

SOUTH ASIA JUDICIAL BAROMETER

The South Asia Judicial Barometer brings together the reform activism and legal expertise of a number of legal scholars and practitioners in order to interrogate the rule of law regimes in Bangladesh, Nepal, Bhutan, India, Pakistan and Sri Lanka.

This publication grapples with the institutional architecture of the judiciary, and the ideological character and contestations that shape judicial engagement, including the manner in which the judiciary approaches and perceives public interest, state-society relations, economic interests and the multiplicity of claims in the context of identity-related conflicts. The country chapters are animated by critical questions concerning the interventions of the judiciary: What is the nature of judicial engagement on socio-economic and political issues? How has this engagement changed over time? How can the ideological and social character of the judiciary impact access to justice?

This publication is a reminder of the significant role of the judiciary in shaping our societies and its impact on critical issues of national interest, ranging from the rights of workers and minorities to the freedoms of expression and association.

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THE JUDICIARY IN BANGLADESH: A BASTION FOR RIGHTS, AN INSTITUTION FACING CHALLENGES

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Introduction

The Preamble to the Constitution of Bangladesh²⁹⁸ proclaims that the fundamental aim of the State is to realise—through the democratic process—a socialist society, which is free from exploitation, and one in which the rule of law, fundamental human rights, freedom, equality and justice is secured for all citizens.

Unless there is an effective mechanism for the enforcement of the provisions envisaged in the Constitution through an independent judiciary, constitutional provisions will be no more than moral precepts, yielding no results.²⁹⁹ The road to achieving an independent judiciary has been pitted with many challenges, and the realization of an effectively independent and capable judiciary continues to be a struggle. The aim of this chapter is two-fold. First, we aim to present an overview of the judicial framework of Bangladesh and the journey towards its independence through judicial interventions, along with an analysis of some leading cases, particularly in relation to the appointment procedure, removal and code of conduct of judges. Second, we aim to analyse the monolithic characteristics of the judiciary and its approach towards establishing social, economic and individual rights, citing judicial observations from a rights perspective. This chapter focuses on some of the significant achievements of, and through, the Bangladesh judiciary, and some major challenges it has faced and is still facing as an institution.

²⁹⁸ The Constitution of the People's Republic of Bangladesh, (printed with the latest Amendment), 2016, Legislative and Parliamentary Affairs Division, Ministry of Law, Justice and Parliamentary Affairs, 1, accessed 10 February 2017, http://bdlaws.minlaw.gov.bd/print_sections_all.php?id+367.

²⁹⁹ Mahmudul Islam, *Constitutional Law of Bangladesh* (Dhaka: Mullick Brothers, 2012), 19 and 84-85.

³⁰⁰ *Bangladesh Italian Marble Works Ltd vs. Government of Bangladesh and Others*, 14 (2006) BLT (Spl) (HCD) 1, accessed 14 February 2017, http://www.supremecourt.gov.bd/resources/documents/783957_WP9989of2014.pdf.

Constitutional and Legal Framework of the Judiciary in Bangladesh

The Constitution ensures separation of powers among the legislative, executive and judicial organs of the State. A system of checks and balances between the three institutions of the State is recognized by the Supreme Court of Bangladesh as the essence of the notion of separation of powers.³⁰⁰ Independence of the judiciary, free from any interference from the executive organs, has been designated in the Constitution as one of the ‘fundamental principles of state policy.’³⁰¹ The Fourth Schedule to the Constitution further states, *“The provisions of Chapters II and VI (which relate to subordinate courts) shall be implemented as soon as is practicable, and until such implementation, the matters provided for in that Chapter shall (subject to any other provision made by law) be regulated in the manner in which they were regulated immediately before the commencement of this Constitution.”*³⁰² As a matter of fact, while the process for the realisation of judicial independence has, in theory, been based on express constitutional provisions, the process has been steered by a progressive approach adopted by the judiciary in interpreting the provisions.

Institutional Structure and Composition of the Judiciary in the Constitutional Realm

The Supreme Court of Bangladesh comprises two Divisions, the Appellate Division and the High Court Division, headed by the Chief Justice of Bangladesh, and comprising such number of other judges as the President may deem necessary to appoint to each Division after consultation with the Chief Justice.³⁰³ The Constitution provides for qualifications for the appointment of judges to the Supreme Court as well as qualifications required to be Additional Judges of the Supreme Court.³⁰⁴ Article 115 of the Constitution provides that *“... appointments of persons to offices in the judicial service or as magistrates exercising judicial*

³⁰¹ Bangladesh Constitution, art. 22, which provides, *“The State shall ensure the separation of the judiciary from the executive organs of the State.”*

³⁰² Ibid., Fourth Schedule, para. 6(6).

³⁰³ Ibid., arts. 94(1), (2) and 95(1).

³⁰⁴ Ibid., arts. 95(2) and 97.

*functions shall be made by the President in accordance with rules made by him in that behalf.*³⁰⁵ The Constitution provides that the Chief Justice and the other judges of the Supreme Court, subordinate judicial officers and magistrates shall be independent in the exercise of their judicial functions.³⁰⁶ It also contains provisions relating to the removal of a judge from his/her office for reasons specified in the Constitution.³⁰⁷ The

³⁰⁵ The original Article 115 of the Constitution of 1972 stands as follows:

“Appointments to subordinate courts: 115. (1) “Appointments of persons to offices in the judicial service or as magistrates exercising judicial functions shall be made by the President-
(a) *in case of district judges, on the recommendation of the Supreme Court; and*
(b) *in the case of any other person, in accordance with rules made by the President in that behalf after consulting the appropriate public service commission and the Supreme Court.*

(2) *A person shall not be eligible for appointment as a district judge unless he-*
(a) *is at the time of his appointment in the service of the Republic and has, for not less than seven years, held judicial office in that service; or*
(b) *has for not less than ten years been an advocate.”*

³⁰⁶ Bangladesh Constitution, arts. 94(4) and 116A.

³⁰⁷ Ibid., art. 96, prior to the Sixteenth Amendment (assented on 22 September 2014) reads as follows:

“(1) Subject to the other provisions of this article, a Judge shall hold office until he attains the age of sixty-seven years.

(2) A Judge shall not be removed from his office except in accordance with the following provisions of this article. (3) There shall be a Supreme Judicial Council, in this article referred to as the Council, which shall consist of the Chief Justice of Bangladesh, and the two next senior Judges:

Provided that if, at any time, the Council is inquiring into the capacity or conduct of a Judge who is a member of the Council, or a member of the Council is absent or is unable to act due to illness or other cause, the Judge who is next in seniority to those who are members of the Council shall act as such member.

(4) The function of the Council shall be-

(a) to prescribe a Code of Conduct to be observed by the Judges; and

(b) to inquire into the incapacity or conduct of a Judge or of any other functionary who is not removable from his office except in like manner as a Judge.

(5) Where upon any information received from the Council or from any other source, the President has reason to apprehend that a Judge-

(a) may have ceased to be capable of properly performing the functions of his office by reason of physical or mental incapacity, or

(b) may have been guilty of gross misconduct, the President may direct the Council to inquire into the matter and report its finding.

(6) If, after making inquiry, the Council reports to the President that in its opinion the Judge has ceased to be capable of performing the functions of his office or has been guilty of gross misconduct, the President shall, by order, remove the Judge from office.

(7) For the purpose of an inquiry under this article, the Council shall regulate its procedure and shall have, in respect of issue and execution of processes, the same power as the Supreme Court.

(8) A Judge may resign his office by writing under his hand addressed to the President.”

President is required to exercise his power of posting, promoting, granting of leave and disciplining of persons in judicial service and of magistrates exercising judicial functions in consultation with the Chief Justice as per Article 116 of the Constitution. These provisions in Part VI of the original Constitution, introduced in 1972, have been amended on a number of occasions changing their original nature, and recently, most of the provisions have been restored in their original form (as they were in 1972) as a result of the *Fifth Amendment case*.³⁰⁸

The constitutional provision regarding separation of the judiciary from the executive organs of the State is incorporated as a “...*fundamental principle of state policy*...”³⁰⁹ and thus, not strictly enforceable. As successive governments had disregarded this provision since the inception of the Constitution, the Supreme Court intervened in the case of *Secretary, Ministry of Finance, Government of Bangladesh vs. Mr. Md. Masdar Hossain and Others*³¹⁰ to ensure that the constitutional promise materialized. In its decision, the Appellate Division directed

³⁰⁸ *Khondhker Delawar Hossain, Secretary, BNP and another vs. Bangladesh Italian Marble Works and others*, 62 (2010) DLR (AD) 298, paras 232 and 235-240, accessed 09 October 2017, [www.supremecourt.gov.bd/resources/documents/325431_C.P.%20Nos.%201044%20and%201045%20of%202009%20\(5th%20Amendment\).pdf](http://www.supremecourt.gov.bd/resources/documents/325431_C.P.%20Nos.%201044%20and%201045%20of%202009%20(5th%20Amendment).pdf).

³⁰⁹ Bangladesh Constitution, art. 22 (under Part II: Fundamental Principles of State Policy).

³¹⁰ *Secretary, Ministry of Finance, Government of Bangladesh vs. Mr. Md. Masdar Hossain and Others*, 20 (2000) BLD (AD) 141, accessed 12 February 2017, <https://shamimsufi.files.wordpress.com/2013/05/secretary-ministry-of-finance-vs-md-masdar-hossain-and-others-52-dlr-ad-82.pdf>. The petitioner Masdar Hossain, including 218 persons in judicial service, contended that the subordinate courts were part of the judiciary and therefore, persons in judicial service could not be included within the Bangladesh Civil Service (Reorganization) Order 1980, nor could they be controlled as though they were a part of the Bangladesh Civil Service as defined by the Bangladesh Civil Service Rules 1981 (‘the BCS Rules’). The High Court Division held in favour of the petitioners. After the Government appealed against this decision and lost, the Appellate Division affirmed the High Court’s judgment. In the *Masdar Hossain case*, the Supreme Court reiterated the principle of independence of the judiciary, and elaborated on the constitutional position and practice regarding the separation of the judiciary from the executive.

the Government to implement twelve directives, including the formation of a separate Judicial Service Commission consisting of senior Supreme Court judges for the appointment, promotion and transfer of members of the lower judiciary; framing of rules for posting, promotion, grant of leave etc. consistent with Article 116; establishment of a Judicial Pay Commission; and framing of rules to ensure essential conditions of judicial independence, namely, (i) security of tenure, (ii) security of salary and other benefits and (iii) institutional independence from the Parliament and the executive. It also directed the Government to amend the Code of Criminal Procedure and adopt new rules for the selection and discipline of members of the judiciary. The *Masdar Hossain case* laid the foundation for institutional developments in the judiciary.³¹¹

Amendments to Constitutional Provisions Affecting the Judiciary

The Constitution has been amended sixteen times since its adoption in 1972. Some of these amendments had the effect of altering the fundamental fabric of the judiciary as envisaged originally in the Constitution.

The Constitution (Fourth Amendment) Act of 1975 drastically changed the original character of the Constitution of Bangladesh. The constitutional provisions that were amended included provisions relating to the judiciary under Part VI of the Constitution. Article 95(1) was substituted by way of deleting the most significant words, i.e., ‘after consultation with the Chief Justice’ in case of appointment of judges

³¹¹ Following the *Masdar Hossain* judgment, successive governments have passed and enacted various laws, rules, regulations and orders relating to the judiciary, including, (1) Bangladesh Judicial Service Commission Rules, 2007; (2) Bangladesh Judicial Service (Pay Commission) Rules 2007; (3) Bangladesh Judicial Service Commission (Construction of Service, Appointments in the Service and Suspension, Removal & Dismissal from the Service) Rules, 2007; (4) Bangladesh Judicial Service (Posting, Promotion, Grant of Leave, Control, Discipline and other Condition of Service) Rules, 2007; (5) Probationer Assistance Judges Training and Departmental Examination Order, 2008; and (6) The Judicial Magistracy and Metropolitan Magistracy Courts (Assistant Officer and Staff) Recruitment Rules, 2008.

by the President. Similarly, Articles 98, 102, 109, 115, 116 and 116A were amended in a manner that did not reflect respect for the principle of judicial independence as laid out in the original Constitution of 1972.³¹² A military-led Government passed the Constitution (Fifth Amendment) Act of 1979.³¹³ It amended the Fourth Schedule to the Constitution, ratifying and validating all the Proclamations and Proclamation Orders and the amendments, modifications and omissions made in the Constitution. The Fifth Amendment was passed when the Constitution was not even fully restored.³¹⁴ The Fifth Amendment purported to provide that no court, including the Supreme Court or any tribunal or authority, would have any power to call into question or declare void any Proclamation or any Martial Law Regulation or Order.³¹⁵

Parliament passed the Constitution (Seventh Amendment) Act of 1986³¹⁶ after withdrawal of Martial Law.³¹⁷ This purported to amend the Fourth Schedule to the Constitution ratifying and confirming the

³¹² Bangladesh Constitution, Appendix VI, The Constitution (Fourth Amendment) Act, 1975, Act No. II of 1975, 93-100.

³¹³ Ibid., Appendix VII, the Constitution (Fifth Amendment) Act, 1979 (Act No. I of 1979), 104. This amendment was subsequently declared to be *ultra vires* the Constitution in *KhondhkerDelawar Hossain, Secretary, BNP and Another vs. Bangladesh Italian Marble Works and Others*, 62 (2010) DLR (AD) 298, accessed 09 October 2017, [www.supremecourt.gov.bd/resources/documents/325431C.P.%20Nos.%201044%20and%201045%20of%202009%20\(5th%20Amendment\).pdf](http://www.supremecourt.gov.bd/resources/documents/325431C.P.%20Nos.%201044%20and%201045%20of%202009%20(5th%20Amendment).pdf)

³¹⁴ Islam, *Constitutional Law of Bangladesh*, 26.

³¹⁵ Ibid., 25.

³¹⁶ Bangladesh Constitution, Appendix IX, The Constitution (Seventh Amendment) Act, 1986 (Act No. I of 1986), 106-107.

³¹⁷ In 1982, the then Chief of the Army, Hussain Muhammad Ershad, proclaimed Martial Law assuming all powers as the Chief Martial Law Administrator and subsequently issued the Proclamation (First Amendment) Order, 1982 providing that a Chief Justice shall retire on reaching the age of sixty-two or completing three years as Chief Justice, whichever came first.

Martial Law Proclamation of 1982. It further raised the age of retirement of the judges of the Supreme Court to sixty-five years from sixty-two years.³¹⁸

The Constitution (Eighth Amendment) Act of 1988, among others, amended Article 100 of the Constitution to set up six ‘permanent benches’ of the High Court Division outside Dhaka. A challenge to this amendment led the judiciary to pronounce one of its landmark judgments in *Anwar Hossain Chowdhury etc. vs. Bangladesh and Others*,³¹⁹ more popularly known as the *Eighth Amendment case*. The Court set aside the amendment in relation to setting up permanent benches on the grounds that it would be contrary to the basic structure of the Constitution.³²⁰

³¹⁸ The Seventh Amendment was declared void by the High Court Division on the grounds of destroying the basic structure of the Constitution and fraud on the Constitution, among others. Furthermore, the amendment has been found to be unconstitutional. Accordingly, the Appellate Division maintained the High Court Division’s declaration of invalidity of the Seventh Amendment in *Siddique Ahmed vs. Bangladesh* 63 (2011) DLR (HCD) 565, accessed 09 October 2017, www.supremecourt.gov.bd/resources/documents/270095_WritPetition_No7thAmendment.pdf and *Siddique Ahmed vs. Bangladesh*, 65 (2013) DLR (AD) 8, accessed 09 October 2017, http://www.supremecourt.gov.bd/resources/documents/563864_CA48.pdf. See also Islam, *Constitutional Law of Bangladesh*, 28 and 545-546.

³¹⁹ *Anwar Hossain Chowdhury etc. vs. Bangladesh and Others* 9 (A) (1989) BLD (spl) 1, accessed 09 October 2017, <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwiY1bn95OfWAhUCTY8KHb2RDqgQFggI0MAA&url=https%3A%2F%2Fbetterjustice.files.wordpress.com%2F2013%2F03%2F1989-bld-spl-1-8th-amendment-judgment.pdf&usg=AOvVaw3TWXYSUgpWyWtkoVGxYodU>.

³²⁰ *Anwar Hossain Chowdhury etc. vs. Bangladesh and Others*, paras. 365, 377 and 443. While signifying the importance of the independence of the judiciary, the Appellate Division in its judgment observed, “*Independence of the Judiciary, a basic structure of the Constitution, is also likely to be jeopardized or affected by some of the other provisions in the Constitution. Mode of their appointment and removal, security of tenure particularly, fixed age for retirement and prohibition against employment in the service of the Republic after retirement or removal are matters of great importance in connection with the independence of Judges. Selection of a person for appointment as a Judge in disregard to the question of his competence and his earlier performance as an Advocate or a Judicial Officer may bring in “spineless Judges” in the words of President Roosevelt; such a person can hardly be an independent Judge.*”

The Constitution (Fourteenth Amendment) Act of 2004³²¹ amended, among others, Article 96(1), again raising the retirement age of Supreme Court judges, this time from sixty-five years to sixty-seven years.³²² Questioning this particular change, the then opposition political parties alleged that the change had been made with a political motive, to enable a particular Chief Justice, otherwise on the verge of retirement, to become the Chief Adviser of the next non-party caretaker government, which would conduct the following general elections.

Through the Fifteenth Amendment,³²³ the Constitution revived many of the features of the original Constitution adopted in 1972. It gave rise to fierce political controversy as it also abolished the non-party caretaker form of government system, earlier incorporated in the Constitution by the Thirteenth Amendment to the Constitution.³²⁴ In 2011, the Appellate Division of the Supreme Court declared the caretaker government system to be *ultra vires* the Constitution, stating it was against the principle of democracy, which is a basic feature of the Constitution.³²⁵

³²¹ Bangladesh Constitution, Appendix XVI, The Constitution (Fourteenth Amendment) Act, 2004 (Act No. XIV of 2004), 134.

³²² Islam, *Constitutional Law of Bangladesh*, 30-31.

³²³ Bangladesh Constitution, Appendix XVII, The Constitution (Fifteenth Amendment) Act, 2011 (Act No. XIV of 2011), 156-173.

³²⁴ Islam, *Constitutional Law of Bangladesh*, 31-32. The Constitution (Thirteenth Amendment) Act, 1996 was passed providing for a non-party caretaker government that would act as an interim government for holding the general election of members of the Parliament. The non-party caretaker government, comprising a Chief Adviser and not more than ten other advisers, all appointed by the President through consultation with the major political parties, would be collectively responsible to the President. The Chief Adviser of such a government would enter office after Parliament had been dissolved or had stood dissolved by reason of expiration of its term. The caretaker government would, in turn, stand dissolved on the date on which the new Prime Minister entered office after constitution of the new Parliament. See also Bangladesh Constitution, Appendix XV, The Constitution (Thirteenth Amendment) Act, 1996 (Act No. I of 1996), 128.

³²⁵ *Abdul Mannan Khan vs. Bangladesh*, 64 (2012) DLR (AD) 169, accessed 12 February 2017, <http://www.manupatrafast.com/pdfconvert/pdf/BDAD120014.pdf>.

The Constitution (Sixteenth Amendment) Act replaced the provisions regarding the Supreme Judicial Council³²⁶ with provisions that empower Parliament to remove judges of the Supreme Court. According to the amended provisions, the President shall order removal of the accused judge upon a resolution passed by a two-thirds majority of the total members of the Parliament. It further provides that the Parliament may, by law, regulate the procedure to pass the resolution in the Parliament and to conduct an inquiry into allegations against a judge.³²⁷

Judicial Decisions and Observations on the Independence of the Judiciary

The Supreme Court has, in a number of cases, dealt with questions relating to the appointment and removal of judges, code of conduct for judges and other matters relating to the independence of the judiciary. In the absence of a statutory framework for the appointment and removal of judges of the Supreme Court, the nature of the process of “consultation”³²⁸ with the Chief Justice in appointing judges of the Supreme Court has been a major point of contention

³²⁶ *Advocate Asaduzzaman Siddiqui and Others vs. Bangladesh and Others*, (Writ Petition No. 9989 of 2014), judgment delivered on 05 May 2016, accessed 12 February 2017, http://www.supremecourt.gov.bd/resources/documents/783957_WP9989of2014Final.pdf. According to the Constitution (Sixteenth Amendment) Act, 2014, Article 96 of the Constitution has been amended in relation to the power and procedure of the removal of the judges of the Supreme Court of Bangladesh. The Sixteenth Amendment gave the power of judging the judges of the Supreme Court of Bangladesh to the Parliament. The power of judging is, no doubt, a judicial power. The Sixteenth Amendment empowers a Member of Parliament to bring a motion against any judge in any case and discuss it therein. Through the Sixteenth Amendment, the power of removal of the judges of the Supreme Court has been shifted to the legislature, which is a separate independent organ of the State in the scheme of the Constitution.

³²⁷ Md. Yasin Khan Chowdhury, “Removal of Judges under 16th Amendment of Bangladesh Constitution: A Euphemism to Curb on Judiciary,” *DIU Journal of Humanities and Social Science* 3 (2015): 93.

³²⁸ In the original Constitution of 1972, the requirement of consultation was a part of Article 95 of the Constitution, which was omitted by the Fourth Amendment in 1975, and then reinstated in 2011 by the Fifteenth Amendment.

between the judiciary and the executive. Controversies arose when successive governments chose to abrogate the process of consultation while appointing Supreme Court judges.

The process of consultation is intended to exclude any kind of unwarranted and unfettered exercise of power by the executive in appointing judges. The procedure for consultation with the Chief Justice in respect of appointing judges empowered the judiciary to exercise its own judicial mind and expertise while selecting names for the position of judges. The Supreme Court is empowered to uphold the control and discipline of persons employed in the judicial service and magistrates exercising judicial functions.³²⁹ Therefore, ensuring independence of the higher judiciary paves the way for ensuring independence of the lower judiciary and the magistracy.

Appointment of the Chief Justice and other judges to the Appellate Division

According to Article 48(3) of the Constitution, the President is not required to act on the advice of the Prime Minister while appointing the Chief Justice of Bangladesh.³³⁰ Article 95 provides the procedure for appointment and qualifications of Chief Justice and other judges of the

³²⁹ Islam, *Constitutional Law of Bangladesh*, 88.

³³⁰ Article 48(3) of the Bangladesh Constitution provides, “In the exercise of all his functions, save only that of appointing the Prime Minister pursuant to clause (3) of Article 56 and the Chief Justice pursuant to clause (1) of article 95, the President shall act in accordance with the advice of the Prime Minister...” So, the President acts in accordance with the advice of the Prime Minister in appointing the puisne judges. See also Islam, *Constitutional Law of Bangladesh*, 578-579.

Supreme Court.³³¹ Despite these provisions, the process of appointment of the Chief Justice of Bangladesh has become a matter of controversy in recent years.

The appointment of the Chief Justice of Bangladesh was first challenged in the case of *Hassan MS Azim and Three Others vs. Bangladesh* by several Supreme Court lawyers.³³² While summarily disposing of the application, (i.e., without issuing any rule), the Court observed 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, but 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.³³³ 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 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

³³¹ Article 95 of the Bangladesh Constitution provides: (1) *The Chief Justice and other Judges shall be appointed by the President, and other Judges shall be appointed by the President after consultation with the Chief Justice. [Italics added to highlight the amendment in 2011].* (2) *A person shall not be qualified for appointment as a Judge unless he is a citizen of Bangladesh and has, for not less than ten years, been an advocate of the Supreme Court; or has, for not less than ten years, held judicial office in the territory of Bangladesh; or has such other qualifications as may be prescribed by law for appointment as a Judge of the Supreme Court.*

(3) In this article, “Supreme Court” includes a court which at any time before the commencement of this Constitution exercised jurisdiction as a High Court in the territory now forming part of Bangladesh.

³³² *Hassan MS Azim and Three Others vs. Bangladesh*, 16 (2011) BLC (HCD) 800, para. 2. 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.

³³³ *Hassan MS Azim and Three Others vs. Bangladesh*, 16 (2011) BLC (HCD) 800, para. 13.

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 minimised.³³⁴

The principle of seniority is not always followed in appointing judges to the Appellate Division. On several occasions in the past, senior judges of the High Court were bypassed in the appointment of judges to the Appellate Division. According to the views of many commentators, such supersession of High Court judges has been more due to political considerations than on the basis of merit.³³⁵

³³⁴ *Hassan MS Azim and Three Others vs. Bangladesh*, at paras. 19-21. See also, Dr. Zahidul Islam Biswas, "Do We Have an Independent Judiciary?," *Forum* 6, no. 9, (2012): 12-15, accessed 01 October 2016, <http://archive.thedailystar.net/forum/2012/September/do.html>. Repeated controversies have occurred in consecutive regimes over the appointment of the Chief Justices of Bangladesh subsequent to the restoration of the Parliamentary government in 1991. However, in the recent past, in particular from 2010 to 2012, the principle has been repeatedly circumvented with four of the last six appointments seeing the senior-most judge of the Appellate Division being superseded. The appointment of the former Chief Justice, Justice ABM Khairul Haque, as the 19th Chief Justice of Bangladesh by the President in September 2010, was alleged to have involved supersession of two more senior judges of the Appellate Division, namely Justice Shah Abu Nayeem Mominur Rahman and Justice Abdul Motin. Both the superseded judges had abstained (by taking leave) from judicial work in protest against such blatant supersession and there was no question about the competency of these two superseded judges. While on leave, Justice Motin retired from the judiciary in frustration. The Supreme Court Bar Association, then headed by members affiliated with the leading opposition parties, condemned the selection. Similar controversies arose in the appointment of the following Chief Justice of Bangladesh, Justice Muzammel Hossain on 18 May 2011. In the case of this appointment, Justice Shah Abu Nayeem Mominur Rahman was again superseded and he resigned eventually. That was the first and so far the only instance of a resignation in the face of supersession in the appointment of the Chief Justice.

³³⁵ Sarkar Ali Akkas, *Independence and Accountability of Judiciary - A Critical Review*, (Dhaka: Centre for Rights and Governance, 2004), 140-142.

Appointment of judges to the High Court Division

Over the last decade, the frequent appointments of judges to the High Court Division have given rise to controversies. More than four decades after the adoption of the Constitution, there is still no specific legislation setting out either the qualifications or the criteria for the appointment of judges to the Supreme Court. All governments since independence appear to have found it convenient not to have a statutory framework for the appointment of judges, as this allows the executive to make such appointments on the basis of its own considerations, which may not be conducive to an independent and meritorious judiciary. It has proved tempting to all political parties that have been in power to date, to install individuals in the judiciary who would be loyal to their appointers and susceptible to pressure exerted on them in matters involving sensitive political issues or other interests of the ruling power.

Despite continuous demands from civil society and a section of the legal profession that has retained objectivity, the Government has yet to enact a law to ensure consistency and the use of objective criteria in judicial appointments. The Fifteenth Amendment brought back the requirement for prior consultation by the President with the Chief Justice. However, even after this amendment, the appointment of several judges to the High Court, apparently with the consent of the Chief Justice, has given rise to questions in the media and among the public as to whether or not the Chief Justice was actually consulted.³³⁶

³³⁶ Biswas, "Do We Have An Independent Judiciary?" 12-15.

The Law Commission put forward a number of recommendations in 2012 to enact a law allowing the appointment of legal experts from different professions as Supreme Court judges.³³⁷ According to a newspaper report, the Government drafted a new set of guidelines specifying the academic qualifications required for a candidate for judicial appointment. Regrettably, none of the recommendations of the Law Commission were adopted in the new set of guidelines for the appointment of High Court judges.³³⁸

While emphasizing the need for independence of the judiciary in a democratic polity, the High Court Division outlined twelve norms

³³⁷ Law Commission Bangladesh, “Final Report on the Recommendations of the Law Commission Regarding Appointment of the Judges of Supreme Court” (in Bengali); accessed 01 October 2016, <http://www.lc.gov.bd/reports/118.pdf>. The Law Commission’s acting Chairman, Prof. M Shah Alam, published a seven-page report with six-point recommendations to the Law Ministry. The recommendations of the Law Commission are as follows:

- 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.
- 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.
- 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.
- 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.
- This knowledge and understanding can also be achieved without a person having to work as a judge and lawyer.
- 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.

³³⁸ Ashutosh Sarkar, “Law Commission guidelines ignored,” *The Daily Star*, 25 November 2012, accessed 05 October 2016, <http://www.thedailystar.net/newDesign/news-details.php?nid=258847>.

and processes for the appointment of judges in *Idrisur Rahman and Others vs. Bangladesh*.³³⁹ When the case went before the Appellate Division, it was asserted that there is a continuous and unbroken convention of consultation with the Chief Justice of Bangladesh regarding the appointment of judges.³⁴⁰ Nevertheless, as there are no standard guidelines for appointments, the executive has scope to interfere. Any manner of arbitrary exercise of discretionary powers is excluded in the presence of guidelines and norms of general application.³⁴¹ In hearing an appeal against the High Court's judgment regarding appointments/confirmation of *ad hoc* judges,³⁴² the apex court differed with the observations of the High Court Division in Writ Petition No. 3228 of 2003³⁴³ that there should be a collegium of judges and that the Chief Justice of Bangladesh would be required to consult with them on his recommendation for the candidates for appointment as judges. The apex court, however, agreed with the observations of the High Court that there is no bar for the Chief Justice to discuss with his/her colleagues the legal acumen of any person nominated for appointment as a judge and, in fact, the Chief Justice does, in practice, hold discussions with colleagues before recommending names of candidates for appointment as judges.³⁴⁴

³³⁹ *Idrisur Rahman and Others vs. Bangladesh*, (Writ Petition Nos. 1543, 2975 and 3217 of 2003), 61 (2009) DLR (HCD) 523, para. 152.

³⁴⁰ *Bangladesh, represented by the Secretary, Ministry of Justice and Parliamentary Affairs and Others vs. Md. Idrisur Rahman and Others*, (Civil Petitioner for Leave to Appeal Nos. 2221, 2222, 2046 and 2056 of 2008), 17 (2009) BLT (AD) 231.

³⁴¹ *Idrisur Rahman and Others vs. Bangladesh*, (Writ Petition Nos. 1543, 2975 and 3217 of 2003), 61 (2009) DLR (HCD) 523, para 94.

³⁴² A Civil Petition was filed against the order dated 17 July 2008 passed by the High Court Division in *Idrisur Rahman and Others vs. Bangladesh* being Writ Petition No. 1543 of 2003 heard analogously with Writ Petition Nos. 2975 and 3217 of 2003.

³⁴³ *Idrisur Rahman vs. Bangladesh*, (Writ Petition No. 3228 of 2003), 60 (2008) DLR (HCD) 714.

³⁴⁴ *Bangladesh, represented by the Secretary, Ministry of Justice and Parliamentary Affairs and Others vs. Md. Idrisur Rahman and Others*, (Civil Petitioner for Leave to Appeal Nos. 2221, 2222, 2046 and 2056 of 2008), 17 (2009) BLT (AD) 231, para 8.

Tenure of judges

As noted above, Article 96(1) of the Constitution, following the Fourteenth Amendment in 2004, provides that a judge shall hold office till the age of sixty-seven years. Prior to this amendment, and according to the original provision in the Constitution, the retirement age for a judge of the Supreme Court was sixty-two years. This was changed by the Second Proclamation (Seventh Amendment) Order 1976, which created a separate Supreme Court and High Court (instead of the original Supreme Court comprising the Appellate Division and the High Court Division), and increased the retirement age for Supreme Court judges to sixty-five years while retaining that of High Court judges at sixty-two years.³⁴⁵ This resulted in the appointment of two separate Chief Justices, one for the Supreme Court and another for the High Court.³⁴⁶ The Second Proclamation (Tenth Amendment) Order of 1977 re-established the Supreme Court as comprising the Appellate Division and the High Court Division, restoring the retirement age of sixty-two years for all Supreme Court judges. As a consequence of these changes Supreme Court judges who were scheduled to retire at the age of sixty-five years, overnight became subject to earlier retirement. Several sitting judges of the then Supreme Court, including the former Chief Justice of the Supreme Court, Justice Kemaluddin Hossain, had to retire immediately, when they would otherwise have been due to retire at the age of sixty-five years.³⁴⁷

The Seventh Amendment to the Constitution in 1986 revised the retirement age to sixty-five years. The next change to the retirement age occurred through the Fourteenth Amendment, which was enacted

³⁴⁵ Bangladesh Constitution, Appendix XXII, Second Proclamation (Seventh Amendment) Order 1976, 191.

³⁴⁶ The then Chief Justice of Supreme Court was Justice Syed A.B. Mahmud Husain and the Chief Justice of High Court was Justice Ruhul Islam, as of 07 December 1976.

³⁴⁷ Section 2(7)(c) of the Second Proclamation (Thirteenth Amendment) Order 1977 provides: “A person holding office as Chief Justice or Judge or Additional Judge of the Supreme Court or Chief Justice or Judge or Additional Judge of the High Court immediately before the commencement of the Second Proclamation (Tenth Amendment) Order, 1977shall, if [he] has attained the age of sixty-two years on the date of such commencement, stand retired on that date.”

on 16 May 2004. The retirement age of Supreme Court judges was increased from sixty-five years to sixty-seven years. The leading opposition party then was the Awami League, and they, along with other opposition parties, alleged that the ruling alliance had amended the Constitution with a partisan design to ensure that its own man became the chief of the next caretaker government, and was thereby able to manipulate the upcoming election. The leader of the opposition at the time, Sheikh Hasina, termed the amendment contradictory to the fundamental spirit of the Constitution. Deputy Opposition Leader Abdul Hamid (now the President of Bangladesh) alleged that it was part of a conspiracy by the Government.³⁴⁸

Removal of judges and code of conduct for judges

The discipline and integrity of judges holding their respective offices is another vital aspect in ensuring independence of the judiciary. Instances of disciplinary action against judges are few and far between. During a period of martial law, stretching from 1982 to 1986, two judges of the Supreme Court were removed from office by the military government.³⁴⁹ In 2003, the Supreme Judicial Council conducted their first ever inquiry into the alleged misconduct of an additional judge of the High Court Division. He was charged with receiving bribes to fix bail for an accused in a case involving cruelty against a woman. In 2004, the President finally removed him in accordance with the report of the Supreme Judicial Council.³⁵⁰ In 2007, in a case involving allegations

³⁴⁸ Haroon Habib, "A Controversial Amendment," *Frontline* 21, no. 12, (June 2004), accessed 12 October 2016, <http://www.frontline.in/static/html/fl2112/stories/20040618001205200.htm>.

³⁴⁹ KaziEbadulHoque, "Image and Reputation of the Supreme Court," *Journal of Dhaka Law Reports*, 57 DLR (2005), 1-4. See also, M. I. Farooqui, "Judiciary under the Public Gaze," *Journal of Dhaka Law Reports*, 57 DLR (2005), 26.

³⁵⁰ "Campaign against Bloggers - High Court Judge to face Supreme Judicial Council," *The New Age* (Online Edition), 26 February 2013 (ARCHIVED). See also, "High Court Judge to face investigation," *The Daily Star*, 26 February 2013, accessed 17 October 2016, <http://www.thedailystar.net/news-detail-270497>.

against a sitting High Court judge of tampering with his LL.B certificate, the Supreme Judicial Council was formed to inquire into the allegation. However, the accused judge resigned from his office before he was due to appear before the Council.³⁵¹

In a recent incident, Members of Parliament demanded the removal of Justice A.H.M. Shamsuddin Chowdhury. The row started when the then Speaker, Abdul Hamid (the current President of Bangladesh), made a statement that people might stand against the judiciary if they were aggrieved by any verdict of the Court. Justice Chowdhury, in response to the statement, said that the comment was tantamount to sedition. On 18 June 2013, Speaker Abdul Hamid ruled in Parliament that the Chief Justice should initiate steps to address this matter, and that Parliament would support his decision. However, the validity of the ruling by the Speaker was challenged in a petition filed before the High Court Division. The High Court disposed of the matter by holding that the Speaker's ruling was ineffective. The matter thereafter went to the Appellate Division, which disposed of it with several observations.³⁵² To the best of the knowledge of the authors, the written judgment setting out the observations has yet to be signed and published.

³⁵¹ Abdul Mannan Bhuiyan, "Accountability of the Supreme Court Judges of Bangladesh," *Journal of Mainstream Law Reports*, 13 MLR (2008), 21-28. In the case of Justice Faisal Mahmud Faizee, the approval to form the Supreme Judicial Council came after the then Chief Justice Md. Ruhul Amin sent a letter to the President, on 12 March 2007, seeking his permission for its formation. A Presidential order was sent to the Supreme Court via the Ministry of Law, Justice and Parliamentary Affairs to conduct the enquiry. On 28 March 2007, the Supreme Judicial Council started its probe into controversial High Court Judge Faizee's alleged certificate scandal. The Supreme Judicial Council was in the primary stages of investigating the allegation that he had kept an estimated 180 cases pending during his controversial tenure as a High Court judge, when Faizee resigned on the night of 11 July 2007, 72 hours before he was scheduled to appear before the Supreme Judicial Council. Thus, the Supreme Judicial Council failed to create any precedent for the future.

³⁵² "Ruling of Speaker is ineffective and baseless: High Court," *The Financial Express*, 28 August 2012, accessed 16 October 2016, http://print.thefinancialexpress-bd.com/old/more.php?news_id=141387&date=2012-08-28.

After the Sixteenth Amendment in 2014, the power relating to the removal of Supreme Court judges had been vested in Parliament.³⁵³ The procedure by which Parliament would initiate and conduct proceedings against a judge was to be set out in a separate legislation. In 2015, the constitutionality of this amendment was challenged before the High Court, and the High Court struck down the Sixteenth Amendment. The Court declared the Sixteenth Amendment contrary to the principle of separation of powers among the three organs of the State and inconsistent with judicial independence as guaranteed by the Constitution. The Government had filed an appeal against the High Court judgment³⁵⁴, and the 7-member bench of the Appellate Division, by a unanimous judgment,³⁵⁵ dismissed the Government's appeal. The judgment has sparked a bitter and raucous row between the judiciary and the ruling party. The Government has declared that it would file a petition for review of the judgment, although the period for filing a review petition has lapsed.

In 2000, the then Supreme Judicial Council prepared and issued a 14-point Code of Conduct for Supreme Court judges, which prescribed stringent standards.³⁵⁶ Any breach of this Code of Conduct might be considered 'misconduct' by a judge. However, there is no clear indication

³⁵³ After the Sixteenth Amendment to the Constitution, Article 96 reads as follows: (2) *A Judge shall not be removed from his office except by an order of the President passed pursuant to a resolution of Parliament supported by a majority of not less than two-thirds of the total number of Members of Parliament, on the grounds of proved misbehaviour or incapacity.*

(3) *Parliament may by law regulate the procedure in relation to a resolution under clause (2) and for investigation and proof of the misbehaviour or incapacity of a Judge.*

(4) *A Judge may resign his office by writing under his hand addressed to the President.*

³⁵⁴ *Advocate Asaduzzaman Siddiqui and Others vs. Bangladesh and others*, (Writ Petition No. 9989 of 2014), judgment delivered on 05 May 2016.

³⁵⁵ *Government of Bangladesh and Others vs. Advocate Asaduzzaman Siddiqui and Others*, 25 (2017) (Special Issue) BLT (AD) 1, accessed 09 October 2017, http://supremecourt.gov.bd/resources/documents/1082040_C.A.6of2017_Final_3.8.2017.pdf.

³⁵⁶ Md. Shah Abid Hossain, "Ethics and Codes of Conduct for Judges, Prosecutors and Law Enforcement Officials: Bangladesh Perspective," (paper presented at the 143rd International Training Course), accessed 29 January 2017, http://www.unafei.or.jp/english/pdf/RS_No80/No80_31PA_Hossain.pdf.

in the Code as to the nature of misconduct that might be considered ‘gross misconduct’ and may result in disciplinary measures against judges under the newly amended Article 96 of the Constitution. Article 96 does not define what constitutes ‘gross misconduct’ either. Further, the initiation of disciplinary proceedings against a Supreme Court judge depends solely on the executive, since the President is bound to act in compliance with the advice of the Prime Minister according to Article 48(3) of the Constitution. Thus, the existing system is not free from interference.³⁵⁷

The Appellate Division in *Idrisur Rahman vs. Syed Shahidur Rahman and Others*³⁵⁸ laid down a 40-point Code of Conduct for judges to follow while holding office. The Court held that for violation of any provision of this Code, a judge shall be held liable for gross misconduct. According to the Code of Conduct, judges are obligated to maintain the honour, dignity and integrity of their office with an object to maintain public confidence in the judiciary. However, in order to maintain the supremacy of the judiciary as the guardian of the Constitution, the legislature and the executive must act in aid of the Supreme Court.

Judicial Approach to Social, Economic and Political Issues

The judiciary has been promoting social change through rights-friendly interpretations of the Constitution aimed at implementation of economic and social rights. The increasingly positive attitude of the judiciary towards public interest

³⁵⁷ Harun Ar Rashid and Md. Ashraful Arafat Sufian, “Discipline of the Supreme Court Judges of Bangladesh: A Critical Review,” *Bangladesh Research Publication Journal* 3, no. 4 (March-April-2010): 1166-1168.

³⁵⁸ *Idrisur Rahman vs. Syed Shahidur Rahman and others*, (Civil Appeal No.145 of 2005 with Civil Petition for Leave to Appeal No. 405 of 2005), judgment delivered on 16 September 2015, 94-103, accessed 12 February 2017, http://www.supremecourt.gov.bd/resources/documents/732020_CP_145_2005.pdf .

litigation, overcoming earlier inhibitions which had constrained the role of the judiciary, has enabled the judiciary to play a dynamic role in facilitating and promoting social change.

Dr. Kamal Hossain³⁵⁹

The guardianship of the Constitution is entrusted to the Supreme Court, which is empowered to exercise judicial review and to enforce fundamental rights under Article 102(1) of the Constitution. The High Court Division of the Supreme Court has original jurisdiction over matters concerning fundamental rights and judicial review. So, the Supreme Court can not only review State actions in case of infringement of any provision of the Constitution or the existing law of the land, but it can also strike down any law inconsistent with the fundamental rights enshrined in Part III.³⁶⁰ In consonance with Article 102(1), the judiciary uses a wider margin of appreciation in interpreting socio-economic rights, with the object of imposing an obligation on all constitutional organs to spare no effort in their respective spheres to realize this goal.³⁶¹ The rise in public interest litigation and the positive role increasingly assumed by the judiciary is, in part, the outcome of the reluctance demonstrated by other organs in discharging their roles. The judiciary's sensitivity to socio-economic concerns is evident from instances of judicial activism where the courts have issued a number of directions for implementation of constitutional rights set out in Part II (which, according to Article 8(2) of the Constitution are not "judicially enforceable") and Part III of the Constitution.

³⁵⁹ Dr. Kamal Hossain, "The Role of the Judiciary as a Catalyst of Social Change," accessed 01 October 2016, <http://www.supremecourt.gov.pk/ijc/Articles/9/3.pdf>.

³⁶⁰ Islam, *Constitutional Law of Bangladesh*, 22.

³⁶¹ The Preamble of the Constitution encompasses a society in which the rule of law, fundamental human rights and freedom, equality and justice, political, economic and social, will be secured. Part II and III of the Constitution of Bangladesh provide provisions pertaining to the "Fundamental Principles of State Policy" and "Fundamental Rights."

Article 102(1) of the Constitution provides the opportunity for the judiciary to ensure socio-economic justice to citizens by interpreting laws in conformity with the fundamental principles and rights enshrined in the Constitution. Judicial review is used as a tool by the courts to fill a legislative vacuum and reaffirms public confidence in the rule of law.³⁶² Article 26 of the Constitution makes all laws inconsistent with fundamental rights void to the extent of such inconsistency. The judiciary guards against enactment of any law that infringes fundamental rights.³⁶³ The judiciary's approach to and role in enforcing the socio-economic rights of individuals can be discerned from the hundreds of writ petitions filed and moved every year before the Supreme Court for protection or enforcement of fundamental rights or judicial review of administrative or legislative action pertaining to those rights. The judiciary endeavours to dispense justice in the protection of rights, liberties and freedoms of the people as well as to secure socio-economic rights.³⁶⁴

Minority rights

The Constitution of 1972 did not contain any express provision relating to the rights of minorities. It only provided for affirmative action in favour of women, children and for the advancement of any disadvantaged groups.³⁶⁵ However, by subsequent amendments to the Constitution (incorporated in Part II), provisions have been inserted

³⁶² Surendra Kumar Sinha, Chief Justice of Bangladesh, "Contribution of the Judiciary in Bangladesh in Strengthening Rule of Law and Democracy," (Public Lecture at Gujarat National Law University, Gandhinagar, Gujarat, India on 05 October 2015), 3, accessed 17 October 2016, http://www.supremecourt.gov.bd/resources/contents/Speech_by_HCJ_SK_Sinha_GNLU.pdf.

³⁶³ Article 44(1) of the Constitution also guarantees the right to move before the High Court Division of the Supreme Court for the protection of fundamental human rights of citizens.

³⁶⁴ Sinha, "Contribution of the Judiciary in Bangladesh in Strengthening Rule of Law and Democracy," 11-15.

³⁶⁵ Bangladesh Constitution, arts. 28 and 29.

expressly identifying certain minorities. Article 23A of the Constitution confers protection to the culture of “...tribes, minor races, ethnic sects and communities.”³⁶⁶

The indigenous communities³⁶⁷ in the Chittagong Hill Tracts (“CHT”) have had grievances against the ruling power since before independence. The Kaptai Dam constructed in the 1960s for a hydroelectricity plant caused hundreds of thousands of indigenous people to abandon their ancestral lands and homesteads. Following independence in 1971, there was a general expectation amongst the indigenous peoples that their status as indigenous peoples and the special nature and legal status of their customary rights would be entrenched in the Constitution to be adopted for independent Bangladesh. The Constitution, which was adopted in 1972, did not reflect that expectation. Furthermore, due to deliberate settlement in the 1970s and 1980s of plain-landers in the CHT under martial law by successive regimes, the habitats, livelihoods and more generally, the customary existence of the indigenous peoples of the CHT, came under threat. The general dissatisfaction exacerbated by these events turned into an armed conflict, which continued for two decades.

In 1997, the then Government entered into the Chittagong Hill Tract Accord with the Parbatya Chattagram Jana Samhati Samiti (PCJSS), which was at that time, the only political organization of indigenous people of the CHT, to end the conflict.³⁶⁸ Subsequent to the signing of

³⁶⁶ Article 23A was inserted by the Constitution (Fifteenth Amendment) Act, 2011 (Act XIV of 2011), section 14. Article 23A states, “*The State shall take steps to protect and develop the unique local culture and tradition of tribes, minor races, ethnic sects and communities.*”

³⁶⁷ There are 11 (eleven) multilingual indigenous peoples living in the Chittagong Hill Tracts consisting of Chakma, Marma, Tripura, Mro, Bawm, Pangkhu, Khyang, Khumi, Chak, Lushai and Tanchangya.

³⁶⁸ The Peace Accord was signed and executed to facilitate the public interest in general, especially the people living in the Chittagong Hill Tracts in order to bring peace and harmony in that region of Bangladesh so that the tribal and non-tribal people of Bangladesh living in the said area could co-exist there. It was also done to give effect to constitutional mandates for the advancement of backward sections of the population and establishment of efficient local government institutions.

the Accord, a number of laws were enacted and amended on the basis of the constitutional mandate for equality, non-discrimination and advancement of backward sections of citizens, among others.³⁶⁹

However, the Accord and subsequent legislation were challenged before the Supreme Court in 2000 and 2007 on the grounds of violation of various provisions of the Constitution.³⁷⁰ The process of promoting rights of the indigenous communities suffered a setback when the High Court declared that various provisions of the legislations were *ultra vires* of the Constitution.³⁷¹

³⁶⁹ The Government upon signing the Peace Accord of 1997 enacted a number of laws, in particular: (1) Chittagong Hill Tracts Regional Council Act, 1998, (2) Rangamati Hill District Council Act, 1989 (as amended in 1998), (3) Bandarban Hill District Council Act, 1989 (as amended in 1998) and (4) Khagrachari Hill District Council Act, 1989 (as amended in 1998).

³⁷⁰ *Md. Badiuzzaman vs. Government of Bangladesh and Others*, 15 (2010) BLC (HCD) 531 and *Md. Tajul Islam vs. Government of Bangladesh and Others* (Writ Petition No. 6451 of 2007).

³⁷¹ After the hearing, the High Court passed the judgment and order dated 12 April 2010 and 13 April 2010, finding merit in part in Writ Petition No. 2669 of 2000. Accordingly, in light of this Court's findings and observations, the rule was made absolute in part. However, the rule nisi as issued in Writ Petition No. 6451 of 2007 was also discharged. Further, Section 6 (Umo) of the Hill District Council Acts (Act Nos. 9, 10 and 11 of 1998) as amending Section 4 of the 1989 and Sections 28 of the Rangamati Hill District Council Act, 1998 (Act No. 9 of 1998) and the Khagrachari Hill District Council Act, 1998 (Act No. 10 of 1998) and section 27 of the Bandarban Hill District Council Act, 1998 (Act No. 11 of 1998), as amending sections 32(2) and 62(1) of the Hill District Council Acts, 1989 and the Hill District Council Acts as amended by Section 11 of the 1998 Act were declared unconstitutional. The Court further observed that, (1) the Regional Council Act "is nothing but a mere colourable piece of legislation"; (2) the Regional Council Act is *ultra vires* of the Constitution as the "said Act purports to create a territorial unit without legal or constitutional sanction" and that the "Regional Council has the potential to eventually claim the status of a federating unit for the Chittagong Hill Tracts, thereby destroying the very fabric of a unitary Republic"; (3) Sections 40 and 41 of the Regional Council Act, 1998 appear to be deliberate in their formulation to further the underlying cause of the Regional Council Act to erode the unitarity [sic] of the State; (4) Section 6 of the impugned Hill District Council Acts (which provides for the respective Circle Chiefs to issue a certificate regarding residency, on the basis of a certificate issued by the respective Mauza Headman/the Union Parishad Chairman/Pourashava Chairman) infringes the petitioner's right of franchise; and (5) Special measures of tribal population laid down in Section 32(2), i.e., Appointment of officers and employees of the council and Section 62(1), i.e., Appointment of the District Police of the Hill District Council Acts are in contravention of Articles 27, 28(1), 29 and 31 of the Constitution.

The Government argued that the Accord of 1997 was signed and the said Hill District Acts enacted by Parliament in order to restore peace and harmony in the region so that long overdue special measures could be taken for a historically disadvantaged section of citizens, as provided for in Article 28(4) of the Constitution, read with the Preamble and other provisions thereof. The Hill District Council Acts and the Regional Council Act are specifically intended to address this historical disadvantage and exclusion and to further the process of inclusion of the disadvantaged “tribal people” of the region. The impugned Hill District Council Acts and the Regional Council Act reaffirm the unitariness of the Republic³⁷² and the Constitutional aspirations of “...rule of law, fundamental human rights and freedom, equality and justice, political, economic and social, for all citizens.”³⁷³ The Regional Council as one of the writ respondents argued, among others, that the provisions of the Acts have a remedial and protective purpose intended to ensure the rights of a historically disadvantaged and marginalized community of the CHT. Article 28(4) of the Constitution of Bangladesh empowers the State to take special measures such as the declaration of the CHT as a ‘tribal-populated area’ for the advancement of tribal people, who are recognized as a ‘backward section’ of citizens in terms of having historically faced limited access to education, health, shelter and other basic needs. The Regional Council is a statutory public authority created within the broader scheme of “special measures” for the advancement of a historically disadvantaged section of citizens, as provided for in Articles 28(4) and 29(3) of the Constitution, read with the Preamble and other provisions of the Constitution.³⁷⁴ The Government and the Chittagong Hill Tracts Regional Council subsequently filed two appeals,

³⁷² The preamble to all of the Acts contain statements in identical language reaffirming full and unwavering allegiance to the sovereignty and territorial integrity of the Republic.

³⁷³ Paragraph 13 of the Concise Statement filed by the appellant in *Government of Bangladesh and Others vs. Md. Badiuzzaman* (Civil Appeal No. 94 of 2011).

³⁷⁴ Submissions of the Regional Council as one of the respondents in *Chittagong Hill Tracts Regional Council, represented by its Chairman vs. Md. Badiuzzaman* (Civil Appeal No. 95 of 2011).

now pending hearing before the Appellate Division, against the judgment passed by the High Court.³⁷⁵

In the meantime, the Appellate Division, in a separate matter, has passed a judgment³⁷⁶ where the status of the CHT as a special region inhabited by indigenous peoples has been recognized. The Appellate Division has also recognized in the judgment, the need for special treatment of the rights of the indigenous communities within the framework of the Constitution.

While emphasizing the role of the judiciary in promoting social justice pertaining to the minorities, the Appellate Division has made the following observation, among others:³⁷⁷

Our judiciary always plays a pivotal role to strengthen and promote social justice, and the protection of indigenous people is one of the basic principles for promoting social justice. To that end in view, it is the duty of this Court to see that the indigenous people enjoy the rights and protections guaranteed to them under the Constitution and the laws. There is no doubt that the citizens of three hill districts are backward people. These provisions embody the concept of making special provisions for the weaker backward section of the citizens by taking such measures as are necessary for removal of economic inequalities and rectifying discriminations resulting from State actions between unequal in society. This may be achieved by special laws or by direct regulation of transactions by forbidding certain transactions. It also means that those who have been

³⁷⁵ *Government of Bangladesh and Others vs. Md. Badiuzzaman* (Civil Appeal No. 94 of 2011) and *Chittagong Hill Tracts Regional Council, represented by its Chairman vs. Md. Badiuzzaman* (Civil Appeal No. 95 of 2011).

³⁷⁶ *Wagachara Tea Estate Ltd. vs. Muhammad Abu Taher and Others* (Unreported, judgment delivered on 02 December, 2014), accessed 12 February 2017, http://www.supremecourt.gov.bd/resources/documents/450020_Civil_Appeal_No.147of_2004.doc.pdf

³⁷⁷ *Wagachara Tea Estate Ltd. vs. Muhammad Abu Taher and Others*, 38 and 46.

deprived [of] their property by unconstitutional actions should be restored...their property. The State is under obligation to provide the facilities and opportunities for their economic empowerment, as it is their fundamental right.

Religious rights and the rights of disadvantaged communities

The Constitution, on the one hand, includes secularism as one of the fundamental principles of state policy, but on the other, recognizes Islam as the “*state religion*.”³⁷⁸ This ambivalence subverts the idea of Bangladesh as an independent, secular nation state, as envisioned by its founders.

As one of the foundational principles, secularism was originally incorporated into the Constitution. The Martial Law government in 1977³⁷⁹ removed the principle of secularism, replacing it with “*faith in Almighty Allah*” as a fundamental principle. The subsequent Eighth Amendment in 1988, passed by the Parliament under a presidential form of government (led by a General-turned President), inserted into the Constitution the concept of “*state religion*” and declared Islam as the state religion. Although the Fifteenth Amendment, in 2011, restored secularism as a fundamental principle of state policy and inserted provisions in the Constitution³⁸⁰ against communalism, abuse of religion for political purposes and discrimination on the basis of religion, it retained the inclusion of Islam as the “*state religion*.”

³⁷⁸ Bangladesh Constitution, arts. 2A and 12.

³⁷⁹ Ibid., Appendix XXIII, The Proclamations (Amendment) Order, 1977 (Proclamations Order No. I of 1977), 195.

³⁸⁰ Bangladesh Constitution, Article 12, amended by the Fifteenth Amendment, provides as follows:

“*The principle of secularism shall be realised by the elimination of-*

- (a) *communalism in all its forms;*
- (b) *the granting by the State of political status in favour of any religion;*
- (c) *the abuse of religion for political purposes;*
- (d) *any discrimination against, or persecution of, persons practising a particular religion.*”

While emphasizing the importance of the concept of secularism, the High Court observed in the writ petition³⁸¹ challenging the Fifth Amendment that secularism means equality of all its citizens regardless of caste, creed or religion without any prejudice on the part of the State, and that the State must ensure protection of all kinds of religious communities, followers of all faiths and even an atheist who does not follow any religion or faith.

In a case involving the challenge of inclusion of a “*state religion*,” the High Court adopted a narrow technical approach to dismiss the matter summarily.³⁸² This decision was disappointing and may have been influenced by the current political environment, in which the incumbents prefer to placate Islamic organizations, so as to remain in power, without having to deal with the difficult issue of the abolition of the so-called state religion.

³⁸¹ *Bangladesh Italian Marble Works Ltd vs. Government of Bangladesh and Others*, 14 (2006) BLT (Spl) (HCD) 1.

³⁸² M. Muneruzzaman, “HC rejects 1988 writ petition challenging state religion,” *New Age*, 29 March 2016, accessed 29 January 2017, <http://archive.newagebd.net/215812/hc-rejects-1988-writ-petition-challenging-state-religion/>. On 28 March 2016, the High Court rejected a writ petition filed twenty-eight years ago challenging the legality of Article 2A of the Constitution that declared Islam as the state religion. A three-judge High Court Bench comprising Justice Naima Haider, Justice Quazi Reza-UlHaque and Justice MdAshraful Kamal, rejected the petition on the ground that the petitioner had no legal right to file the petition stating, “*Our finding is that the petitioner does not have the locus standi and that is why the petition is summarily rejected.*” The Court heard the petition for two minutes before the presiding judge, Justice Naima Haider pronounced the three-word verdict, “*Rule is discharged.*” The original ruling was issued on 08 June 2011, asking the Government to explain the legality of the insertion of Article 2A into the Constitution by the Eighth Amendment in 1988. The rule was issued twenty-three years after the writ petition was filed by fifteen eminent citizens. In a supplementary ruling issued on 01 December 2011, another bench asked the Government to explain the legality of the retention of Article 2A in the Constitution under the Fifteenth Amendment to the Constitution made on 03 July 2011. The supplementary ruling came up for hearing following a supplementary petition that stated that the Parliament passed the Fifteenth Amendment to the Constitution reinstating Islam as the state religion on 30 June 2011, while the question of legality of state religion was still pending with the High Court.

In effect, both the judiciary and the executive adopted a narrow margin of appreciation while dealing with the provisions relating to religion as they remained silent on how these two different notions could or could not co-exist.³⁸³

In assessing the place of religion within the ambit of the Constitution, the Court observed that restrictions may be imposed on the right to religion by law for the sake of public order or morality. However, such restrictions must be reasonable and what is reasonable may depend on the facts and circumstances under which such restrictions may be imposed.³⁸⁴

In a case regarding the imposition of extra-judicial punishments in the name of execution of a fatwa³⁸⁵ in 2001, the High Court held that all kinds of fatwas are unauthorized and illegal. The Court held that while a fatwa means a legal opinion of a lawful authority, the legal system of Bangladesh empowers only the courts to decide all questions relating to Muslim laws and other laws as in force.³⁸⁶

Subsequently, appeals were filed in the Appellate Division against the High Court judgment. The Appellate Division in its judgment allowed the appeals in part, holding that (a) a fatwa on religious grounds

³⁸³ KaziAtaul-Al-Osman, "Politics of religion and distortion of ideologies," *Forum* 6, no. 4, (2012), accessed 17 October 2016, <http://archive.thedailystar.net/forum/2012/April/religion.htm>.

³⁸⁴ *DewanbaghDarbar Sharif and Another vs. Bangladesh and Others*, 54 (2002) DLR (HCD) 413, accessed 09 October 2017, <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwjSnq vT7OfWAhXLPo8 KHTeqA9E QFggIMAA&url=http%3A%2F%2Fwww.southasianrights.org%2Fwp-content%2Fuploads%2F2011%2F07%2FDewanbagh-Darbar-Sharif-and-another-vs-Bangladesh-and-others-54-DLR-HCD-2002-413.pdf&usg=AOvVaw27ZZCeRAiQwTpsFZ-kl07>.

³⁸⁵ It was common, particularly in rural areas, to inflict physical punishment and social proscription in the name of a fatwa pronounced by religious clerics and supported by the local elite.

³⁸⁶ *Bangladesh Legal Aid and Services Trust and Others vs. Government of Bangladesh and Others*, (Writ Petition Nos. 5863 of 2009, 754 and 4275 of 2010), accessed 29 January 2017, <http://www.blast.org.bd/content/judgement/ejp-judgment-8july2010.pdf>.

could only be issued by educated persons, and must be voluntarily accepted by the person upon whom it is issued. Coercion or undue influence of any kind being used to pressure an individual in to accepting a fatwa was prohibited; (b) no person could pronounce a fatwa violating the rights, reputation and dignity of any person; and (c) no physical or mental punishment could be imposed or inflicted on any person in pursuance of a fatwa.³⁸⁷

Although the Constitution promises equal rights to all citizens, thousands of Harijans, Dalits and other members of excluded communities are treated as ‘untouchables’. Article 28(1) of the Constitution guarantees equal rights for all citizens and prohibits discrimination by the State on the grounds of religion, race, caste, sex or place of birth.³⁸⁸ In order to protect the rights of Dalits, Harijans and other excluded communities, two organizations—International Dalit Solidarity Network (IDSN) and Bangladesh Dalit and Excluded Rights Movement (BDERM)—submitted a draft anti-discrimination law to the Bangladesh Law Commission, which was subsequently submitted to the Ministry of Law.³⁸⁹ In 2016, a discussion held by the Bangladesh Harijan Unity Council and the Bangladesh Dalit Council to mark the International Day for the Elimination of Racial Discrimination, resulted in a 10-point list of demands, including immediate enactment of an anti-discrimination law, allocation of a quota for Dalits and Harijans in education and services, budgetary allocations and implementation of the ruling party’s commitments in their election manifesto for the

³⁸⁷ The Government did not file any appeal against the judgment. *Mohammad Tayeeb and Another vs. Bangladesh and Others*, 23 (2015) BLT (AD) 10, judgment delivered on 12 May 2011, accessed 29 January 2017, http://www.supremecourt.gov.bd/resources/documents/800933_CA593.pdf.

³⁸⁸ Khan Ferdousour Rahman. “The Dalits in Bangladesh,” *The Daily Star*, 19 January 2016, accessed 18 April 2017, <http://www.thedailystar.net/law-our-rights/rights-advocacy/the-dalits-bangladesh-203845>.

³⁸⁹ “Bangladesh - Annual report 2014,” accessed 18 April 2017, <http://idsn.org/wp-content/uploads/2015/08/BANGLADESH-2014.pdf>.

amelioration of Dalits and Harijans, housing and civic services, social protection schemes and social safety nets, and representation in government.³⁹⁰

Freedom of expression

As is evident from the number of cases that came before the judiciary, freedom of expression in Bangladesh is now one of the most contentious issues. The right to freedom of speech and expression is not limited to print and electronic media but also includes online speech and social media. In 2010, a writ petition was moved before the High Court challenging the blocking of the social networking website Facebook by the Government and challenging Section 46 read with Section 57 of the Information and Communications Technology Act, 2006 (“the ICT Act”). It was argued that these provisions in the ICT Act confer unfettered discretionary powers to law enforcement agencies. The Court directed the Government to show cause as to why Sections 46 and 57 of the ICT Act, 2006 should not be held to be declared *ultra vires* the Constitution, and to be in violation of the fundamental right to freedom of expression.³⁹¹

In 2016, this writ petition came up for a hearing before the High Court, but was not disposed of due to certain changes in the constitution of the bench concerned, and is still pending hearing. Several other writ petitions were filed challenging the legality of Section 57 of the ICT Act. The High Court Division initially issued rules in these writ petitions asking the Government for reasons why Section 57 of the ICT Act should

³⁹⁰ “Establishment of rights for Dalits, Harijans demanded,” *New Age*, 22 March 2016, accessed 18 April 2017, <http://archive.newagebd.net/213960/establishment-of-rights-for-dalits-harijans-demanded/>.

³⁹¹ *Arafat Hossen Khan and others vs. Bangladesh and others*, (Writ Petition No. 4719 of 2010). The writ petition was filed on 06 June 2010. The Government lifted the ban on Facebook after several hours around midnight on the same day it was blocked. The High Court issued the rule on 26 July 2010 after modification of the initial prayer of the petition. The writ petition is now pending before a Division Bench of the High Court.

not be declared *ultra vires* the Constitution. However, subsequently, on 30 August 2016, the High Court rejected a petition challenging the legality of Section 57 of the ICT Act.³⁹²

In 2013, Parliament enacted amendments to the existing ICT Act, particularly to Section 57, which is in direct violation of Articles 39 (freedom of thought and conscience, and of speech) and 43 (protection of home and correspondence) of the Constitution. The amendment sets a minimum sentence of a seven-year jail term for these offences and increases the maximum to fourteen years, as opposed to the original ten years.

The amendment obstructs due process, increases criminal penalties and allows for arbitrary arrest and detention of suspected offenders. Beginning in 2010, on a number of occasions, the provisions

³⁹² “HC rejects writ challenging sec 57 of the ICT Act,” *The Independent*, 02 September 2015, accessed 29 January 2017, <http://www.theindependentbd.com/post/14133>. In another writ petition filed by eleven eminent citizens, the High Court on 01 September 2015 issued a rule upon the Government to explain why Section 57 of the ICT Act, 2006 would not be declared unconstitutional. The Court issued the rule considering the recent verdict of the Supreme Court of India which had struck down Section 66A of the Indian Information Technology Act, 2000 finding it contradictory to Article 19 of the Indian Constitution which guarantees freedom of expression. The Court said that Section 57 of the ICT Act of Bangladesh and Section 66A of the Indian IT Act were similar. Article 39 of the Bangladesh Constitution is also similar to that of Article 19 of the Indian Constitution. The Court said that it would scrutinize whether or not Section 57 of the ICT Act is in conflict with any provision of the Constitution guaranteeing fundamental rights of the citizens. The Deputy Attorney General appearing for the Government, argued that a Division Bench of the High Court was scheduled to pass its order on a separate writ petition challenging the same section of the law and another Bench rejected a similar writ petition on the Section 57 of ICT Act. Barrister Jyotirmoy Barua appearing for the writ petitioners, argued that Section 66A of the Indian IT Act, 2000 clearly spelt out the offences, while Section 57 of the ICT Act of Bangladesh left the matter vague and did not clarify what information would be considered offensive. He further pointed out that the ICT law gave ample powers to the police to arrest an accused without bail, while the same offences under the Penal Code carried lesser sentences and the cases had to be filed with courts. See also M. Moneruzzaman, “Section 57 of ICT Act: HC asks govt to explain legality,” *New Age*, 02 September 2015, accessed 18 April 2017, <http://archive.newagebd.net/153843/section-57-of-ict-act-hc-asks-govt-to-explain-legality/>.

of the ICT Act of 2006, and Section 57 in particular, have been misused by law enforcement agencies to justify arbitrary arrests and detention.³⁹³ In 2015, the debate over Section 57 and the demand for its repeal intensified when it made possible the arrest of veteran journalist ProbirSikdar, who stood accused of allegedly defaming a government minister. In the Daily Star news article on 22 August 2015, various eminent rights activists condemned the arrest and stated that Section 57 of the ICT Act of 2006 was so vague that law enforcers could interpret it as they wished to arrest anyone, at any time.³⁹⁴

In 2013, the Bangladesh Telecommunication Regulatory Commission (BTRC) imposed restrictions on international social media and communication applications such as Facebook and YouTube, and individual blogs without any prior justification. In March 2013, the Government formed an official committee to identify bloggers who had allegedly demeaned the spirit of Islam. The Committee participated in discussions with clerics to produce a list of bloggers and Facebook users they alleged had published blasphemous content. The BTRC subsequently directed domestic blog-hosting platforms to close the accounts of just four bloggers it identified as

³⁹³ “Freedom of Expression in Bangladesh: 2014,” country report published by ARTICLE 19, accessed 10 February 2017, <https://www.article19.org/data/files/medialibrary/37943/Bangladesh-FoE-Country-Report-2014.pdf>. It is reported that “criminalisation of online expression continues with the application of Section 57 of the Information, Communications Technology Act, 2006 (as amended in 2013). 6.10 percent of violations comprised of arrests (13) by the law enforcement agencies under the ICT Act 2006.” It was further stated in the report that “expressions have been penalized on grounds of being “hurtful to the image of the state or person” or “hurtful to religious sentiments,” which is deeply problematic as the law itself does not provide any guidance as to what constitute these grounds, leaving it widely open to arbitrary application by law enforcement agencies. This trend of arbitrary use promotes a culture of fear and shrinks the space for online expression, tacitly forcing online activists, users and bloggers to resort to self-censorship when expressing their opinions.”

³⁹⁴ “Free speech vs. Section 57,” *The Daily Star*, 22 August 2015, accessed 16 October 2016, <http://www.thedailystar.net/frontpage/free-speech-vs-section-57-130591>.

“anti-religious elements.” The owners of the host platforms reported that officials never cited any court orders or legal explanations in their communications.³⁹⁵

Labour rights

The ready-made garments (RMG) industry in Bangladesh is the second largest in the world and occupies a key role in the country’s economy. About five million workers are employed in this sector, spread over about five thousand factories of different sizes. Despite the crucial contribution made by the RMG sector to the country’s economy, working conditions in the industry, the rights of workers and industrial relations remain causes for concern. This became starkly apparent in the wake of a number of catastrophes, such as the Spectrum factory collapse in 2005, the Tazreen Fashions fire in 2012 and the Rana Plaza collapse in 2013. The fire and collapse in 2016 of the Tampaco factory, a packaging facility, was the most recent workplace accident to end in tragedy. In these incidents, a total of nearly two thousand workers lost their lives. In addition, violations of the right to organize, bargain collectively and to establish a common platform for dialogue at the workplace are common. In all cases, non-compliance with the existing legislation is a major cause.³⁹⁶

Through a number of cases, the judiciary has acted as a catalyst in ensuring and promoting workers’ rights, particularly in the RMG sector.

³⁹⁵ “Freedom on the Net 2013: Bangladesh Country Report,” Freedom House, 2013, accessed 16 October 2016, https://freedomhouse.org/sites/default/files/resources/FOTN%202013_Bangladesh_0.pdf. See also, Affidavit-in-Reply to the Affidavit-in-Opposition and Supplementary Affidavit filed by Respondent Nos. 3 and 4 (November 2015) in *Arafat Hossen Khan and others vs. Bangladesh and others* (Writ Petition No. 4719 of 2010).

³⁹⁶ Riccardo David Mariani, “Working conditions in the Bangladeshi garment sector: Social dialogue and compliance,” (Fair Wear Foundation, TUDelft, 2013), 8, accessed 29 January 2017, <http://repository.tudelft.nl/islandora/object/uuid:33c040ea-c468-49ca-bce7-2d0e9f0a098c?collection=education>.

In *ASK, BLAST and Others vs. Bangladesh and Others*,³⁹⁷ which concerned the fire at KTS Garments, the High Court directed the authorities concerned to investigate and submit a report detailing the causes of the incident and the safety measures adopted. The Court also directed the garment authorities to ensure medical treatment was made available to victims of the fire and demanded a report of the amount of compensation paid to them.

In *ASK, BLAST and Others vs. Bangladesh and Others*,³⁹⁸ which concerned the fire incident in Tazreen Garments, the High Court Division issued a number of directions, including: (i) to submit a list of garment factories across the country and report whether factory authorities had complied with the relevant laws designed to prevent accidental fires from taking lives, (ii) explain steps taken to implement the High Court directives issued in 2001 in Writ Petition No. 6070 of 1997 intended to ensure the safety and security of garment workers and form an inspection committee to monitor the garments authorities, and (iii) state detailed steps taken regarding compensation for the workers killed and injured and measures for treatment of the injured workers. In 2013, the High Court directed the Government to increase the compensation and extend it to the families of the missing workers, whose DNA could be traced.³⁹⁹ The Court further ordered the Government and the Bangladesh Garments Manufacturers and Exporters Association (BGMEA) to pay compensation. As per the recommendations made by the Government and the BGMEA, each of the victim's family was to get 700,000 Taka (approximately US\$ 8,530).⁴⁰⁰

³⁹⁷ *ASK, BLAST and Others vs. Bangladesh and Others* (KTS Garments Fire case), Writ Petition No. 2019 of 2006.

³⁹⁸ *ASK, BLAST and Others vs. Bangladesh and Others* (Tazreen Garments case) Writ Petition No. 15693 of 2012.

³⁹⁹ "Bangladesh: Companies Fail to Compensate Fire Victims," Human Rights Watch, 15 December 2013, accessed 18 April 2017, <https://www.hrw.org/news/2013/12/15/bangladesh-companies-fail-compensate-fire-victims>.

⁴⁰⁰ Afrose Jahan Chaity, "26 Tazreen victim families yet to be compensated," *Dhaka Tribune*, 22 July 2014, accessed 18 April 2017, <http://archive.dhakatribune.com/bangladesh/2014/jul/22/26-tazreen-victim-families-yet-be-compensated>.

In 2014, in the case relating to the Rana Plaza disaster, the High Court issued directions to set up an expert committee comprising economists, social scientists, healthcare experts and others to propose a set of criteria for assessing the rates of compensation due to Rana Plaza victims. Their proposals have been submitted before the Court for its consideration.⁴⁰¹ Independent of the legal proceedings, and as a voluntary measure adopted and sponsored by the brands whose products were being manufactured in the collapsed building, trust funds were set up and funds disbursed to the victims of the Rana Plaza disaster.⁴⁰² The writ petition pending in the Supreme Court is intended to determine the liability of the owner of the collapsed building, and the owners of the garment factories housed in that building, to determine compensation for victims and their families. The latest tragedy that occurred in the industrial sector is the Tampaco factory fire. Three human rights organisations filed a petition before the High Court. The Court issued a Rule and an interim direction upon the Bangladesh Bank, to identify

⁴⁰¹ *Suo Motu Rule No. 9 of 2013, (Rana Plaza case); ASK & BLAST vs. Secretary, Ministry of Public Works and Others (Rana Plaza case), Writ Petition No. 4390 of 2013, Kamal Hossain Meahzi and Others vs. Bangladesh and Others (Rana Plaza case), Writ Petition No 4428 of 2013.* The Government of Bangladesh formally directed the ILO to assist in the implementation and coordination of the National Tripartite Plan of Action on fire safety and structural integrity (NTPA), which was developed following the Tazreen factory fire in November 2012. The ILO has played a leading role in helping to coordinate the response to the Rana Plaza collapse. The ILO works with the National Tripartite Committee (government, workers' and employers' organizations) and others, the Accord and Alliance to help ensure coordination. ILO is providing technical assistance for trade union organizations to improve the capacity of workers to organize through a workers' education programme organized in collaboration with the National Coordination Committee for Workers Education (NCCWE) and the Industrial Bangladesh Council (IBC). The programme aims at creating an enabling environment for worker organizations and collective bargaining at factory level that will lead to workers participating in occupational safety and health as well as rights-related matters.

⁴⁰² Action Aid Bangladesh, "Three years Post Rana Plaza: Changes in the RMG Sector," 15 April 2016, accessed 18 April 2017, https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=6&cad=rja&uact=8&ved=0ahUKEwjK072v0K3TAhXLabwKHfL4AjQQFghCMAU&url=http%3A%2F%2Fwww.actionaid.org%2Fsites%2Ffiles%2Factionaid%2Frana_plaza_year_3.pdf&usq=AFQjCNFDJfkMmaeXt1l9Kdd4Yb_1Hi3rFw.

and freeze the bank accounts of Tampaco Foils Ltd and the Managing Director and Chairman of the company so as to ensure that the funds held in those accounts are not diverted and are preserved for providing compensation to the victims.⁴⁰³

The increasing number of child workers in various factories is also a major concern. In 2011, a petition was filed seeking to protect an estimated 25,000 child workers in a factory. The petitioners also sought a declaration that such activity was illegal and unconstitutional. The Court observed that the age-old practice of bonded labour, where young children are victimized, must be put to an end. The Court further directed the relevant government ministry to secure the right to education, food and clothing for the children. All the employers engaging children as labourers were directed to abide by the law and not engage children below the legal age stipulated by statute, and to provide all necessary facilities and equipment to ensure a healthy working atmosphere in their establishments for those who may be lawfully engaged in remunerated work.⁴⁰⁴

⁴⁰³ *BLAST and Others vs. Bangladesh and Others (TAMPACO Fire and Collapse case)* Writ Petition No. 12182 of 2016. On 10 September 2016, a fire broke out and an explosion occurred at the factory of Tampaco Foils Limited, Dhaka, resulting in the collapse of the building that left twenty-nine dead and fifty injured. Three human rights organizations, i.e., Bangladesh Legal Aid Services and Trust (BLAST), Ain o Shalish Kendra (ASK) and the Bangladesh Environment Lawyers Association (BELA), filed a writ petition impugning the failure of the concerned authorities to discharge their statutory duties relating to building construction, labour safety and welfare and to ensure that appropriate actions were taken to investigate the causes of the fire; to prosecute and punish those responsible for this incident, and also to ensure sufficient compensation for the victims, including long-term medical treatment and rehabilitation of those injured, and to prevent future incidents occurring by ensuring effective enforcement and implementation of workplace safety laws in industries, in particular to ensure the fundamental rights to life and the protection of law of all workers and other people therein.

⁴⁰⁴ *Ain o Salish Kendra vs. Bangladesh*, (Writ Petition No. 1234 of 2004), 63 (2011) DLR (HCD) 95, para. 32.

Right to shelter

A large number of people live in urban slums in Bangladesh due to the lack of adequate housing. According to the Constitution, the State has a responsibility to provide and secure the basic necessities, including, among others, the right to shelter for each of its citizen as a Fundamental Principle of State Policy.⁴⁰⁵ The right to shelter as a basic component of social rights has been, time and again, ensured and secured by the judiciary whenever there has been an incident of arbitrary or forcible eviction by any executive authority. The High Court has ruled consistently that state authorities are required to give notice in accordance with the law and provide rehabilitation or resettlement before evicting slum dwellers.⁴⁰⁶

In one of the cases that came before the High Court in the context of attempted evictions of slum dwellers, the following guidelines were laid down by the Supreme Court:

The Government should undertake a master plan or rehabilitation schemes or pilot projects for rehabilitation of the slum dwellers and undertake eviction of the slum dwellers according to the capacity of their available abode and with option to the dwellers either to go to their village home or to stay back leading an urban life, otherwise the wholesale demolition of slums may not solve the problem because the evicted persons from one slum may flock together to another place forming a slum or slums and thereby mounting problems for the Government and the country. We have been told that ECNEC [Executive Committee of the National Economic Council] has also approved construction of residential apartments for the slum dwellers and lower income people. We appreciate the Government anxiety but considering the

⁴⁰⁵ Bangladesh Constitution, art. 15.

⁴⁰⁶ See “Right to shelter,” accessed 28 January 2017, <https://www.blast.org.bd/issues/shelter> for more information.

human aspects that is attached to the slum dwellers, we provided the guidelines to the Government to undertake a master plan rehabilitation scheme/pilot programme for rehabilitation by evicting the slums phase by phase otherwise, the wholesale removal will give rise to multiple problems for the society and the State.⁴⁰⁷

Subsequent to the above observations, a series of cases followed, where the spirit of this judgment was reflected. The reality, however, is grim. Various government bodies have exhibited systematic disregard for judicial directives and observations, and have continuously been attempting to displace the slum-dwellers in the name of development, without taking any measures for their rehabilitation. There are instances where interim injunctive orders passed by the Supreme Court have been flouted by the Government who went ahead in evicting slum-dwellers, and the remedy against the Government's high-handedness has proved ineffective.

National security and terrorism

Bangladesh has a documented history of torture and abuse during detention and interrogation by law enforcement agencies. The recent years have witnessed an increase in the incidents involving arbitrary and illegal arrests, enforced disappearances, torture and custodial deaths.⁴⁰⁸

In *Bangladesh Legal Aid and Services Trust (BLAST) vs. Bangladesh*,⁴⁰⁹ the High Court provided fifteen directives in the form of guidelines for reforming provisions of arrest without warrant and

⁴⁰⁷ *Ain o Salish Kendra (ASK) and Others vs. Government of Bangladesh and Others*, (Writ Petition No. 3034 of 1999), 19 (1999) BLD (HCD) 488 at para. 17.

⁴⁰⁸ "Bangladesh: Halt Mass Arbitrary Arrests," Human Rights Watch, 17 June 2016, accessed 18 April 2017, <https://www.hrw.org/news/2016/06/17/bangladesh-halt-mass-arbitrary-arrests>.

⁴⁰⁹ *Bangladesh Legal Aid and Services Trust vs. Bangladesh and Others*, 55 DLR (HCD) 2003, at 363, accessed 09 October 2017, <https://www.blast.org.bd/content/judgement/55-DLR-363.pdf>.

interrogation on remand, under Sections 54 and 167 respectively, of the Code of Criminal Procedure of 1898. Subsequently, in *Saifuzzaman vs. State and Others*,⁴¹⁰ the Court issued guidelines in respect of arbitrary arrest, detention, investigation and the treatment of suspects to be followed by the Government, magistrates and the police. In the BLAST case, the Court directed the legislature to amend Sections 54, 167, 176 and 202 of the Code of Criminal Procedure to ensure accountability on the part of the police and magistrates while dealing with issues relating to the arrest of a person for suspicion of commission of any offence, detention in custody, manner of investigation, persons empowered to investigate and the duties of magistrates in cases of detention and custodial deaths. It was further observed that Sections 54 and 167 of the Code are inconsistent with constitutionally guaranteed rights.

These guidelines, though not systematically observed, have played a vital role in protecting vulnerable persons from custodial violence. In 2004, the Government filed an appeal against the judgment of the High Court.⁴¹¹ When the matter finally came up for hearing in 2016, the Supreme Court turned down the appeal and upheld substantially the guidelines of the High Court with certain modifications.⁴¹² The Court in formulating the guidelines held as follows:

...We are of the view that all the recommendations are not relevant under the changed circumstances. We formulate the responsibilities of the law enforcing agencies which are basic norms for them to be observed by them at all levels. We also formulate guidelines to be followed by every member of law enforcing agencies in case of arrest and detention of a person

⁴¹⁰ *Saifuzzaman vs. State and Others*, 56 DLR (HCD) 2004, at 324.

⁴¹¹ *Bangladesh, represented by the Secretary, Ministry of Law, Justice and Parliamentary Affairs vs. Bangladesh Legal Aid and Services Trust and Others*, Civil Appeal No. 53 of 2004, accessed 12 February 2017, http://www.supremecourt.gov.bd/resources/documents/734650_Civil_Appeal_No_53_of_2004_final_2016.pdf.

⁴¹² "Supreme Court rejects State's appeal on CrPC Sections 54, 167," *bdnews24.com*, 24 May 2016, accessed 16 October 2016, <http://bdnews24.com/bangladesh/2016/05/24/supreme-court-rejects-states-appeal-on-crpc-sections-54-167>.

out of suspicion who is or has been suspected to have involved in a cognizable offence. In order to ensure the observance of those guide lines we also direct the Magistrates, Tribunals, Courts and Judges who have power to take cognizance of an offence as a court of original jurisdiction.”⁴¹³ The Government has filed a review petition against the judgment, which is pending before the Appellate Division.⁴¹⁴

Recently, Bangladesh has witnessed a series of murders of bloggers, atheists, foreigners and LGBTI activists and finally the Holey Artisan Bakery attack in Dhaka on 1 July 2016. In response to the earlier murders, the law enforcement agencies arrested nearly 15,000 people during the month of June alone. According to the 2016 Human Rights Watch Report, since the bakery attack, security forces have conducted raids, killed alleged militants in so called encounters, and arrested many others in a manner that has raised questions. Law enforcement agencies secretly detained two individuals, who were hostages in the Holey Artisan Bakery attack, for over a month before the Government, in the face of intense national and international pressure, admitted to having them in custody. One was finally released without charge after three months in detention; the other is still in detention and it is unclear what charges have been brought against him.⁴¹⁵ The Supreme Court has not intervened on its own motion in any of these incidents, nor has any arrested or detained person or their family members raised these issues before the Supreme Court.

⁴¹³ *Bangladesh, represented by the Secretary, Ministry of Law, Justice and Parliamentary Affairs vs. Bangladesh Legal Aid and Services Trust and Others*, (Civil Appeal No. 53 of 2004).

⁴¹⁴ *Government of Bangladesh, Bangladesh Secretariat and Others vs. Bangladesh Legal Aid and Services Trust and Others*, (Civil Review Petition No.41 of 2017) filed on 24 January 2017.

⁴¹⁵ “Bangladesh: End Arbitrary and Secret Arrests,” Human Rights Watch, 12 October 2016, accessed 20 October 2016, <https://www.hrw.org/news/2016/10/12/bangladesh-end-arbitrary-and-secret-arrests>.

Conclusion

An independent judiciary is indispensable for good governance and for bolstering a culture of accountability. A judiciary that is not independent of the executive and the legislature affects society as it fails to uphold the rights of citizens. Interference in the appointment process and non-compliance with statutory obligations further weakens the state of rule of law and undermines the rights guaranteed under the Constitution.⁴¹⁶ The absence of legislation providing for the appointment and removal of judges in an orderly and transparent manner leaves room for political manoeuvring and also makes judges susceptible to various forms of manipulation. Despite limitations, the judiciary in Bangladesh has been playing a constructive role in protecting the civil liberties and socio-economic rights of citizens. The inherent institutional weaknesses in the judiciary, ranging from a politicized appointment process to the lack of financial independence of the judiciary, have affected its capacity to function as a strong check on abuses of power and the violation of human rights. If the maladies inherent in the selection and operation of the judiciary are not remedied by the installation of a transparent system for the appointment of and disciplining of judges, whilst also allowing for financial independence, the ability of the judiciary to uphold rule of law and the rights of citizens will continue to wane. The foundation of the Constitution visualizes a society where rule of law, fundamental human rights and freedoms, equality and political, economic and social justice, is guaranteed to all citizens. This vision is also echoed in the Preamble to the Constitution. The Republic nature of State can be ensured if the mandate of the Constitution is obeyed and the judiciary is free from all interference.⁴¹⁷

⁴¹⁶ Adeeba Aziz Khan, "NGOs, the Judiciary and Rights in Bangladesh: Just Another Face of Partisan Politics?," *Cambridge Journal of International and Comparative Law* (1) 3: 254–274 (2012): 262.

⁴¹⁷ *Advocate Asaduzzaman Siddiqui and Others vs. Bangladesh and Others*, (Writ Petition No.9989 of 2014), judgment delivered 05 May 2016.

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