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Politicisation of the Appointment and Removal of Judges in a Declining Democracy: The Case of Bangladesh

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In Bangladesh, the judiciary has adjudicated important political issues, particularly cases of constitutional amendments. On the other hand, the judiciary has been utterly politicised against a backdrop of deep-seated antagonism and mistrust between the two major political parties. Although the related literature tends to focus on either the judicialisation of politics or the politicisation of the judiciary alone, this paper argues that politicisation and judicialisation have coexisted and the relative importance of these two factors can change depending on the type of issue dealt with by the judiciary. Accordingly, this paper takes up the latest constitutional amendment case as an example, in which the Supreme Court struck down a significant constitutional change in the procedure for the removal of judges. In so doing, we demonstrate that, while judicial appointments had been deeply politicised for decades, judges across the political spectrum were very keen to uphold judicial autonomy vis-à-vis the executive branch. However, as the current regime has become increasingly authoritarian after "landslide victories" in general elections in 2014 and 2018, it seems more likely that the politicisation (and possibly the subjugation) of the judiciary has played a dominant role in recent years.

Keywords: Bangladesh; judicialisation of politics; appointment and removal of judges

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Abstract: In Bangladesh, the judiciary has adjudicated important political issues, particularly cases of constitutional amendments. On the other hand, the judiciary has been utterly politicised against a backdrop of deep-seated antagonism and mistrust between the two major political parties. Although the related literature tends to focus on either the judicialisation of politics or the politicisation of the judiciary alone, this paper argues that politicisation and judicialisation have coexisted and the relative importance of these two factors can change depending on the type of issue dealt with by the judiciary. Accordingly, this paper takes up the latest constitutional amendment case as an example, in which the Supreme Court struck down a significant constitutional change in the procedure for the removal of judges. In so doing, we demonstrate that, while judicial appointments had been deeply politicised for decades, judges across the political spectrum were very keen to uphold judicial autonomy vis-à-vis the executive branch. However, as the current regime has become increasingly authoritarian after "landslide victories" in general elections in 2014 and 2018, it seems more likely that the politicisation (and possibly the subjugation) of the judiciary has played a dominant role in recent years.

1. Introduction

A growing number of studies have documented the increasing significance tied to the role of the judiciary in politics in many parts of the world. Accordingly, the trend towards the "judicialisation of politics" (Hirschl 2006) has been recognised in the literature concerning Asia, and this is also the case with some countries in South Asia in particular (Dressel 2012). For example, Hoque (2015, 266) states that the "judicialisation of politics has achieved a significant place within the higher judiciaries of Bangladesh, India, and Pakistan—although in differing degrees and types." For Bangladesh, he claims that the judicialisation of politics has recently reached a stage in which the judiciary intruded into "mega-politics" in an unprincipled and unpragmatic manner. This observation on the judiciary of Bangladesh appears quite reasonable, given that the Supreme Court has annulled four constitutional amendments since 2010.

On the other hand, many legal scholars and practitioners have pointed out that in Bangladesh the executive branch has interfered in the judiciary, especially through judicial appointments, against a backdrop of deep-seated antagonism and mistrust between the two major political parties. More specifically, there is significant room for political discretion in elevating judges from the High Court Division (HCD) to the Appellate Division (AD) in the Supreme Court and in appointing the Chief Justice among judges of the AD (Bari 2016; Islam 2012; Jahan and Shahan 2014; Siddiq 2018)[1]. Therefore, judges have a strong incentive to act in accordance with the government's wishes.

The aim of this paper is to show that politicisation and judicialisation have coexisted and the relative importance of these two factors can change depending on the type of issue dealt with by the judiciary. While the related literature tends to focus on either politicisation of the judiciary or the judicialisation of politics alone, the judiciary of Bangladesh is not simply characterised by either politicisation or judicialisation (or a transition from the former to the latter). Therefore, this sort of dichotomous thinking is not appropriate when looking at the relationship between the executive and judicial branches.

In this paper, we take up the example of the latest constitutional amendment case, which was about the procedure for the removal of judges (the Sixteenth Amendment Case). In doing so, we demonstrate that judges across the political spectrum were very keen to uphold judicial autonomy vis-à-vis the executive branch, notwithstanding its extensive interference in the judiciary. Combining different types of evidence—such as patterns of judicial appointments, a detailed insider account by a former Chief Justice (Sinha 2018), and the Supreme Court's rulings and voting patterns of judges in major cases—we argue that it is possible to understand why the Supreme Court struck down the Sixteenth Amendment against the government's wishes. However, as the current regime has become increasingly authoritarian after "landslide victories" in general elections in 2014 and 2018, it seems

[1] The Supreme Court of Bangladesh consists of the HCD and the AD. The former is the lower division, and the Chief Justice belongs to the latter (Article 94 of the Constitution).

more likely that the politicisation (and possibly the subjugation) of the judiciary has played a dominant role in recent years.

The paper is organised as follows. Section 2 describes how constitutional provisions relating to the appointment and removal of Supreme Court judges have changed over time. Section 3 examines the politicisation of the judiciary through judicial appointments in the past few decades. In Section 4, we document and analyse the Supreme Court's decisions about the Constitution (Sixteenth Amendment) Act of 2014. In Section 5, we discuss why the government did not have full control of the higher judiciary despite its interference in judicial appointments. The final section concludes with some thoughts on the future of the relationship between the judicial and executive branches in Bangladesh.

2. Constitutional Provisions on the Appointment and Removal of Judges

Provisions relating to the judiciary in the Constitution are in Part VI (titled "The Judiciary"), and that part is separated into Chapter I (titled "Supreme Court") and Chapter II (titled "Subordinate Court"). Twenty provisions are contained in Chapter I and four provisions are in Chapter II.

Among these provisions, Articles 95 and 96 are closely related to the Sixteenth Amendment. In this section, we will introduce these two provisions focusing on their transformation through several constitutional amendments.

2.1. Article 95

The original provision of Article 95 as enacted in 1972 was as follows;

> (1) The Chief Justice shall be appointed by the President, and the other Judges shall be appointed by the President after consultation with the Chief Justice.
> (2) A person shall not be qualified for appointment as a Judge unless he is a citizen of Bangladesh and
> (a) has, for not less than ten years, been an advocate of the Supreme Court; or
> (b) has, for not less than ten years, held judicial office or been an advocate, in the territory of Bangladesh and has, for not less than three years, exercised the powers of a district Judge.
> (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 of Bangladesh.

This article was amended by the Fourth Amendment in 1975. The largest change was in clause 1 which was amended to the following:

(1) The Chief Justice and other judges shall be appointed by the President.

This amendment means that consultation with the Chief Justice is no longer required for appointment of a Supreme Court judge. In other words, the amendment made it possible to appoint Supreme Court judges at the discretion of the President. The Fourth Amendment aimed to concentrate the power to the President by changing the governance system from a parliamentary system to a presidential system and considerably reducing the authority of the judicial branch and impairing its independence. As part of this, the provision that guaranteed the opportunity for the Supreme Court to be involved in the appointment of Supreme Court judges was removed from the Constitution.

After that, according to the Fifth Amendment of 1979, the one-party system introduced by the Fourth Amendment was abolished and a certain degree of change was also seen with respect to the judiciary. However, the phrase "consultation with the Chief Justice" was restored in clause 1 and the system for the appointment of Supreme Court judges returned to its original form through the Fifteenth Amendment of 2011, which was made in response to a judgement that invalidated the Fifth Amendment.

In relation to this provision, one subclause introduced by the Fifth Amendment was (2) (c) of Article 95. This provides that one of the qualifications to be appointed as a Supreme Court judge is prescribed by law. However, a criticism is that this "law" has not been enacted to date, so this provision might lead to discretionary appointments.

The Fifteenth Constitutional Amendment abolished the Non-Party Caretaker Government (NCG) system that had been in effect up to that time, and also revised provisions related to fundamental rights and the governance system in various aspects of the Constitution. It was one of the amendments that brought about major changes in the constitutional history of Bangladesh.

2.2. Article 96

Article 96 provides the term of office of the Chief Justice and other Supreme Court judges, and is a provision that was more greatly changed by the constitutional amendment compared with Article 95. The current provisions enacted by the Sixteenth Amendment of 2014 are 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 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 ground 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.

Looking at the changes in the text, clause 1 of the original Constitution specified a retirement age of sixty-two years old. Then, by the Seventh Amendment of 1986, the retirement age was raised to sixty-five years old, and was raised again to the age of sixty-seven by the Fourteenth Amendment in 2004.

The original provisions of clauses 2 and 3 were same as the current ones. However, the Fourth Amendment of the Constitution revoked clause 3 and changed clause 2 as follows;

(2) A Judge may be removed from his office by order of the President on the ground of misbehaviour or incapacity:

Provided that no judge shall be removed until he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him.

In other words, Parliament lost control over the dismissal procedure of judges. Furthermore, when we read it together with Article 95, it is clear that the President was granted the power to appoint and dismiss judges by the Fourth Amendment. However, these provisions were changed again by the Fifth Constitutional Amendment to the following:

(2) A Judge shall not be removed from 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 consists 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.

This amendment was one factor in restoring judicial independence. This is because a new framework was established in which the Supreme Judicial Council plays an important role in the dismissal of judges. Furthermore, the provisions of clauses 4 to 7, which were added as a result of the Fifth Amendment, are as follows;

(4) The functions of the Council shall be-

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

(b) to inquire the capacity or conduct of a Judge or of any other functionary who is not removable from 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 the inquiry, the Council reports to the President that in its opinion the Judge has ceased to be capable of properly 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.

However, as a result of the Sixteenth Amendment, clauses 2 and 3 became current provisions (i.e. the repeal of these provisions was reversed to restore the original), and the framework of the Supreme Judicial Council was deleted as the provisions of clauses 4 to 7 were replaced by clause 3. In other words, the scope of the judiciary's involvement in the dismissal of judges has been narrowed, and the dismissal of judges for political reasons has become a possibility.

2.3. Other provisions

Some other provisions were also amended in addition to Articles 95 and 96. For example, Article 98 provides for the appointment of HCD judges as *ad hoc* judges for the AD. Originally, consultation with the Chief Justice was required. However, with the Fourth Amendment, the phrase "consultation with the Chief Justice" was removed. Article 100 was also once amended, but unlike the case of Article 98, this provision was amended again and restored to its original wording.

As described above, several provisions have been amended in relation to political circumstances. Among them, Articles 95 and 96 were most strongly affected by the politico-judicial relationship. The Sixteenth Amendment was one of these cases.

3. Politicisation of Judicial Appointments

The independence of the judiciary is one of the basic pillars of the Constitution of Bangladesh, but in reality, judicial appointments have been utterly politicised over the past few decades. This has occurred against a backdrop of deep-seated antagonism and mistrust between the two major political

parties—the Awami League (AL), led by Sheikh Hasina, and the Bangladesh Nationalist Party (BNP), led by Khaleda Zia.

Many legal scholars and practitioners have observed that notwithstanding Articles 95 (1) and 48 (3) of the Constitution, it is not the President but the Prime Minister who selects the Chief Justice of Bangladesh (Bari 2016; Islam 2012; Jahan and Shahan 2014; Siddiq 2018). A former Chief Justice, recalling the selection process of one of his predecessors, candidly says that although the Constitution empowered the President to appoint the Chief Justice, the Prime Minister had full authority over the matter. He also argues that "[t]he office of Chief Justice was made political for a long time and it was beyond comprehension that anyone would become the Chief Justice outside the political line of thinking" (Sinha 2018, chapters 6 and 10).

In the same vein, appointments of other judges of the Supreme Court have also been made with political considerations. There is a common perception that when in power, both the AL and the BNP regularly attempted to elevate judges who shared their partisan interests and political views (Chowdhury 2015, 223-224; Jahan and Shahan 2014, 227). As a result, according to a former Chief Justice, various benches of the Supreme Court were divided along political lines like an "Awami League Court" and a "BNP Court" (Rahman 2011). After the Fifteenth Constitutional Amendment in 2011, the President is obliged to consult the Chief Justice on appointments of puisne judges, but this would not make much difference given that the executive branch handpicks the Chief Justice. In fact, as far as we know, the Chief Justice was even ignored in some cases.[2]

The sheer politicisation of judicial appointments can be seen from the fact that supersession has recently been the rule rather than the exception in Bangladesh. This stands in contrast to India, where seniority is arguably the single most important unwritten norm in the judiciary (Chandrachud 2014, 11).[3] Between 1972 and 2002, twelve AD judges assumed the office of the Chief Justice of Bangladesh, and there was no instance of departure from the seniority principle. Since 2003, in marked contrast to the preceding thirty years, seven of ten AD judges who assumed the office of the Chief Justice superseded senior colleagues of the AD including the senior-most judges (Table 1). It was the BNP government (October 2001-October 2006) that, for the first time since independence, violated the convention of appointing the senior-most AD judge as the Chief Justice in June 2003,

[2] In 2013, the President elevated a judge of the HCD to the AD without any consultation with the Chief Justice (Sinha 2018, chapter 10). Another case saw an additional judge dropped in 2014, though the Chief Justice recommended his confirmation as a permanent judge of the HCD (Siddiq 2018, 65).

[3] Since independence, the seniority norm has been followed in the appointment of the Chief Justice of India, barring three exceptions more than four decades ago. When it comes to appointing judges to the Supreme Court of India, seniority is an informal eligibility criterion taken into account (Chandrachud 2014, 212). On the other hand, the collegium system has recently come under fire for its arbitrariness, opacity, and lack of accountability. See Siddiq (2018); "The collegium system must be reformed," *Hindustan Times*, 17 January 2019; "Hollowing out of judiciary," *Economic and Political Weekly*, 54 (4), 26 January 2019.

when K. M. Hasan assumed the office in supersession of two fellow judges.[4] During the BNP regime, the next Chief Justice, Syed J. R. Mudassir Husain, also superseded the same senior judges.

It is important to note that, even before this, judicial appointments were politicised. As shown in Table 2, the BNP government (March 1991-June 1996) had already breached the seniority principle in appointing AD judges, and the succeeding AL government (June 1996-July 2001) went even further. While two of three judges elevated to the AD superseded fellow HCD judges during the BNP government, six of seven judges elevated to the AD superseded senior colleagues of the HCD during the AL government.[5] In appointing AD judges, supersession of the senior-most HCD judges has been quite common under all the successive regimes: the BNP government (October 2001-October 2006), the military-backed NCG (January 2007-December 2008), and the AL government (January 2009-present). Given that the number of judges superseded by junior colleagues has skyrocketed in recent years, the present AL government seems to have made more blatantly arbitrary decisions on judicial appointments. It elevated judges to the AD who it had appointed (or confirmed) to the HCD after coming back to power in 2009, and they superseded a group of HCD judges appointed by the BNP government between 2001 and 2006.[6] In fact, in a great majority of cases since 2002, both the BNP and AL governments appointed judges to the AD whom they had previously elevated to the HCD (Table 2).

Figure 1 illustrates the composition of AD judges between 1991 and 2018. Since February 2010, the AD has consisted of only judges appointed by the AL government. In addition to those judges, there has been at least one judge appointed by the AL in the AD over the past 20 years, including the period when it lost power. It appears that the AL government and, to a lesser extent, the BNP government have been keen to appoint relatively younger judges to the AD, who would then have longer tenures (see the fourth column of Table 2) and, in doing so, both the governments have tried to keep a grip on the high court even after losing power. This forward-looking step would be another reason for the prevalence of supersession in the higher judiciary.

It is also worth pointing out that while the Constitution does not stipulate the size of the Supreme

[4] The retirement age of Supreme Court judges was raised from 65 to 67 years by the Constitution (Fourteenth Amendment) Act of 2004. It was alleged that this extension of retirement age was politically motivated to make K. M. Hasan, who previously served as the International Affairs Secretary of the BNP, the Chief Advisor of an NCG (Islam 2016, 48-49). In October 2006, Justice Hasan declined to assume the role of Chief Advisor, which led to the two-year rule of the military-backed NCG.

[5] In 2001, for example, Md. Ruhul Amin and Mohammad Fazlul Karim were elevated to the AD in supersession of the aforementioned K. M. Hasan, who later became the Chief Justice superseding Amin and Karim, in return.

[6] AHM Shamsuddin Choudhury, Md. Nizamul Huq, and Mohammad Bazlur Rahman were confirmed as permanent judges of the HCD in 2009, after serving as additional judges for no less than 8 years. Obviously, the BNP government (2001-2006) and the military-backed NCG (2007-2008) blocked their confirmation.

Court, the number of AD judges has increased only marginally over the years. Therefore, a single judge can carry much weight in the AD, and this gives the government a strong incentive to appoint those who are committed to their partisan interests as AD judges in general and as Chief Justice in particular.[7] On the other hand, the size of the HCD has increased steadily and more than tripled during the same period: 28, 48, and 97 judges in 1991, 2003, and 2015, respectively (Supreme Court of Bangladesh 2016, 112). This puts the government in a better position to find favourable judges in the HCD for elevation to the AD not just because the pool of candidates has become bigger, but because more competition for promotion among HCD judges could tempt them further to act in favour of the government.

As we will see later, however, this politicisation of judicial appointments does not mean that judges always make decisions in a partisan way (i.e. in favour of the political party that appointed them), no matter which party holds the reins. Nor does it mean that judges are always subservient to the powers-that-be due to their carrot-and-stick approach. In the following sections, we illustrate that the reality is more complicated and nuanced, with special reference to the Sixteenth Amendment Case.

4. The Sixteenth Amendment Case

The Sixteenth Amendment of the Constitution of Bangladesh was passed in September 2014 and was a change that empowered Parliament with respect to the dismissal of Supreme Court judges. However, in response to the amendment, the Supreme Court ruled against a writ petition under Article 102 of the Constitution that contested its constitutionality, and after the ruling that the amendment was unconstitutional by the HCD on May 5, 2016, the judgement of the HCD was upheld by the AD on July 3, 2017.

In this section, we will examine the contents of the judgement that the Sixteenth Amendment was unconstitutional by the HCD. In examining the judgement, we will focus on the majority opinion of Justice Moyeenul Islam Chowdhury. Later on, the criticisms contained in Chief Justice Surendra Kumar Sinha's dissent in this case caused conflict between the political establishment and the judicial branch. However, since the important matters were already mentioned in the judgement of the HCD, this section will focus on the majority opinion by the HCD.

4.1. Main claims of the plaintiff and respondent

[7] The size of the Supreme Court of India is now fixed at 31 (including the Chief Justice) by Article 124 (1) of the Constitution with the Supreme Court (Number of Judges) Amendment Act, 2008. Chandrachud (2014, 162) argues that the large size of the Supreme Court of India creates a greater diffusion of power amongst the judges.

The plaintiff firstly argued that persons who have political influence tend to ignore the law for their own interests in Bangladesh as compared with countries such as India.

Then, the plaintiff also argued that the Sixteenth Amendment, which gave Parliament the authority to make recommendations to the President on the dismissal of judges, contradicted the principle of separation of powers included in the preamble of the Constitution. Also, it infringed on the basic structure of the Constitution and violated Article 7B. In addition, the plaintiff criticised this amendment for violating the spirit of Article 22, which clarified the separation between the administrative and judiciary branches. In addition, as stipulated in Article 70 (b), members of Parliament are unable to vote against the decisions of their political party, so it is a problem that they are unable to freely express opinions on the dismissal of judges.

In response to the plaintiff's argument, Attorney General Mr. Mahbubey Alam and others expressed the following opinion as counsel to the respondent. First of all, while touching on the scandals of judges reported on the media, they argued that it is generally accepted that the Supreme Judicial Council was not functioning, and that the Sixteenth Amendment improved governance in the judicial branch (pp. 11-12: hereinafter, number indicates page number of the judgement). They also argued that the amendment does not conflict with the preamble of the Constitution or Article 7B.

As for Article 70, Mahbubey Alam argued that the dismissal of judges is not a political issue, and that it would not be a problem because Parliament will discuss constitutional issues regardless of political beliefs. (12-15). Furthermore, Article 7 stipulates that all of the country’s power belongs to the people, and exercise thereof is said to be on behalf of the people. Such sovereignty of the people is reflected in the provisions on impeachment of the President, the chairman of Parliament, and others in Articles 52, 57, 74, and 96. It was argued that because the government under martial law tried to dismiss a judge through the Supreme Judicial Council the military government, in a sense, robbed the sovereignty of the people (17-18).

In this case, the four senior lawyers nominated by the court expressed their views as "friends of the court" (amicus curiae). One of them, Kamal Hossain, who served as Minister of Justice and Minister of Foreign Affairs and also as the chairperson of the drafting committee of the 1972 Constitution, mentioned that the independence of the judiciary is Constitution (e.g. Article 22). In Masdar Hossain’s , he argued that the AD emphasised the independence of the judiciary, in addition to such independence being mentioned in Articles 94(4), 116A, and 147. Furthermore, independence of the judiciary in particular means independence from intervention by the legislature, and when the Constitution was first enacted, it stipulated that Parliament is involved in the dismissal procedure of judges, but it does not mention such a role for political parties (38-40).

In addition, Article 96 of the original Constitution was amended by the Fourth Amendment, and the organisation called the Supreme Judicial Council was introduced by the Fifth Amendment, after which the AD judged the Fifth Amendment as unconstitutional. Since the provision related to the

Supreme Judiciary Council was approved, it was said that the Sixteenth Amendment infringes on the judgment of the AD, weakens the independence of the judiciary, and adversely affects the rule of law. In addition, it was also pointed out that the Sixteenth Amendment conflicted with Article 147 (2) (41 - 43).

Lastly, Kamal Hossain gave the criticism that while partisanship affects the impeachment procedure in the United States, considering Bangladesh's current political situation in particular, the Sixteenth Amendment would threaten judicial independence due to the existence of Article 70 (43-44).

4. 2. Judgment

The trial was handled by three judges: Moyeenul Islam Chowdhury, Quazi Reza-Ul Hoque, and Md. Ashraful Kamal. In this section, we focus on the majority opinion written by Justice Chowdhury. Incidentally, while Justice Hoque agreed with the majority opinion of Justice Chowdhury, Justice Kamal is said to have changed his mind at the last minute[8].

4.2.1. Locus standi

One of the issues presented by the Attorney General was that the plaintiff did not have standing to raise a writ petition in this case, showing that "who is infringed on the right" prescribed in Article 102 of the Constitution, is not clearly defined and is not bound by the traditional concept of locus standi, but should be interpreted according to the purpose and framework of the Constitution (58). Regarding this point, while referring to the so-called Bangladesh Environmental Lawyers Association (BELA) Case and the Ekushey Television Case, it was argued that judicial review is the core of the judicial branch under the Constitution of Bangladesh and that the scope of judicial review spreads on the basis of judicial activism, although there are certain restrictions (59-63).

In consideration of the above discussion, it is obvious that the plaintiff is a lawyer in the Supreme Court with a high awareness of the public interest, and is concerned with the establishment of the rule of law. Moreover, if we have to establish the rule of law as the idea of the Constitution, even if the plaintiff has not been directly or personally affected by the Sixteenth Amendment, there is an interest of sufficient appeal as a lawyer (63-64). Then, after considering that the problem of the

[8] Since Justice Hoque complained that an army officer had pressured him to deliver a judgment in favor of the government, it is quite presumable that Justice Kamal was also threatened and (unlike Justice Hoque) bent to the government's will (Sinha 2018, chapter 27). Interestingly, the dissenting opinion of Justice Kamal was in Bangla (or Bengali). While it is the state language of Bangladesh, it is quite unusual that for a Supreme Court judge justice writes to write an opinion in Bangla. Justice Kamal, praising the state language, argued why his opinion must be written in Bangla. Given that Sheikh Mujibur Rahman, the founding father of Bangladesh and the father of Sheikh Hasina, played a major role in the Bengali Language Movement in East Pakistan, Justice Kamal's opinion was quite pro-AL in another sense.

separation of powers presented by the plaintiff and judicial independence are matters of interest to society, the plaintiff to standing. Based on Article 102 of the Constitution, this case could proceed under the framework of a writ petition (65-67).

4.2.2. Parliament's involvement in judicial dismissal

The procedures for dismissing judges are diverse within British Commonwealth countries, and about 63% of these countries and regions have dismissed judges without involvement of the legislature. Because of this, Justice Chowdhury mentions that involving Parliament in the dismissal procedure of a judge is not mainstream within the British federal state. And Justice Chowdhury mentions many countries are sensitive to the separation of powers and judicial independence under such circumstance (67-76).

4.2.3. Basic Structures of the Constitution and Independence of the judiciary

In his opinion, a relatively large number of pages are allocated for the basic structure doctrine of the Constitution and independence of the judiciary. First, Justice Chowdhury said that a judge must exercise the sovereignty of the people under the Constitution, because the judges of the Supreme Court are "defenders of the Constitution" (77-78). Even though the Constitution does not contain any provision that the judiciary is accountable to Parliament, it has been argued that the Sixteenth Amendment would make the judiciary accountable to Parliament. Furthermore, unlike the British Parliament, the Bangladeshi Parliament does not prevail over anything, and Chowdhury stated that legislation should not infringe on the constitutional text and the basic structure (78-79).

Justice Chowdhury, while referring to the fact that the "rule of law" is also touched upon in the preamble of the Constitution, states that the concept is a basic principle of the Bangladeshi Constitution. He also mentions that the "law" that this refers to is not limited to the law made by the Parliament. He states that a prerequisite for the "rule of law" is independent and fair justice (pages 79-80). From Article 147, which provided a guarantee for the treatment of judges, and Article 94 (4), which provided for independence of the judiciary in the performance of its duties, the founders of the Constitution of Bangladesh declared that the executive and legislative branches would not touch acts of judges (84-85).

From the case of Muhammad Abdul Haque vs. Fazlul Quader Chowdhury in 1963 before the Dhaka High Court, the concept of the basic structure of the Constitution was introduced, and the historical development was reflected in the Constitution of Bangladesh. It is said that a major position is placed on the Eighth Amendment judgment[9], which acknowledged the basic structure of the Constitution. In the same ruling, it is stated that the basic structure of the Constitution, such as

[9] *Anwar Hossain Chowdhury v. Bangladesh*, 1989 BLD (Spl.)1.

the separation of powers, democracy, republicanism, and independence of the judiciary, and so forth. Justice Chowdhury mentions that constitutional amendments are meant to make the Constitution better, effective, and meaningful, while maintaining its basic structure. The court pointed out that it has the authority to invalidate any constitutional amendment that would alter this structure (90-99).

In addition, Justice Chowdhury said that the judiciary must have an independent environment so that judges can judge freely, without external interference or pressure; and the independence of the judiciary is based on the rule of law as a cornerstone for the constitutional democratic state (100-109). Then, after listing the provisions of the Constitution concerning this case, Justice Chowdhury argued that the Constitution must be protected from any attack by the executive branch or the legislature, and since judicial independence is one of the basic structures of the Constitution, the Supreme Court must protect and defend it at any cost (114-121).

4.2.4. Opinion on trial

Next, Justice Chowdhury considered opinions from amicus curiae. For example, Chowdhury shows support for Hossain's opinion that judicial independence will be threatened by exposure of the judiciary to the Supreme Court dismissal procedure involving Parliament, which tends to be influenced by political pressure (121 -123).

The respondent noted that Parliament is involved in the dismissal procedure of judges in some countries such as the United Kingdom, the United States, and India. However, according to Article 70 of the Constitution in Bangladesh, members of Parliament must follow the instructions of political parties on the dismissal of judges (123-124). Justice Chowdhury also pointed out that in Bangladesh, the executive branch refers to the appointment procedure of these countries despite the fact that these countries focus on the appointment, rather than the dismissal, of judges.

Justice Chowdhury also stated that, in considering the constitutional conformity of the Sixteenth Amendment, it is impossible to ignore the political situation of Bangladesh, such as (1) the lack of agreement on national issues among major parties, (2) the large degree of polarisation in society, and (3) the inability of any party to gain two-thirds of the seats in Parliament, which would be required for Parliament to stop dismissal procedure against a judge. From these political circumstances, the Sixteenth Amendment precludes the judiciary from fulfilling its duties with confidence (126-127).

Moreover, Justice Chowdhury upheld the plaintiff’s argument that the authority to dismiss a judge granted to Parliament by the Sixteenth Amendment is neither legislative authority nor supervisory authority over administrative activity, but ultra vires. He also upheld the argument that this amendment violates the philosophy of Article 22 of the Constitution. Furthermore, he also noted that details in the law on the dismissal of Supreme Court judges could be easily changed under Article 96 (3) by a simple majority of Parliament, which in turn infringes on the independence of the judiciary (130-132).

Regarding the independence of the judiciary, Justice Chowdhury assumed that there are three aspects: guarantee of term, guarantee of treatment, and institutional independence. Among them, the Sixteenth Amendment affects the guarantee of term of office, which is said to be related to the core of independence. In addition, Justice Chowdhury made a critical argument in connection with the independence of the judiciary, within the context that many members of the legislature have a history of crime or become a party to civil petitions. If such politicians were to be positioned superior to judges under the Sixteenth Amendment, then the independence of victims would be violated and the enforcement of judicial duties would be in danger (136-138). Furthermore, he concluded that the Sixteenth Amendment would lead to infringement of the public interest, and adopted the idea that the purpose of the Sixteenth Amendment was to destroy the concept of an independent Judiciary. He further mentioned that the proposed legislation based on Article 96(3) violated the independence of the judiciary along with the Sixteenth Amendment (141-143).

According to Justice Chowdhury, by passing the Sixteenth Amendment, the government was attempting to control the judicial system through Parliament, and this would influence judicial independence and the separation of powers, which are basic structures of the Constitution, and therefore dismissed the arguments made by the government (145-146 and 151).

Then, referring to the judgment of unconstitutionality by the Supreme Court of India against the 99th Amendment of the Indian Constitution concerning the appointment of judges in India, Justice Chowdhury noted that the independence of the judiciary and the separation of powers are dependent on the involvement of judges in the dismissal procedure (151-161). Lastly, he pointed out that the Sixteenth Amendment had no underlying legitimate intention (162-163). From the above discussion, Judge Chowdhury stated that the Sixteenth Amendment infringed on the basic structure of the Constitution, the independence of the judiciary, and the separation of powers.

4.3. Judgment in the AD

After judgment by the HCD was delivered on 5 May 2016, several politicians criticised the judgment. The government appealed to the AD and sought to overturn the HCD's judgment. However, contrary to the government's expectation, the AD ruled the Sixteenth Amendment unconstitutional on 3 July 2017. Chief Justice Surendra Kumar Sinha wrote a long opinion full of criticism toward the political culture of the country. His opinion mainly upheld Justice Chowdhury's. However, Chief Justice Sinha's strong criticisms led to conflict with the political establishment, and he was eventually forced to leave the country and resign as Chief Justice.[10]

[10] See "PM critical of CJ's remarks," *The Daily Star*, 22 August 2017; "AL leaders now calling for CJ to step down," *The Daily Star*, 23 August 2017; "I am completely well, says Chief Justice SK Sinha as he leaves country," *The Daily Star*, 13 October 2017; "Chief justice steps down," *The Daily Star*, 12 November 2017; "Forced to quit: BNP, No pressure: AL," *The Daily Star*, 12 November 2017. See also Sinha (2018).

5. Between Politicisation and Judicialisation

In Bangladesh, as discussed earlier, the executive branch has had great and non-transparent discretion in appointing judges to the Supreme Court, and consequently the selection process has become deeply politicised. This is especially true of the relationship between the higher judiciary and the current AL government, which has retained power over a decade and become increasingly authoritarian in recent years. Nevertheless, these observations seem to contradict the fact that the Supreme Court has made a number of major judgments unfavourable to successive governments, including that in the Sixteenth Amendment Case mentioned above. In the latest case, the constitutional amendment was struck down by a 2-1 decision (practically a 3-0 decision, as described in footnote 8) of the HCD and subsequently by a unanimous (7-0) decision of the AD. This is all the more puzzling, given that the seven AD judges who heard the case had been appointed to the AD by the AL government.

How can we understand this seemingly wide gap? We argue that there are mainly two reasons why the executive branch did not have full control of the Supreme Court, despite its political interference in judicial appointments. First, judges across the political spectrum were very keen to uphold judicial autonomy vis-à-vis the executive branch. Needless to say, there is no denying that the high court had self-serving purposes in dealing with the issue of the judicial independence. At the same time, it is indisputable that a number of legal decisions helped safeguard the autonomy of the judges and the judiciary from executive interference. They include landmark judgements in the Anwar Hossain Case (the Eighth Amendment Case), the Masdar Hossain Case, and the so-called Ten Judges Case (the case of *Bangladesh v. Idrisur Rahman*), among many others.[11]

Concerning the appointment of judges to the higher judiciary and their removal, the Supreme Court's judgement in the Fifth Amendment Case is also well worth mentioning. In August 2005, the HCD declared unconstitutional the Constitution (Fifth Amendment) Act of 1979, which was intended to grant constitutional protection to the martial-law regime, its actions, and laws (during the period between August 20, 1975 and April 9, 1979) by inserting a new paragraph in the Fourth Schedule to the Constitution. The AD unanimously upheld the HC's decision with some modifications in February 2010.[12] Interestingly, although the Supreme Court struck down most of the constitutional changes, it did validate some changes, including the amendment to Article 96, which introduced a new provision pertaining to the Supreme Judicial Council. Without convincingly explaining the rationale behind its selectivity, the AD claimed that "[t]his substituted provisions being more transparent procedure than that of the earlier ones and also safeguarding independence of

[11] For the first two cases, see Hossain (2010). The Ten Judges Case concerned non-confirmation of ten additional judges to the HCD despite the recommendations of the Chief Justice.

[12] *Bangladesh Italian Marble Works Ltd. v. Bangladesh*, (2006) BLT (Special) (HCD)1; *Khondkher Delwar Hossain v. Bangladesh Italian Marble Works Ltd.*, (2010) 62 DLR (AD) 298.

judiciary, are to be condoned." It also demanded that the Supreme Court regain its power in appointment to and control and discipline of subordinate courts: "It is our earnest hope that Articles 115 and 116 of the Constitution will be restored to their original position by the Parliament as soon as possible."[13]

Second, although the government had enormous power in judicial appointments of the Supreme Court, not only partisan interests and political ideologies of judges but other factors like external pressure and lobbying could matter. Therefore, judges would be selected who were neither pliable nor favourable to the ruling party. Among judges of this type, a noticeable example is Md. Abdul Wahhab Miah, who served as an AD judge from 2011 to 2018. The AL government was reluctant to elevate Justice Miah from the HCD to the AD even though there were only three judges on the AD, including the Chief Justice. This reluctance was due to the fact that he was not aligned with the political ideology of the AL and had close relations with lawyers affiliated with the BNP. At the same time, the AL government was afraid that if the senior-most judge of the HCD was superseded and junior judges were elevated to the AD instead, "there might be a commotion in the Supreme Court Bar," given his connections with and popularity among the pro-BNP lawyers. Meanwhile, Justice Miah was actively canvassing and lobbying for his own elevation.[14] For example, he approached the Law Minister and asked him to persuade the Prime Minister, and in February 2011, Justice Miah was appointed to the AD in accordance with the seniority norm (Sinha 2018, chapter 6). However, in February 2018, three months after Surendra Kumar Sinha was forced to resign as Chief Justice, he left the Supreme Court before retirement because Syed Mahmud Hossain was appointed as the new Chief Justice in supersession of Justice Miah, the senior-most AD judge. This incident corroborates the claim that Justice Miah had not been in line with the political thinking of the AL.

The appointment of Mohammad Fazlul Karim as the Chief Justice is another example illustrating that the government did not always have the freedom to appoint judges who were committed to its partisan interests and political views. Justice Karim was "against [the] political thinking of the Awami League," but his lobbying efforts paid off and an important Member of Parliament from the same region managed to convince Prime Minister Hasina to elevate him to Chief Justice. In February 2010, after assuring the Law Minister that he would never embarrass the government during his

[13] *Khondkher Delwar Hossain v. Bangladesh Italian Marble Works Ltd.* (2010) 62 DLR (AD) 298. In the original Constitution, consultation with the Supreme Court was required in appointing judges of subordinate courts (Article 115), and it was empowered to handle the posting, promotion, and granting of leave of those judges (Article 116). Nevertheless, the jurisdiction was transferred to the President by the Fourth Amendment to the Constitution in 1975. Article 115 has remained the same since then, and Article 116 has not been fully restored to the original form, though it was amended again by the Fifth Amendment in 1979. The hypocrisy of the AL government is very clear here: while it justified the Sixteenth Amendment as the restoration of the original Article 96 of the Constitution, it ignored Articles 115 and 116.

[14] In India, judges canvass and lobby for appointments to the Supreme Court and High Courts, and these activities continue under the collegium system as well (Chandrachud 2018, 209-213).

tenure, Justice Karim assumed the highest judicial post in the land (Sinha 2018, chapter 6).[15]

To elaborate on the discussion above, we compare the Sixteenth Amendment Case with the Thirteenth Amendment Case. In the latter case, the AD declared illegal the Constitution (Thirteenth Amendment) Act of 1996, which introduced the NCG system. An NCG was an interim government set up following the expiry of the constitutionally stipulated five-year tenure of the Parliament, and it "shall give to the Election Commission all possible aid and assistance that may be required for holding the general election of members of Parliament peacefully, fairly and impartially" (Article 58D (2) of the Constitution). It was composed of the Chief Advisor at its head and not more than ten other Advisors. Retired Chief Justices, the most recent of whom were first on the list, were eligible for the post of the Chief Advisor. Under the NCG system, general elections were successfully held in 1996, 2001, and 2008, and the incumbent government was defeated every time.[16] However, after the AD declared the Thirteenth Amendment unconstitutional in 2011, the ruling AL hastily pushed a constitutional amendment removing the NCG provisions (Articles 58B-58E) from the Constitution. This caused the BNP, which had only ever demanded parliamentary elections under an NCG rather than a party government, to boycott the general election held in January 2014.

The cases of the Thirteenth Amendment and Sixteenth Amendment are similar in some respects. For example, they were heard during the AL government, and all the judges were ones appointed to the AD (and also to the HCD) by the AL government (Table 3). The AD annulled the constitutional amendments through the application of the basic structure doctrine.[17] Moreover, the AL government allegedly intruded into both cases.

In the Thirteenth Amendment Case, the AD allegedly acted on behalf of the government, which had wanted to discard the NCG system when in power.[18] There were indeed many pieces of circumstantial evidence for the alleged collusion (or at least a tacit agreement) between the government and a section of the AD (Bari 2016, 46-51; Hoque 2015, 280-283; Siddiq 2018, 81). First, after A. B. M. Khairul Haque was appointed Chief Justice in September 2010, the AD started to hear an appeal against the HCD's judgement on the amendment, even though it had been pending

[15] In December 2016, the BNP submitted to the President the names of four "renowned citizens of the country" for a search committee for the reconstitution of the Election Commission. The opposition party recommended four former Chief Justices, including Mohammad Fazlul Karim ("Khaleda-led BNP delegation to meet president today," *Dhaka Tribune*, 18 December 2016). This episode also implies that Justice Karim was not a favorable choice for the AL government.

[16] For more details on the NCG system and its problems, see Ahmed (2004), Chowdhury (2015), and Haque (2011).

[17] The AD declared unconstitutional the Eighth Amendment, the Fifth Amendment, and the Seventh Amendment in 1989, 2010, and 2011, respectively, in addition to the Thirteenth Amendment and the Sixteen Amendment in 2011 and 2017, respectively.

[18] It has been a universal law of Bangladeshi politics since 1991 that regardless of which party is in power, the ruling party has a negative attitude toward the NCG system and the opposition supports it and demands a parliamentary election under an NCG.

in the AD since 2005. Incidentally, his appointment was in supersession of two senior judges, who were unacceptable to the government (Sinha 2018, chapter 6). Second, the AD initially handed down the judgement by issuing a one-page short order, eight days before the retirement of the Chief Justice, and the AD needed more than a year to make the full judgement public. This means that Justice Haque wrote his opinion after his retirement. Third, it was only two months after the short order was released (therefore, before the release of the full judgement) that the AL used its absolute majority in Parliament to pass the Constitution (Fifteenth Amendment) Act abolishing the NCG system. In fact, it is alleged that the detailed decision by a plurality of the court was written in line with changes brought about through the Fifteenth Amendment. Last but not least, some AD judges, especially Chief Justice Haque and Justice Muzammel Hossain, were widely known to be pro-AL because of their track records. In addition, judging from his memoir, Justice Sinha seems to have had a cordial relationship with the AL and its leaders. For example, before he was appointed to the Chief Justice, Justice Sinha felt that "under the circumstances then prevailing in the country, there was no reason on her [Prime Minister's] part not to appoint me as the Chief Justice" (Sinha 2018, chapter 10).

For the Sixteenth Amendment Case, on the other hand, Justice Sinha saw that Prime Minister Hasina pressured him to side with the government (i.e. to declare the constitutional amendment unlawful) in a secret meeting also attended by the President, the Law Minister, and the Attorney General. He suspects that some of the other judges were also pressed to render a verdict favourable to the government (Sinha 2018, chapter 27). However, the AD unanimously declared the Sixteenth Amendment unconstitutional, and the verdict was denounced harshly by the government and lauded by the opposition. This stood in sharp contrast to the Fifteenth Amendment Case, in which the AD declared the amendment unconstitutional, and the verdict was endorsed by the government and criticised by the opposition. This contrast supports our argument that judges across the political spectrum were very keen to uphold the independence of the judiciary, given that the Sixteenth Amendment Case was directly related to judicial autonomy vis-à-vis the executive branch.[19]

Moreover, a closer look at the voting patterns of judges in the two cases vindicates another claim we made above, that judges could be selected who were neither pliable nor favourable to the ruling party. The Fifteenth Amendment Case ended up as a 4-3 split decision; while the judges who were suspected to be pro-AL formed the majority, three judges, including Justice Miah, dissented. It is surely not a coincidence that Justice Haque has been the Chairman of the Law Commission since

[19] The independence of the judiciary was an issue in the Thirteenth Amendment Case as well. Some studies also point out that after the introduction of the NCG system, judicial appointments became more politicized because successive governments got more eager to handpick the Chief Justices and other judges of the AD, calculating the future possibility that they would become the Chief Advisor of an NCG (Chowdhury 2015, 223-224; Jahan and Shahan 2014, 227). Nevertheless, as Islam (2012, 86-87) rightly points out, "the provisions relating to caretaker government cannot be blamed as destroying the independence of the judges of the Supreme Court." The minority judges also said that the Thirteenth Amendment did not destroy any basic structures of the Constitution.

July 2013 and that three other judges in the majority were promoted to the Chief Justice, two of whom (Md. Muzammel Hossain and Syed Mahmud Hossain) superseded the senior-most judges (Table 1).[20] In contrast, the verdict of the Sixteenth Amendment Case was unanimous, and all the judges ruled against the amendment to Article 96, including Justice Sinha and Justice Syed Mahmud Hossain, who were part of the majority in the Fifteenth Amendment Case.

6. Conclusion

This paper shows that while the executive branch has interfered in the judiciary, especially through the extensive politicisation of judicial appointments, it does not have full control of the Supreme Court in Bangladesh. We argue that there are two main reasons for this gap: (1) judges across the political spectrum have been very keen to uphold judicial autonomy vis-à-vis the executive branch (probably for self-serving reasons), and (2) judges who were neither pliable nor favourable to the ruling party were selected because of not only partisan interests and the political ideologies of judges but also because of other important factors. In light of the above, we can properly understand why the Supreme Court struck down the Sixteenth Amendment over the government's objections. Taken together, the judiciary of Bangladesh is not characterised solely by either politicisation or judicialisation (or a transition from the former to the latter), and therefore this sort of dichotomous thinking is not appropriate in looking at the relationship between the executive and judicial branches in Bangladesh. Accordingly, we need to examine important legal issues on a case-by-case basis, taking into account both the political and judicial contexts.

However, with that said, it seems that as the judiciary has faced mounting pressure from the government, politicisation of the judiciary—and possibly its subjugation—has played a more dominant role in recent years. As pointed out in Section 3, the number of judges superseded by junior colleagues has skyrocketed recently, and this trend reflects AL government's more blatantly arbitrary decisions in judicial appointments. One plausible explanation for this bold move is that because the AL had "landslide victories" in a virtually uncontested election in January 2014 and in an allegedly rigged election in December 2018,[21] the current regime has become increasingly

[20] In addition to higher positions in the Supreme Court, post-retirement appointments to the Law Commission and other public offices have also been used to lure judges to give judgments favorable for the authorities concerned.

[21] In the 2014 parliamentary election, the BNP boycotted and its long-time ally the Jamaat-e-Islami was barred from participating. As a result, 154 out of 300 seats were not contested and turnout was reported to be as low as 15 to 20 percent (Riaz 2014, 129). For the 2018 parliamentary election, in which the AL-led coalition won 288 out of 300 seats, there were many allegations about the absence of a level-playing field and organized electoral fraud (e.g. voter intimidation and vote rigging). See, for example, "Bangladesh election: PM Sheikh Hasina wins landslide in disputed vote," *BBC News*, 31 December 2018.

authoritarian. In fact, it has stifled dissent by both legal and extralegal means,[22] and consequently it has faced less criticism from the opposition, the media, civil organisations, intellectuals, and the bar. It is yet another manifestation of this dismal trend that the AL government forced the 'rebel' Chief Justice to leave the country and resign without invoking Article 96 of the Constitution.

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[22] They include the International Crimes Tribunal, the Digital Security Act, "anti-terrorist" operations, extrajudicial killings, forced disappearances, just to name a few. For more details, see Ahmed (2018), Ashan (2016), Cadman, Buckley and Moraleda (2018), Robertson (2015), among others.

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Table 1 Chief Justices of Bangladesh appointed after 1990

Name	Date of elevation to the HCD	Date of elevation to the AD	Tenure as Chief Justice			Number of AD judges superseded	Tenure shortened because of
			From	To	Years		
M. H. Rahman	1976-05-08	1985-12-26	1995-02-01	1995-04-30	0.2	0	NA
A. T. M. Afzal	1977-04-15	1985-12-26	1995-05-01	1999-05-31	4.1	0	NA
Mustafa Kamal	1979-04-09	1989-12-01	1999-06-01	1999-12-31	0.6	0	NA
Latifur Rahman	1979-11-21	1990-01-15	2000-01-01	2001-02-28	1.2	0	NA
Mahmudul Amin Chowdhury	1987-01-27	1999-06-28	2001-03-01	2002-06-17	1.3	0	NA
Mainur Reza Chowdhury	1990-01-29	2000-11-08	2002-06-18	2003-06-22	1.0	0	NA
K. M. Hasan	1991-07-13	2002-01-20	2003-06-23	2004-01-26	0.6	2	NA
Syed J. R. Mudassir Husain	1992-02-18	2002-03-05	2004-01-27	2007-02-28	3.1	2	NA
Md. Ruhul Amin	1992-02-18	2001-01-11	2007-03-01	2008-05-31	1.3	0	NA
M. M. Ruhul Amin	1994-02-10	2003-07-13	2008-06-01	2009-12-22	1.6	1	NA
Md. Tafazzul Islam	1994-02-10	2003-08-27	2009-12-23	2010-02-07	0.1	1	NA
Mohammad Fazlul Karim	1992-11-01	2001-05-15	2010-02-08	2010-09-29	0.6	0	NA
A.B.M. Khairul Haque	1998-04-27	2009-07-16	2010-09-30	2011-05-17	0.6	2	NA
Md. Muzammel Hossain	1998-04-27	2009-07-16	2011-05-18	2015-01-16	3.7	1	NA
Surendra Kumar Sinha	1999-10-24	2009-07-16	2015-01-17	2017-11-11	2.8	0	Resignation
Syed Mahmud Hossain	2001-02-22	2011-02-23	2018-02-02	-	-	1	-

Source: Website of the Supreme Court of Bangladesh (http://www.supremecourt.gov.bd/web/) and Supreme Court of Bangladesh (2016). The number of AD judges superseded by a judge appointed as the Chief Justice was calculated by authors.

Notes: The dark gray entries correspond to periods of when an AL government was in power, and the light gray entries correspond to periods of when a BNP government was in power. The retirement age of Supreme Court judges was raised from 65 to 67 years old by the Constitution (Fourteenth Amendment) Act, passed in May 2004.

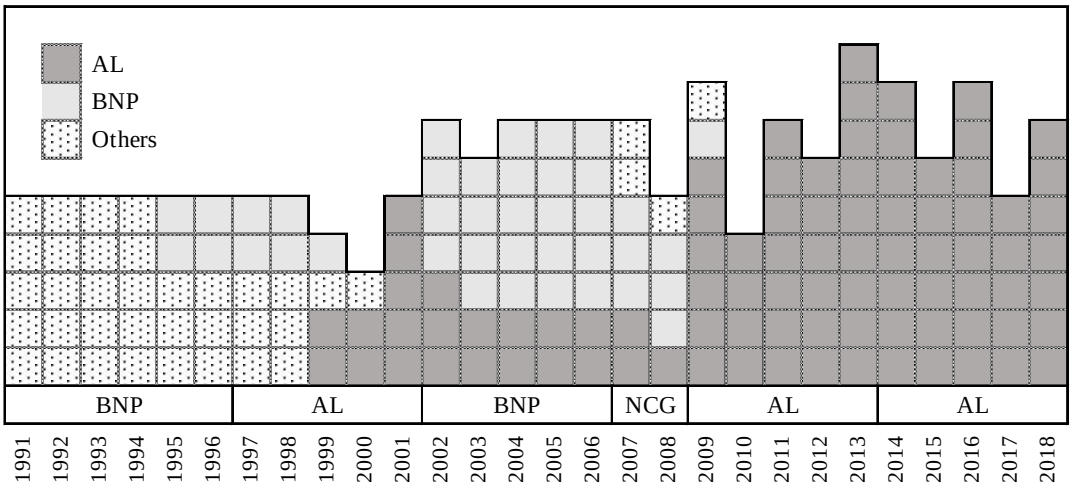
Table 2 AD Judges appointed after 1990

Name	Date of elevation to the HCD	Tenure at the AD			Number of HCD judges superseded	Tenure shortened because of
		From	To	Years		
Mohammad Abdur Rouf	1982-01-29	1995-06-08	1999-02-01	3.7	1	NA
Mohammad Ismailuddin Sarker	1983-12-30	1995-06-08	1996-01-20	0.6	1	Death
Bimalendu Bikash Roy Chowdhury	1985-07-02	1996-05-11	2000-11-01	4.5	0	NA
A. M. Mahmudur Rahman	1985-12-26	1999-02-01	2000-12-14	1.9	0	NA
Mahmudul Amin Chowdhury (CJ)	1987-01-27	1999-06-28	2002-06-17	3.0	2	NA
Kazi Ebadul Hoque	1990-01-29	2000-01-19	2001-01-01	1.0	2	NA
Mainur Reza Chowdhury (CJ)	1990-01-29	2000-11-08	2003-06-22	2.6	2	NA
Mohammad Gholam Rabbani	1992-02-18	2001-01-11	2002-01-10	1.0	1	NA
Md. Ruhul Amin (CJ)	1992-02-18	2001-01-11	2008-05-31	7.4	2	NA
Mohammad Fazlul Karim (CJ)	1992-11-01	2001-05-15	2010-09-29	9.4	3	NA
K. M. Hasan (CJ)	1991-07-13	2002-01-20	2004-01-26	2.0	0	NA
Syed J. R. Mudassir Husain (CJ)	1992-02-18	2002-03-05	2007-02-28	5.0	0	NA
Abu Sayeed Ahammed	1992-11-01	2002-03-05	2003-08-23	1.5	0	NA
Kazi A. T. Monowaruddin	1994-02-10	2002-06-25	2002-07-15	0.1	0	NA
Md. Fazlul Haque	1994-02-10	2002-07-17	2003-06-30	1.0	0	NA
Hamidul Haque	1994-02-10	2003-06-29	2003-12-20	0.5	0	NA
M.M. Ruhul Amin (CJ)	1994-02-10	2003-07-13	2009-12-22	6.4	1	NA
Md. Tafazzul Islam (CJ)	1994-02-10	2003-08-27	2010-02-07	6.5	1	NA
M. A. Aziz	1996-06-01	2004-01-07	2006-09-30	2.7	1	NA
Amirul Kabir Chowdhury	1996-06-01	2004-02-26	2007-06-30	3.3	1	NA
Md. Joynul Abedin	1996-06-01	2006-08-24	2009-12-31	3.4	3	NA
Md. Hassan Ameen	1996-06-01	2007-03-21	2008-07-03	1.3	0	NA
Md. Abdul Matin	1996-06-01	2007-09-19	2010-12-25	3.3	1	NA
Shah Abu Nayeem Mominur Rahman	1996-06-01	2009-03-08	2011-05-12	2.2	0	Resignation
(Alhaj) Md. Abdul Aziz	1998-04-27	2009-03-08	2009-12-31	0.8	0	NA
B.K. Das	1998-04-27	2009-07-16	2010-04-10	0.7	0	NA
A.B.M. Khairul Haque (CJ)	1998-04-27	2009-07-16	2011-05-17	1.8	0	NA
Md. Muzammel Hossain (CJ)	1998-04-27	2009-07-16	2015-01-16	5.5	0	NA
Surendra Kumar Sinha (CJ)	1999-10-24	2009-07-16	2017-11-11	8.3	0	Resignation
Md. Abdul Wahhab Miah	1999-10-24	2011-02-23	2018-02-02	6.9	0	Resignation
Nazmun Ara Sultana (f)	2000-05-28	2011-02-23	2017-07-07	6.4	0	NA
Syed Mahmud Hossain (CJ)	2001-02-22	2011-02-23	-	-	0	-
Muhammad Imman Ali	2001-02-22	2011-02-23	-	-	0	-
Muhammed Mamataz Uddin Ahmed	1999-10-24	2011-05-16	2011-12-31	0.6	0	NA
Md. Shamsul Huda	2001-02-22	2011-05-16	2012-11-02	1.5	0	NA
Mohammad Anwarul Haque	2001-07-03	2013-03-31	2014-04-09	1.0	0	NA
Siddiqur Rahman Miah	2002-07-29	2013-03-31	2013-06-02	0.2	3	NA
Hasan Foez Siddique	2009-03-25	2013-03-31	-	-	38	-
AHM Shamsuddin Choudhury	2001-07-03	2013-03-31	2015-10-02	2.5	38	NA
Mirza Hussain Haider	2001-07-03	2016-02-08	-	-	1	-
Md. Nizamul Huq	2001-07-03	2016-02-08	2017-03-14	1.1	29	NA
Mohammad Bazlur Rahman	2001-07-03	2016-02-08	2017-01-01	0.9	29	Death
Zinat Ara (f)	2003-04-27	2018-10-09	-	-	3	-
Abu Bakar Siddiquee	2009-06-30	2018-10-09	-	-	23	-
Md. Nuruzzaman	2009-06-30	2018-10-09	-	-	23	-

Source: Website of the Supreme Court of Bangladesh (http://www.supremecourt.gov.bd/web/) and Supreme Court of Bangladesh (2016). The number of HCD judges superseded by a judge elevated to the Appellate Division was calculated by authors.

Notes: The dark gray entries correspond to periods of when an AL government was in power, and the light gray entries correspond to periods of when a BNP government was in power. The retirement age of Supreme Court judges was raised from 65 to 67 years old by the Constitution (Fourteenth Amendment) Act, passed in May 2004. (CJ) indicates that the judges became the Chief Justice. (f) indicates that the judges are female.

Figure 1 Composition of AD Judges, 1991-2018



Source: Website of the Supreme Court of Bangladesh (http://www.supremecourt.gov.bd/web/) and Supreme Court of Bangladesh (2016).

Notes: This figure shows the composition of AD judges for each year (at the end of a year). Dark gray, light gray, and dotted cells represent judges appointed to the AD by an AL government, a BNP government, and other governments (either the Jatiya Party government or the military-backed NCG), respectively.

Table 3 Voting Patterns of AD Judges

Name	Date of elevation to the HCD	Tenure at the AD		Voting Patterns of Judges	
		From	To	13th Amendment Case (2011-05-10)	16th Amendment Case (2017-07-03)
A.B.M. Khairul Haque	1998-04-27	2009-07-16	2011-05-17	Unconstitutional*	-
Md. Muzammel Hossain	1998-04-27	2009-07-16	2015-01-16	Unconstitutional	-
Surendra Kumar Sinha	1999-10-24	2009-07-16	2017-11-11	Unconstitutional*	Unconstitutional*
Md. Abdul Wahhab Miah	1999-10-24	2011-02-23	2018-02-02	Constitutional*	Unconstitutional*
Nazmun Ara Sultana	2000-05-28	2011-02-23	2017-07-07	Constitutional	Unconstitutional
Syed Mahmud Hossain	2001-02-22	2011-02-23	-	Unconstitutional	Unconstitutional*
Muhammad Imman Ali	2001-02-22	2011-02-23	-	Constitutional*	Unconstitutional*
Hasan Foez Siddique	2009-03-25	2013-03-31	-	-	Unconstitutional*
Mirza Hussain Haider	2001-07-03	2016-02-08	-	-	Unconstitutional*

Source: Website of the Supreme Court of Bangladesh (http://www.supremecourt.gov.bd/web/) and Supreme Court of Bangladesh (2016).

Notes: The dark gray entries correspond to periods of when an AL government was in power. * indicates that the judge wrote his own judgement. A.B.M. Khairul Haque and Surendra Kumar Sinha were the Chief Justices in the Fifteenth Amendment Case and the Sixteenth Amendment Case, respectively.