appointments Commission Act, 2009, s 1(3).

<sup>22</sup> *Ibid.* s 5(1).

<sup>23</sup> *Ibid.*

<sup>24</sup> *Ibid.* s 10(2).

<sup>25</sup> The Constitution of Namibia, 1990, in Art 85(4) provides that “Any casual vacancy in the Judicial Service Commission may be filled by the Chief Justice or in his or her absence by the Judge appointed by the President.”

### C. *Selection Criteria*

A candidate is qualified for selection as a judge of the High Court, if he fulfils the requirements (i.e. citizenship, ten years experience as an advocate of the High Courts or as a member of the judicial and legal service of the Federation or of the legal service of a state) laid down in Article 123 of the Federal Constitution.<sup>26</sup> The Judicial Appointments Commission Act, though not required by the Constitution, has spelled out certain criteria to take into account by the Commission in selecting candidates for appointment.<sup>27</sup>

The enumeration of certain important criteria of honesty, fairness, good health, strong achievement, aptitude, knowledge and the ability to write judgments in time is a positive development in line with the modern trend of specifying certain benchmarks to be found in some of the constitutions of the world for selecting in a holistic manner the best candidates as judges. For example, the Constitution of the Islamic Republic of Comoros provides that the members of the Supreme Court shall be chosen on the basis of their competence, their integrity and their knowledge of law.<sup>28</sup> Jurist like Chief Justice Dickson (of Canada) also looks for in a good judge the five qualities of: integrity, equanimity, legal knowledge, patience and common sense.<sup>29</sup>

However, a serving judge or judicial commissioner must be disqualified for appointment if he has three or more pending judgments or unwritten grounds of judgments that are overdue by sixty days or more from the date they are deemed to be due.<sup>30</sup> Such a provision is also to be found in the 1994 Code of Ethics, adopted by the *Yang di-Pertuan Agong* on the recommendation of the Chief Justice of the Federal Court, the President of the Court of Appeal and the Chief Judges of the High Court, after consulting the Prime Minister in pursuance of the Constitution (Amendment) Act, 1994, which provides that judges should not inordinately and without reasonable explanation delay in the disposal of cases, the delivery of decisions and the writing of grounds of judgments. Despite these provisions, the justification of incorporating similar provisions into the Judicial Appointments Commission Act demonstrates Government's seriousness to address past public criticisms regarding the appointment/promotion of a High Court Judge to the Federal Court in August 2007 "who had not submitted written judgments in 33 cases"<sup>31</sup>, of which in three cases, death sentences were passed against the accused.

### D. *Initiation of the Proposal for Selecting the Candidates*

It is a very rare arrangement that the initiations of the proposals for selecting the candidates for vacancies in the offices of the Chief Justice of Malaysia (i.e. head of the Federal Court), President of the Court of Appeal, Chief Judge of the High Court in Malaya and Chief Judge of the High Court in Sabah and Sarawak have been given to the retiring, not retired, heads of three superior courts respectively- the retiring Chief Justice, the President and Chief Judges- who are, through their long association with the respective

<sup>26</sup> The Federal Constitution of Malaysia, 1963, Art 123.

<sup>27</sup> The Judicial Appointments Commission Act, 2009, s 23(2).

<sup>28</sup> The Constitution of the Islamic Federal Republic of the Comoros, 1978, Art 32(6).

<sup>29</sup> George Sturgess and Phillips Chubb, *Judging the World Law and Politics in the World's Leading Courts* (Butterworths, 1988), at page 148.

<sup>30</sup> Supra note 21, s 23(3).

<sup>31</sup> SUARAM, Overview of the Malaysian Civil and Political Rights (Kuala Lumpur, December 2007), at page 15.

court, conversant and best equipped to assess objectively the attributes of their fellow colleagues for proposing the names of their successors in office.

But the Chief Justice of Malaysia, the head of the Malaysian Judiciary and *paterfamilias* of the judicial fraternity, has also been given, following the constitutional scheme, the role of proposing names to the Commission for selection against the vacancies of the President of the Court of Appeal, and the Chief Judges of the two High Courts. Furthermore, he has been empowered, not only to propose the names against vacancies in the office of the judges of the Federal Court, but also, along with the President of the Court of Appeal, for the vacant posts of judges of the Court of Appeal. For, he is in a better position to know the functional suitability of the candidates in terms of experience or knowledge of law, ability to handle cases, firmness and fearlessness requisite for appointment as the superior court judges for ensuring dispassionate and objective adjudication. It is expected that the incumbent Chief Justice of Malaysia, President of the Court of Appeal and retiring heads of the three superior courts shall not be imperceptibly influenced by extraneous or irrelevant considerations and shall be free from bias, predilection or inclination in proposing names of the suitable candidates for appointment on the bench. Perhaps taking into account the nature and importance of judicial appointment, plurality of sources of proposing competent candidates from outside judiciary has also been provided for. Thus eminent persons having knowledge of the legal profession or achieved distinction in the legal profession have been empowered to propose names for the consideration of the Judicial Appointments Commission in respect of vacancies in the Federal Court and the Court of Appeal. Hence there is the scope for the stalwarts in legal profession to be associated with the selection process for judicial appointment.

### ***E. Selection Procedure***

The transparent process of selection involves two parts, namely the screening of the antecedent or background of the candidates and ascertaining the suitability of the candidates for judicial appointment on the basis of fitness and competence. The initial investigation of potential judicial candidates by the four agencies of (a) Malaysian Anti Corruption Commission, (b) Royal Malaysia Police, (c) Companies Commission of Malaysia, and (d) Department of Insolvency Malaysia to verify their educational qualification, financial position statement, tax payment record and credit history as to arrest and conviction may be compared with the crucial investigation of the prospective judicial candidates done by the US Federal Bureau of Investigation (FBI) on receipt of three names from the Office of Policy Development (OPD) of the Department of Justice (supervised and directed by the Attorney General) after its positive preliminary evaluation.<sup>32</sup> However, the Secretary to the Commission prepares a deliberation paper on each of the candidates, about whom the relevant agencies have given satisfactory and positive reports, for the consideration of selection by the Commission.

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<sup>32</sup> The names of the candidates are also sent to the American Bar Association (ABA) for assessing their qualifications including temperament. The ABA's informal piece of advice to the Department of Justice on the rating of the candidates' states: "well qualified", "qualified" or "not qualified." If the ABA rating is positive, the FBI report is satisfactory and the Department of Justice's evaluation is favourable, then the Attorney General formally recommends the nomination to the President.

### ***F. Consideration of Report by the Prime Minister***

After receiving the report of the Commission as to the selection of the candidates for the appointment to the office concerned containing reasons for selection and necessary information<sup>33</sup>, the Prime Minister may “request” for two more names to be selected and recommended for his consideration with respect to any vacancy to the office of the Chief Justice of the Federal Court, the President of the Court of Appeal, the Chief Judge of the High Court in Malaya, the Chief Judge of the High Court in Sabah and Sarawak, judges of the Federal Court and the Court of Appeal, and the Commission [which maintains reserve candidates for this purpose] shall, as soon as may be practicable, comply with the request in accordance with the selection process as prescribed in the regulations made under this Act.

Thus the Judicial Appointments Commission, which has been given the authority to vet and select the best candidates taking into account the selection criteria as laid down in Article 123 of the Federal Constitution and Section 23 of the Judicial Appointments Commission Act, 2009, requires unjustifiably to propose varying number of minimum candidates: not less than three candidates for each vacancy of the High Court Judge and not less than two persons for each vacancy of the Federal Court Judge and the Court of Appeal Judge. Again the Prime Minister may require the Commission to select and recommend two more names for his consideration, not for an appointment against a vacant post of the High Court, but only for appointment to an office bearer position of the three superior courts- the Chief Justice of the Federal Court, the President of the Court of Appeal, the Chief Judge of the High Court in Malaya and the Chief Judge of the High Court in Sabah and Sarawak- and judges of the Federal Court and the Court of Appeal. The Commission is required to comply with such a request from its reserve candidates as soon as may be practicable. Thus the Prime Minister is empowered to reject the well considered selection of two candidates by the Commission for vacant positions of the office bearers of three superior courts and judges of the Federal Court and the Court of Appeal without any obligation to make his reasons for such a rejection known to the Commission and request for two additional names without assigning any reasons whatsoever. Generally, it is expected that the Commission will recommend the best two suitably candidates available for the first instance against those vacant posts and being requested for two additional names, it shall comply with the request from the ‘reserve candidates’<sup>34</sup> who may be of comparatively less appropriate candidates. The provision for providing the Prime Minister with the multiple choices of four candidates for appointment to the each office bearer position of the Federal Court, the Court of Appeal and two High Courts and each vacant post of judges of the Federal Court and the Court of Appeal is

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<sup>33</sup> Supra note 21, s 26(1).

<sup>34</sup> As Reg 9, the Judicial Appointments Commission (Selection Process and Method of Appointment of Judges of the Superior Courts) Regulations, 2009 provides that “1) In selecting candidates to be recommended for appointment to the superior courts, the Commission shall ensure that reserve candidates are available for purposes of complying with any request that may be made by the Prime Minister under s 27 of the Act. 2) Upon receiving a request from the Prime Minister under s 27 of the Act, the Commission shall submit the names of the reserve candidates and its report under s 26 of the Act.”

incompatible and inconsistent with the very purpose of establishing the Commission as an effective and meaningful selection body.

### ***G. Tender of Advice***

As to the acceptance of the candidates recommended by the Commission for Prime Minister's consideration, the Judicial Appointments Commission Act provides that: "Where the Prime Minister has accepted any of the persons recommended by the Commission, he may proceed to tender his advice in accordance with Article 122B of the Federal Constitution."<sup>35</sup>

Thus it is not explicitly and unequivocally stated that the Prime Minister must accept only those candidates recommended by the Commission for proceeding to tender his advice to the *Yang Di Pertuan Agong* under Article 122B of the Federal Constitution. Because of the using of vague and imprecise words of "where the Prime Minister has accepted any of the persons recommended by the Commission", it appears that the Prime Minister is not bound to recommend to the Head of the State after consulting the Conference of Rulers from among those candidates shortlisted by the Judicial Appointments Commission for appointment in the vacant posts of judges of the Superior Courts. If the Prime Minister is free to accept or reject the recommendation of the Commission, then there is little point and justification in having such a "toothless tiger."

### ***H. Independence of the Commission***

The kernel and success of the Judicial Appointments Commission lie in its independence. The member of the Judicial Appointments Commission is expected to perform their function of selecting and recommending suitable persons for judicial appointment without submitting to their personal likeness or dislikeness and improper influences, inducements or pressures from any quarter except toeing the line with the constitutional and legal criteria and the commands of their conscience. The Commission will only be as independent as the members of which it is composed. The question of independence of the Commission is inextricably linked with, apart from the method of appointment, its members' security of tenure, salaries and other terms and conditions of service.

The conferring on the Prime Minister the power to appoint majority of the members of the Judicial Appointments Commission (five out of nine) is, as it seems, deliberately designed to staff the Commission with pro-Government people to retain his control over the judicial selection and recommendation process. Furthermore, the four out of five appointed (except appointed Federal Court Judge) members of the Commission from the category of "eminent persons" have not been given the security of tenure, the most fundamental of the guarantees of independence of the members of the Commission for enabling them to perform their functions without fear of the consequences regardless of whether their job or actions do not please the Prime Minister or some other person. For, the appointment of any of the four eminent persons as members "may at any time be

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<sup>35</sup> Supra note 21, s 28.

revoked by the Prime Minister without assigning any reason.”<sup>36</sup> Thus the four non ex-officio members of the Commission (indeed eminent persons), who are appointed “for a period of two years and are eligible for reappointment”<sup>37</sup> for another term only, cannot be expected to acquire that habit of independence in discharging their duties without fear or favour requisite in their office if their grounds of removal are not clearly specified and their removal procedure is not made a difficult process involving careful consideration by an independent body other than the Prime Minister.

Furthermore, all the members of the Commission have not been given the security of providing them with adequate allowances and appropriate privileges during their terms of office. For, the “members of the Commission shall be paid such allowances as the Prime Minister may determine”<sup>38</sup> which implies that the Prime Minister has not only given the absolute and unfettered power to determine the amount of allowances for the Commissioners but also to alter the amount of allowances to their disadvantages. Taking these realities into account, the Constitution of the Sovereign Democratic Republic of Fiji, 1990 has aptly vested the power with the Parliament to fix allowances for the members to the Judicial Service Commission.<sup>39</sup>

On top of it, the Judicial Appointments Commission Act contains a very unusual stipulation as to the amendment of its provisions in Section 37. the Parliament, which has passed the Judicial Commissions Act, has been deprived of its inherent power of modifications, including “amendments, alteration and non-application of any provisions of this Act,” to remove the defects of the Act after its coming into force with a view to improve the existing arrangement keeping pace with changing needs of time. The power of modifications has been completely given to the Prime Minister in the two years of the coming into operation of the Act by ministerial order usurping the power of the Parliament.

Therefore, it appears that the provisions of the Judicial Appointments have been carefully crafted to incapacitate the members of the Commission, particularly the members appointed from the category of eminent persons, from performing their functions of selecting and recommending candidates for appointment as judges of the superior courts independently and “to uphold the continued independence of the judiciary” without paying any attentions to the wishes and desires of the Prime Minister.

#### **IV Validity of the Judicial Appointments Commission Act**

The Federal Constitution of Malaysia provides for a detailed procedure in Articles 122B and 122AB for the appointment judges of three superior courts, and appointment of Judicial Commissioners in the High Court in Malaya and the High Court in Sabah and Sarawak respectively by the *Yang di-Pertuan Agong* acting on the advice of, and, after consulting the designated constitutional functionaries. The qualifications for the appointment of judges in the superior courts of the Federal Court, Court of Appeal and of High Courts have been, as stated earlier, outlined in Article 123 of the Constitution.

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<sup>36</sup> *Ibid.* s 9(1).

<sup>37</sup> *Ibid.* s 6(1).

<sup>38</sup> *Ibid.* s 37.

<sup>39</sup> The Constitution of the Sovereign Democratic Republic of Fiji, 1990, Art 131(3).

The Federal Constitution neither contemplates of establishing any Judicial Appointments Commission for selecting candidates for the consideration of the Prime Minister with respect to judicial appointment in superior courts nor does it empower the Parliament to enact law determining the organization, powers and functioning of the Commission, a power which has been given to the Parliament in the Constitution of Algeria, 1989, the Constitution of France, 1958, the Constitution of Italy, 1947, the Constitution of Namibia, 1990, the Constitution of Sudan, 1998 and the Constitution of Rwanda, 2003.<sup>40</sup> The Constitution of Malaysia has also not empowered the Parliament to pass any law prescribing additional qualifications for the appointment of judges of superior courts as it is to be found in Article 95(2) of the 1972 Constitution of Bangladesh.<sup>41</sup> Furthermore, the Constitution has given the Prime Minister unfettered prerogative of exploring any number of candidates for each judicial vacancy. Therefore, it can be strongly argued that the enactment of the Judicial Appointments Commission Act, 2009 providing for the establishment of a Judicial Appointments Commission, prescribing selection criteria and limiting Prime Minister's choice to three candidates for the appointment of judges in the High Courts and ultimately four candidates for appointment as judges of the Federal Court and the Court of Appeal is unconstitutional. For, the Parliament cannot assume a power which has not been conferred on it by the Constitution itself. Furthermore, the establishment of the Judicial Appointments Commission under an ordinary Act of the Parliament consisting of, *inter alia*, the Chief Justice of the Federal Court, the President of the Court of Appeal, the Chief Judge of the High Court in Malaya and the Chief Judge of the High Court in Sabah and Sarawak as ex-officio members, has given rise to an over-lapping exercising of power under the Federal Constitution regarding judicial appointment in superior courts. For, after receiving the names of the candidates recommended by the Commission, the Prime Minister is required under the Constitution to consult again the Chief Justice of the Federal Court before tendering his advice to the *Yang di-Pertuan Agong* for the appointment of all the judges of the superior court (Federal Court), consult the President of the Court of Appeal for the appointment of judges to the Court of Appeal and consult each of the Chief Judges of the two High Courts for appointing puisne judges to the High Court concerned. This will enable the heads of the superior courts, particularly the Chief Justice of Malaysia who is a common consultee in appointing all judges of superior courts, to express their personal impression and point of view for the second time as to the suitability of the candidates having disagreed with the Commission's decision taken in the selection meeting.

In very recent times, the Constitutions of some of the countries of the world, e.g. the Constitution of Pakistan in 2010<sup>42</sup> and the Constitution of the UK in 2005<sup>43</sup>, have been amended to provide for the establishment of an independent body for selection

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<sup>40</sup> The Constitution of Algeria, 1989, Art 155; the Constitution of France, 1958, Art 65; the Constitution of Italy, 1947, Art 105; the Constitution of Sudan, 1998, Art 102(2); and the Constitution of Rwanda, 2003, Art 158.

<sup>41</sup> After laying down the criteria of citizenship and 10 years of experience as an Advocate of the Supreme or Court or holding judicial office for 10 years, Art 95(2)(c) as an alternative requirement speaks of "such other qualifications as may be prescribed by law for appointment as a Judge of the Supreme Court."

<sup>42</sup> Hasan-Askari Rizvi, "Constitutional Amendment and Judicial Appointments", *The Daily Times*, 16 May 2010.

<sup>43</sup> See the Constitutional Reform Act, 2005.

and recommendation of duly qualified persons for appointment of judges in the superior courts in order to ensure that neither political bias nor personal favouritism and animosity play any part in judicial appointment. Therefore, it may be suggested that the Federal Constitution of Malaysia should be amended providing for the establishment of an independent, effective and meaningful body for vetting and selecting best candidates for the consideration of the Prime Minister excluding the present overlapping process which enables the office bearers of the superior courts, to have a “first bite at the cherry” as the ex-officio members of the Commission under the Act and to have a “second bite at the cherry”, while expressing their personal views about the candidates under the Constitutional selection procedure if they disagreed earlier with Commission’s choice.

## V. Constitutional Process of Appointment of Judges of the Superior Courts in Bangladesh

The 1972 Constitution of Bangladesh originally provided that the judges of the Supreme Court “shall be appointed by the President, in consultation with the Chief Justice.”<sup>44</sup> For, the Chief Justice of Bangladesh was in a better position to know about the competence, legal practice, seniority and integrity of the members of the bar and bench. The consultation with the Chief Justice in the selection of other judges was, indeed, a major safeguard against political and expedient appointments. The Chief Justice could reasonably be expected not to be guided by any parochial considerations and, as such, would nominate objectively names of such advocates or judicial officers who would be most suitable for appointment as judges of the Supreme Court. But the Constitution (Fourth Amendment) Act, passed on 25 January 1975, dispensed with President’s obligation to consult the Chief Justice in appointing puisne judges of the Supreme Court. This left the door wide open for the President to measure fitness in terms of political eminence rather than judicial quality. But the first Martial Law Regime of Bangladesh restored on 28 May 1976 the Constitutional provision of consultation with the Chief Justice by the President in making appointment of the judges to the Supreme Court. The President’s obligation to consult the Chief Justice in appointing the judges of the Supreme Court was again dispensed with on 27 November 1977 by the new President and Chief Martial Law Administrator Major General Ziaur Rahman. However, it is claimed that he himself developed the convention of consulting the Chief Justice of Bangladesh in appointing the puisne judges of the Supreme Court.<sup>45</sup> Thus the power to appoint the judges of the Supreme Court is an executive power vested in the President who is duty bound, as a constitutional head, to exercise this power under Article 48(3) “in accordance with the advice of the Prime Minister” after consulting the Chief Justice of Bangladesh.

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<sup>44</sup> The Constitution of the People’s Republic of Bangladesh, 1972, original Art 95(1).

<sup>45</sup> Justice Kemal Uddin Hossain, “Independent Judiciary in Developing Countries” (Speech delivered at the Justice Ibrahim Memorial Lecture Series, University of Dhaka, 1986), at page 45.

## VI. The Supreme Judicial Commission of Bangladesh

### A. Background

Since the number of judges to be appointed in the High Court Division and Appellate Division of the Supreme Court of Bangladesh has been kept indeterminate,<sup>46</sup> it is to be determined by the President on the advice of the Prime Minister. Although the Appellate Division of the Supreme Court has the strength of judges determined by the President from time to time, there is no such strength for the High Court Division fixed by the President. Thus the number of judges varies at the pleasure of the executive. If the President is satisfied that the number of judges of a Division should for the time being be increased then the President may under Article 98 of the Constitution appoint Additional Judges to the said Division for a period of two years. The successive governments have taken advantage of this lacuna to pack the Supreme Court with judges of political allegiance with the hope that they would support their action, omission and legislation if challenged. When the Government of the *Awami* League succeeded the Bangladesh Nationalist Party (BNP) Government in 1996, there were 37 judges in the High Court Division and five judges in the Appellate Division including the Chief Justice of Bangladesh. During their five year rule, the number of judges in the High Court Division was increased from 37 to 56 although the number of judges in the Appellate Division remained the same. The *Awami* League Government altogether appointed 40 additional judges to the High Court Division.<sup>47</sup> In October 2001, the Bangladesh Nationalist Party came to power and next year it raised the number of judges in the Appellate Division from five to seven (on 9 July 2009, President Zillur Rahman raised the number of posts of Judges in the Appellate Division of the Supreme Court from seven to 11 under Article 94(2) of the Constitution<sup>48</sup>). When the BNP Government relinquished power in October 2006 the number of judges in the High Court Division was 72 and it appointed altogether 45 judges.<sup>49</sup> In order to prevent politically motivated appointments that took place allegedly during the previous two regimes and ‘to select and recommend competent persons for appointment as judges of the Supreme Court’,<sup>50</sup> the President Iajuddin Ahmad issued on 16 March 2008 the Supreme Judicial Commission Ordinance providing for the establishment of a Supreme Judicial Commission for selection and recommendation of names to the President for appointment as additional judges and regular judges of the High Court Division and

<sup>46</sup> As Art 94(2) of the Constitution of Bangladesh provides that the Supreme Court shall consist of the Chief Justice, to be known as the Chief Justice of Bangladesh, and such number of other Judges as the President may deem it necessary to appoint to each division.

<sup>47</sup> Staff Correspondent, “HC verdict on judges’ appointment stayed for three weeks”, *New Age*, 30 July 2008, available at < <http://newagebd.com/2008/jul/30/front.html#12>> (visited 10 December 2010).

<sup>48</sup> Ashutosh Sarkar, “Appellate Division: Number of posts of judges raised to 11”, *The Daily Star*, 10 July 2009, available at < <http://www.thedailystar.net/story.php?nid=96265>> (visited 10 December 2010).

<sup>49</sup> Staff Correspondent, “10 new HC judges to be appointed”, 31 October 2008, available at < <http://www.thedailystar.net/newDesign/news-details.php?nid=61184>> (visited 10 December 2010). After 2004, the B.N.P Government did not appoint any additional judges to the High Court Division.

<sup>50</sup> First preambular para to the Supreme Judicial Commission Ordinance, 2008.

judges of the Appellate Division of the Supreme Court. The Ordinance was issued during the regime of the Non-Party Care-taker Government (consisting of the Chief Advisor and ten other nominated Advisors) which is an interim government established within 15 days of dissolution of the Parliament<sup>51</sup> having only the mandate to carry on ordinarily the routine functions of the government and is destined to “give to Election Commission all possible aid and assistance for holding the general elections of members of parliament peacefully, fairly and impartially.”<sup>52</sup>

### **B. Composition of the Supreme Judicial Commission**

The original Supreme Judicial Commission Ordinance, 2008, issued in March 2008, provided that the Commission would consist of nine members with the Chief Justice as its Chairman and the Minister of Law, Justice and Parliamentary Affairs, two senior most judges of the Appellate Division, Attorney General, two Members of Parliament- one should be nominated by the Leader of the House and the other by the Leader of the Opposition in Parliament, President of the Supreme Court Bar Association and Secretary, Ministry of Law, Justice and Parliamentary Affairs as the members of the Commission.<sup>53</sup> Thus among the members of the Commission the six non-judicial members constituted the majority. Since the Commission was established for a cautious, professional and non-political search for the best persons for the judgeship of the Supreme Court, based on first-hand knowledge about each of the candidate’s keen intellect, legal acumen, integrity and suitability of character and temperament as an advocate and a judicial officer, the provisions for inclusion into it two members of a political body like the Parliament, and a Minister (a politician) and the Secretary (a loyal civil servant) of the Ministry of Law, Justice and Parliamentary Affairs as its members could hardly serve the purpose of selecting and recommending for appointment as judges of the Supreme Court the best potential candidate for maintaining the quality of the Bench. Although both the President of the Supreme Court Bar Association and the Attorney General (principal and Constitutional Law Officer of the Government) are pre-eminently suited to evaluate the advocates of the Supreme Court for appointment as judges, their inclusion into the Commission might not be conducive to check patronage appointment. For, they are under the distressing influence of either party in power or opposition political parties and, as such, are highly politically charged. Furthermore, out of the nine members of the Commission, the provision for including only three judges of the Supreme Court- the Chief Justice and two senior most judges of the Appellate Division- into the Commission evinced the domination of six non-judicial members in the selection process. Since the composition of the Supreme Judicial Commission was diluted, the purpose of establishing the Commission for selecting and recommending the most qualified and appropriate persons for appointment as judges of the Supreme Court was destined to be frustrated.

But only three months after the promulgation of the Ordinance, on 16 June 2008, the Supreme Judicial Commission (Amendment) Ordinance, 2008 was issued to introduce

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<sup>51</sup> The Constitution of the People’s Republic of Bangladesh, 1972, Art 58C(2).

<sup>52</sup> *Ibid.* Art 58D (2).

<sup>53</sup> The Supreme Judicial Commission Ordinance, 2008, s 3(2).

changes in the composition of the Commission by which the provision of appointing two members of Parliament (one from the ruling party and other from the opposition) and the Secretary of the Ministry of Law as the Commission's members were deleted and provision was made to include two senior most judges of the High Court Division of the Supreme Court as the members of the Commission. Thus under the new arrangement, the Commission would consist of the Chief Justice as its ex-officio Chairman and the Minister of Law, three senior most judges of the Appellate Division (previously it was two), two senior most judges of the High Court Division, the Attorney General and the President of the Supreme Court Bar Association, altogether eight, as the ex-officio members.

Thus unlike Malaysia, the Prime Minister or President of Bangladesh was not given any authority to appoint any imminent person, jurist or supreme court judge, close to the regime, as members of the Commission. It is noticeable that the majority of the members of the Commission- six out of nine- are ex-officio members of the Commission from the Judges of the High Court Division and Appellate Division of the Supreme Court. Thus the majority judicial members having expert knowledge about the candidate's acumen and suitability dominate the selection process of judges for appointment to the highest judicial office. The other three members- the Law Minister, the Attorney General and the President of the Supreme Court Bar Association (if the Bar President has political allegiance to the party in power)- could make an abortive attempt in the meeting of the Commission in deference to the wishes of the Prime Minister/President for filling in the vacancies in the Supreme Court. However, the inclusion of the two senior most judges of the High Court Division into the Supreme Judicial Commission may be considered as a positive development in the sense that the large number of lawyers appear before them and only a small fraction of the lawyers having a good length of practice and better reputation and standing (generally not interested to become a judge) appear before the Appellate Division of the Supreme Court.

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

### **C. Selection Process**

Unlike the Judicial Appointments Commission of Malaysia, the Supreme Judicial Commission of Bangladesh was not given any discretion to advertise in the Commission's website or in any other medium the Commission deems appropriate, to fill in any vacancy in the office of a judge of the Supreme Court. Thus any citizen having the experience of practising before the Supreme Court for a period not less than 10 years or a judicial officer having not less than ten years experience could not apply directly for selection as a judge of the High Court Division of the Supreme Court. The Commission was required to consider the names of the candidates proposed by the Law, Justice and Parliamentary Affairs Ministry.<sup>54</sup> The Law Ministry could propose minimum three and maximum five names for each vacancy to the Commission for its consideration to recommend for

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<sup>54</sup> *Ibid.* s 6(1).

appointment by the President as additional judges and judges of the High Court Division and the judges of the Appellate Division.<sup>55</sup> It is obvious that candidates sharing ideological views of the party in power would have better prospects of getting nomination from the Law, Justice and Parliamentary Affairs Ministry for the consideration of the Supreme Judicial Commission of Bangladesh. However, if the Commission considered it necessary to take into account the names of the additional candidates, it could make such a request to the Law, Justice and Parliamentary Affairs Ministry or it could select any competent person outside the names proposed by the Law, Justice and Parliamentary Ministry.<sup>56</sup> Of course, such a candidate, if selected and recommended, would have the least chance of getting appointment for not having political patronage.

Thus non-recognition of plurality of sources of proposing candidates from outside the Ministry of Law, Justice and Parliamentary Affairs for judicial appointment was a serious drawback of the system. However, the Supreme Judicial Commission was allowed to follow a transparent process in selecting the candidates by taking interviews of the candidates at its discretion<sup>57</sup> as against the previous system of appointing judges of the Supreme Court which had been cloaked with secrecy and devoid of any transparency. But unlike the Malaysian Judicial Appointments Commission Act, the Supreme Judicial Commission Ordinance of Bangladesh did not contain any provision as to screening of the antecedents of the candidates by the Independent Anti-Corruption Commission, Police Forces or Tax Ombudsman of Bangladesh in respect of their educational qualification, tax payment record, credit history as to arrest and conviction, integrity etc.

#### **D. Functions and Selection Criteria**

The authority of the Commission was confined only to select and recommend candidates for appointment as regular and additional judges to the High Court Division and of regular judges to the Appellate Division of the Supreme Court. But, unlike the Judicial Appointments Commission of Malaysia, it was not given the jurisdiction to recommend candidates for appointment as the Chief Justice of Bangladesh. It was also not given any authority to discuss about the disposal of cases and improving the performance of the Supreme Court Judges. The Supreme Judicial Commission Ordinance provided for different sets of criteria for the consideration of candidate's by the Commission for the appointment of additional judges in the High Court Division and Judges in the Appellate Division of the Supreme Court. The Commission was required to consider the candidates' educational qualifications, professional skills (efficiency), seniority, honesty and reputation (along with other ancillary matters) in recommending for appointment as additional judges of the High Court Division.<sup>58</sup> On other hand, for recommending any judge of the High Court Division of the Supreme Court for appointment to the Appellate Division, his seniority, judicial skill, integrity and reputation (along with other subsidiary matters) were to be taken into account by the Commission.<sup>59</sup>

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<sup>55</sup> *Ibid.* s 6(2).

<sup>56</sup> *Ibid.* s 6(3).

<sup>57</sup> *Ibid.* s 5(7).

<sup>58</sup> *Ibid.* s 5(6).

<sup>59</sup> *Ibid.* s 5(5).

### ***E. Selection Meeting of the Commission***

The Supreme Judicial Commission of Bangladesh was required to sit at least once in six months.<sup>60</sup> But the Chairman of the Supreme Judicial Commission, the Chief Justice, would immediately convene the meeting of the Commission if he was requested to do so for selecting and recommending the names by the President or by the competent authority (i.e. Ministry of Law, Justice and Parliamentary Affairs under the Rules of Business) for the appointment of judges of the Supreme Court.<sup>61</sup> It was stressed that the Commission first would strive at to take a unanimous decision, perhaps taking into account the importance of appointing the most qualified and suitable persons as judges, for maintaining the quality of the Bench. If that was not possible, the decision was to be taken by a majority of the members present.<sup>62</sup> The presence of five members, out of nine, would constitute quorum of the meeting and a decision to recommend names for appointment could be taken by a majority of the members present which implied that a decision of the Commission might be taken by the support of three members if only five members attended the meeting.<sup>63</sup> Unlike the Malaysian Judicial Appointments Commission, it did not say that the quorum would include the Chairman. But like the Malaysian Judicial Appointments Commission, it was provided that when there was an equality of votes, the Chairman of the Commission or the person presiding over the meeting could exercise a casting vote.<sup>64</sup> It is to be stressed here that the three non-judicial members of the Commission (the Law Minister, Attorney General and President of the Supreme Court Bar Association) were allowed to attend its meeting as members of the Commission for selecting and recommending the High Court Division judges for appointment to the vacant posts in the Appellate Division. But the senior most judges of the High Court Division as the Members of the Commission were precluded from taking part in its meeting without assigning any reason whatsoever (for example, if he was being considered for selection).<sup>65</sup> However, the Commission was required to select and recommend two candidates for each vacancy of the Supreme Court judge (that was the usual practice) without the requirement of any mention of the order of preference<sup>66</sup>, perhaps to give a free hand to the appointing authority in selecting any of the two candidates proposed.

### ***F. Consideration of Report by the President***

The Supreme Judicial Commission of Bangladesh was required to send its recommendation to the Ministry Law, Justice and Parliamentary Affairs for forwarding it to the President.<sup>67</sup> Ordinarily the President would appoint the judges of the Supreme Court in accordance with the recommendation of the Commission.<sup>68</sup> In case of differing with the recommendation of

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<sup>60</sup> *Ibid.* s 4(5).

<sup>61</sup> *Ibid.* s 4(6).

<sup>62</sup> *Ibid.* s 4(7).

<sup>63</sup> *Ibid.* Proviso to sub-section (4) to Section 4.

<sup>64</sup> *Supra* note 61.

<sup>65</sup> *Ibid.* s 4(9). Added by the Supreme Judicial Commission (Amendment) Ordinance, 2008.

<sup>66</sup> *Ibid.* s 5(2).

<sup>67</sup> *Ibid.* s 7.

<sup>68</sup> *Ibid.* s 9(1).

the Commission, the President would send the recommendation back to the Commission for its reconsideration.<sup>69</sup> After receipt of any request from the President for reviewing any recommendation, the Commission would promptly reconsider the recommendation and would send either its modified recommendation or earlier recommendation with recorded reasonable grounds to the President.<sup>70</sup> The President was given the right to ignore and reject the recommendation of the Commission by recording appropriate reasons.<sup>71</sup>

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

## VII. Validity of the Supreme Judicial Commission Ordinance

The Ordinance making power of the President of Bangladesh, conferred on him by Article 93 of the Constitution as a legislative function, is a relic of the Government of India Act, 1935<sup>72</sup> which is of the nature of an emergency power, to meet “circumstances” that “render immediate action necessary” when “Parliament stands dissolved or is not in session”<sup>73</sup> to secure the enactment of necessary legislation instantly. Apart from the time and circumstances, there are other limitations on the ordinance making power of the President, who is the sole judge of the necessity of issuing an ordinance (as Article 93 contains the words “if the President is satisfied”); he cannot promulgate an ordinance making any provision i) which could not lawfully be made under this [the Bangladesh] Constitution by Act of Parliament; ii) for altering or repealing any provision of this Constitution.<sup>74</sup> Although the ordinance making power of the President should be exercised sparingly, there has always been a tendency on the part of the successive Governments to resort to such a power frequently than seems necessary and desirable. However, the Supreme Judicial Commission Ordinance was issued in March 2008 during the regime of the third Non-Party Care-taker Government established after the dissolution of the Parliament in 2007 as a stopgap arrangement for holding free and fair General Elections. This Government was required to discharge its function as an interim government and, as such, to carry on routine day to day works of the Government in addition to their main function of assisting and aiding the Election Commission. Hence it could not make any policy decision except in the case of necessity for the discharge of such routine functions.<sup>75</sup> The promulgation of the Supreme Judicial Commission Ordinance cannot be accepted as a valid piece of legislation within the framework of the Constitution due to the following grounds:

Unlike Article 115 of the Constitution of Bangladesh, which empowers the President to make rules in accordance with which he is required to exercise his power

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<sup>69</sup> *Ibid.* s 9(2).

<sup>70</sup> *Ibid.* s 9(3).

<sup>71</sup> *Ibid.* s 9(4).

<sup>72</sup> The Government of India Act, 1935, s 42.

<sup>73</sup> The Constitution of the People’s Republic of Bangladesh, 1972, Art 93(1).

<sup>74</sup> *Ibid.* Proviso to Art 93(1).

<sup>75</sup> *Ibid.* Art 58D (1).

of appointing subordinate judicial officers and magistrates exercising judicial functions, Articles 95(1) and 98 (which deal with appointment of regular and additional judges of the Supreme Court respectively) do not at all provide for the enactment of any law setting up a mechanism, like the Supreme Judicial Commission, for selecting candidates in the matter of appointment of judges to the Supreme Court by the President. Unlike the Constitutions of Algeria, France, Italy, Namibia, Sudan and Rwanda,<sup>76</sup> the Constitution of Bangladesh does not even empower the legislative authorities to enact law/promulgate ordinance regulating the organization, powers and functioning of the Commission. Article 95(2)(c) of the Constitution of Bangladesh empowers the Parliament only to pass law providing for an alternative requisite qualification (e.g. a distinguished jurist) for the appointment of judges to the Supreme Court and, as such, an ordinance if at all necessary, could only be promulgated in this regard. Instead, the Supreme Judicial Commission Ordinance, apart from providing for detailed provisions concerning the composition, functions and procedure of the Commission, laid down different selection criteria (educational qualification, professional skill, seniority, honesty and reputation for High Court Division judgeship and seniority, judicial skill, integrity and reputation for Appellate Division judgeship) for the appointment of the High Court Division as well as the Appellate Division Judges. Therefore, it can be argued that the Supreme Judicial Commission Ordinance, 2008, was not promulgated within the parameters of Articles 95, 98 and 65<sup>77</sup> of the Constitution of Bangladesh and, as such, is *ultra vires* of the Constitution of Bangladesh.

### VIII. Functioning of the Supreme Judicial Commission

For the first time in the history of Bangladesh, the President on 12 November 2008 appointed the seven new additional judges to the High Court Division for two years on the recommendation of the Supreme Judicial Commission<sup>78</sup> of which one regretted to accept the offer of judgeship due to his ill-health. The Commission also recommended in its first meeting, held on 16 October 2008, four senior most judges of the High Court Division for the two vacant posts of the Appellate Division.<sup>79</sup>

### IX. Natural Death of the Supreme Judicial Commission

It is ironical that the Bangladesh *Awami* Lawyers Association, a platform of pro-*Awami* League lawyers, demanded on 26 July 2008 that the Supreme Judicial Commission Ordinance, 2008 be repealed.<sup>80</sup> After coming to power by obtaining a landslide victory

<sup>76</sup> Supra note 40.

<sup>77</sup> Art 65(1) of the Constitution of Bangladesh, 1972 provides that ‘There shall be a Parliament for Bangladesh (to be known as the House of the Nation) in which subject to the provisions of this Constitution, shall be vested the legislative powers of the Republic.’

<sup>78</sup> Ashutosh Sarkar, ‘Appellate Division running with few judges for long’, *The Daily Star*, 18 December 2008, 1.

<sup>79</sup> *Ibid.*

<sup>80</sup> Staff Correspondent, ‘No UZ elections before JS polls: AL Awami Ainjibi Parishad to form human chains Aug 7’, *The Daily Star*, 27 July 2008, available at <<http://www.thedailystar.net/story.php?nid=47643>> (visited 10 December 2010).

in the General Elections, held on 29 December 2008, the *Awami* League regime placed 54 out of 122 Ordinances promulgated by the Non- Party Care-taker Government for the approval of the Parliament. But, as expected, the Supreme Judicial Commission Ordinance was not placed before the newly elected House of the Nation (the Parliament) for its passing into law. Therefore it met a natural death<sup>81</sup> as the life of an ordinance is always subject to the approval of the Parliament. Since it is the same political party which deleted from the Constitution on 25 January 1975 the provision concerning consultation with the Chief Justice by the President in appointing judges of the Supreme Court, it is only natural that it (the *Awami* League) cannot afford to experience the luxury of seeing the embargo of following a detailed and time-consuming procedure under the auspices of the Supreme Judicial Commission by the executive in the appointment of judges to the highest court of the land.

## X. Conclusion

The foregoing discussion reveals that keeping the Constitutional selection procedure of appointing judges of the Federal Court, the Court of Appeal and the High Courts untouched, the Parliament of Malaysia passed in December 2008 the Judicial Appointments Commission Act providing for the establishment of a Judicial Appointments Commission. The Commission, established in February 2009, is comprised of four ex-officio judicial members and five non ex-officio members to be appointed by the Prime Minister, for selecting candidates for the consideration of the Prime Minister in the matter of the appointment of judges including heads of the superior courts.

Unlike Malaysia, the President of Bangladesh, during the regime of third Non-Party Care-taker Government, set up as an interim Government for about four months mainly to assist the Election Commission in conducting the General Elections in a free, fair and impartial manner, promulgated the Supreme Judicial Commission Ordinance, 2008 providing for the establishment of a Supreme Judicial Commission. Unlike the Malaysian Judicial Appointments Commission, which is nine-member Commission where the non ex-officio members appointed by the Prime Minister are in a majority (i.e. five in number), the Supreme Judicial Commission of Bangladesh was entirely composed of nine ex-officio members and among the ex-officio members six were from the judiciary- the Chief Justice of Bangladesh, the three senior most judges of the Appellate Division and two senior most judges of the High Court Division of the Supreme Court- who did constitute the majority. This domination of the Commission by the judicial members was more conducive to select and recommend candidates objectively keeping in mind the needs of the office in view. Although the Supreme Judicial Commission was able to recommend the best candidates to the President for appointment of judges to the Supreme Court, unlike the Judicial Appointments Commission of Malaysia it was not empowered to recommend candidates for appointment as the Chief Justice of Bangladesh. However, the recommendations of both the Commissions were not given binding force on the

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<sup>81</sup> Rakib Hasnet Suman, "Public interest ignored in picking CG's ordinances", *The Daily Star*, 24 February 2009, 1.

executive taking into account the scheme of the Constitutions and the establishments of the Commissions in both the countries were provided for neither in pursuance of any provision of the Constitutions nor by amending them (the Constitutions). Therefore, the Judicial Appointments Commission Act of Malaysia, 2009 and the Supreme Judicial Commission Ordinance of Bangladesh, 2008 cannot be considered as valid pieces of legislations.

It seems that the present method for selection and appointment of judges to the superior courts in Malaysia and Bangladesh should be given a “decent burial” for excluding patronage appointment of judgeship or appointment on extraneous consideration. In order to strengthen the independence and impartiality of the judiciary, an independent, effective and meaningful judicial commission, representing various interests with pre-eminent position in favour of the judiciary with the power of selecting and recommending best candidates to the Head of the State for judicial appointment, is the demand of modern times.

In order to ensure that the matter of appointment in the superior courts of Malaysia and Bangladesh does not result in politically biased judges or judges who are or feel beholden to the appointing authority, an independent Judicial Appointments Commission/Supreme Judicial Commission is to be set up through constitutional amendments. The power of appointment of judges of the superior courts by the Head of the State is to be exercised on the recommendation of such a commission. The recommendation of the Commission should be binding upon the Constitutional Head but it shall be open to the *Yang di-Pertuan Agong*/President to refer the recommendation back to the Commission in any given case along with the information in his possession regarding the suitability of the candidates. If, however, after reconsideration the Commission reiterates its recommendation, then the President/*Yang di-Pertuan Agong* shall be bound to make the appointment. Preferably the Judicial Appointments Commission/Supreme Judicial Commission should consist of ex-officio members from the higher judiciary (e.g. the Chief Justice and the six senior most judges), last retired Chief Justice or Judge, and a Professor of Law on the basis of seniority from public universities by rotation. However, it should be added that, “no procedure will be effective if the will to appoint only the best is lacking” “among the politicians of all the parties.”<sup>82</sup> (Australian Chief Justice Harry Gibbs)

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<sup>82</sup> Harry Gibbs, “The Appointment of Judges” (1987) 61 *Australian Law Journal* 7, at page 11.