REVIEWING THE VIEW

Evaluating the Draft Supreme Court Judges Appointment Ordinance, 2024

While it is undoubtedly a commendable initiative, a critical analysis of the draft law reveals some issues that need to be addressed to ensure that a robust framework is prepared for appointing SC judges in Bangladesh to uphold the independence of the judiciary and rule of law.

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Recently, the Ministry of Law, Justice and Parliamentary Affairs (Ministry) has drafted the 'Supreme Court Judges Appointment Ordinance, 2024'. The draft Ordinance addresses all issues regarding the appointment of Supreme Court (SC) judges: the composition of a council for appointment, its working procedure, eligibility criteria for appointment of an advocate or a judicial officer as an SC judge, and the process of confirming such appointments by the President.

While it is undoubtedly a commendable initiative, a critical analysis of the draft law reveals some issues that need to be addressed to ensure that a robust framework is prepared for appointing SC judges in Bangladesh to uphold the independence of the judiciary and rule of law.

The last caretaker government undertook a similar initiative by enacting the Supreme Judicial Commission Ordinance, 2008. The majority decision of a larger High Court Division (HCD) bench in *Idrisur Rahman v Bangladesh* [(2008) 60 DLR 714] found one of its provisions unconstitutional but left the rest of the Ordinance intact. Nevertheless, the ninth Parliament did not pass the Ordinance as an Act, leading to the Ordinance ceasing to have legal effect. Since then, the Awami League government always claimed that a law on appointing SC Judges was in the pipeline. However, it had been mere lip service. We must ensure that this Ordinance does not bear the same fate.

A glaring loophole is the omission of reference to Article 95(2)(c) in the preamble of the Ordinance, as the Ordinance is an exercise fulfilling that constitutional obligation.

There are multiple proposals (from SC, the Judiciary Reform Commission (JRC), and the Ministry) regarding the composition of the appointment council. The Ministry should also ask the Constitution Reform Commission about their proposals to understand all relevant proposals better. The draft Ordinance suggests the following composition of eight members: Chief Justice (CJ) of Bangladesh (chairman of the council), seniormost judge of the Appellate Division (AD), two seniormost judges of HCD (one of whom was elevated from the judicial service), one retired judge of the AD (to be appointed by CJ after consultation with other members of the council who are from SC), Attorney General for Bangladesh (AG), President, Supreme Court Bar Association (SCBA), and one Law Professor (to be appointed by CJ after consultation with other members of the council who are from SC).

Conversely, SC's proposal for a ten-member council, comprising CJ (chairman of the council), two seniormost judges of AD, two seniormost judges of HCD (one of whom was elevated from the judicial service), AG, President, SCBA, one Law Professor (nominated by the University Grants Commission (UGC)), and two citizens of Bangladesh, is rather apt for this purpose.

The necessity of including a Law Professor nominated by UGC is stated below. Bangladesh Judicial Services Association has argued that including the SCBA President may create a conflict of interest as such person is an elected representative of a professional body, which may lead to unethical or political interferences in the appointment procedure of SC judges. However, one can argue in favour of this inclusion from the point of view that advocates are better placed to assess the quality of their peers. Nonetheless, the SCBA President may be replaced by the Vice Chairman of the Bangladesh Bar Council.

Moreover, the drafters may consider appointing one citizen (out of the two positions) from any backward section of citizens, as was done in India in their now defunct National Judicial Appointment Commission, by reserving that position to someone from the scheduled castes, scheduled tribes, other backward classes, minorities or women. The Ordinance then needs to clarify the process of their appointment and tenure in the council.

A significant constitutional change is required by doing away with the provision of additional judges as outlined in Article 98 of the Constitution. The 118th report of the Law Commission (LC) of Bangladesh, titled 'The final report on the Law Commission's recommendations regarding the constitutional and statutory conditions for appointment to the post of a Judge of the Supreme Court' recommended (page-7) that the provision for appointing additional judges to HCD temporarily under Article 98 of the Constitution, and for a judge of HCD to temporarily sit in AD was understandably inconsistent with the concept of judicial independence. Thus, it needs to be abolished through constitutional amendment**.** It is evident that during a judge's tenure as an additional judge in either division of SC, the illusion of securing a permanent position as an SC judge hinders their ability to function independently. To ensure sustainable constitutional reforms, we must provide a process that upholds judicial independence and the rule of law.

Additionally, Article 95(2)(c) states: A person shall not be qualified for appointment as a Judge unless he is a citizen of Bangladesh and – has such qualifications as may be prescribed by law for appointment as a Judge of SC. The three sub-clauses in Article 95(2) are separated by 'or'. Hence, under this provision, a jurist, such as a law professor or a legal researcher with institutional affiliation, can be considered for appointment as an SC judge.

The 118th LC report (page 6) also proposed this and prescribed their minimum age to be 45 years. The report further justified their inclusion (pages 3—4) by stating that this is a practice in India and Nepal. It argued that for conducting judicial proceedings in apex courts, not only practical but also a sound theoretical knowledge of laws, their correct interpretation and application, a sound understanding of justice, etc., are necessary. These can be acquired not only through experience as a judge and a lawyer but also through other means. Hence, conditions such as an excellent academic career, along with a specified term of experience as a law professor at the university level or as a senior research officer at any renowned research institution, may also be attached for such persons to be eligible for appointment as SC judges. LC believed this exception and distinction would contribute to the overall and collective improvement of SC's standards.

Hence, the drafters should evaluate this proposal and draw up further eligibility criteria for qualifications for these candidates, in addition to the qualification criteria drawn up in section 6 of the Ordinance. In this regard, including a law professor (nominated by UGC) to the appointment council is vital.

The malpractice of supersession of HCD judges during their elevation to AD has been a common practice in Bangladesh. Hence, this malpractice must be stopped moving forward. Seniority should be the predominant criterion for elevation. Hence, the relevant provisions in the draft Ordinance should be amended in light of this recommendation.

The provisions on the process of convening a meeting by the Chairperson, or immediately after a request by the President to do so, the selection process whereby the council prepares a list of eligible candidates and also invites applications from interested candidates, conducts interviews of the shortlisted candidates, and ultimately sends the finalized list of candidates along with a reasonable number of standby candidates to the President are indeed praiseworthy as they ensure a transparent and inclusive appointment process. The Ordinance may contain a provision for recording the interviews of the shortlisted candidates for greater transparency. Moreover, rather than fixing up a rigid percentage for appointing SC judges between two groups—judges from the district judiciary and advocates—it is better to follow the proposal forwarded by JRC: reasonable representation of the two classes will be reflected while recommending eligible candidates.

The draft Ordinance also ensures the primacy of the CJ's opinion over that of the President (sections 11—12), ensuring the continuity of the constitutional convention that has developed in Bangladesh over the years, as affirmed by AD in their latest decision in *ABM Altaf Hossain & others v Bangladesh & others* [(2024) 19 SCOB (AD) 21]. Overall, it is a promising development, and addressing the abovementioned concerns will ensure a transparent and inclusive appointment process for SC judges in Bangladesh, paving the path for sustainable reforms in our apex judiciary.

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LAW ADVOCACY

Need for Medical Negligence Law

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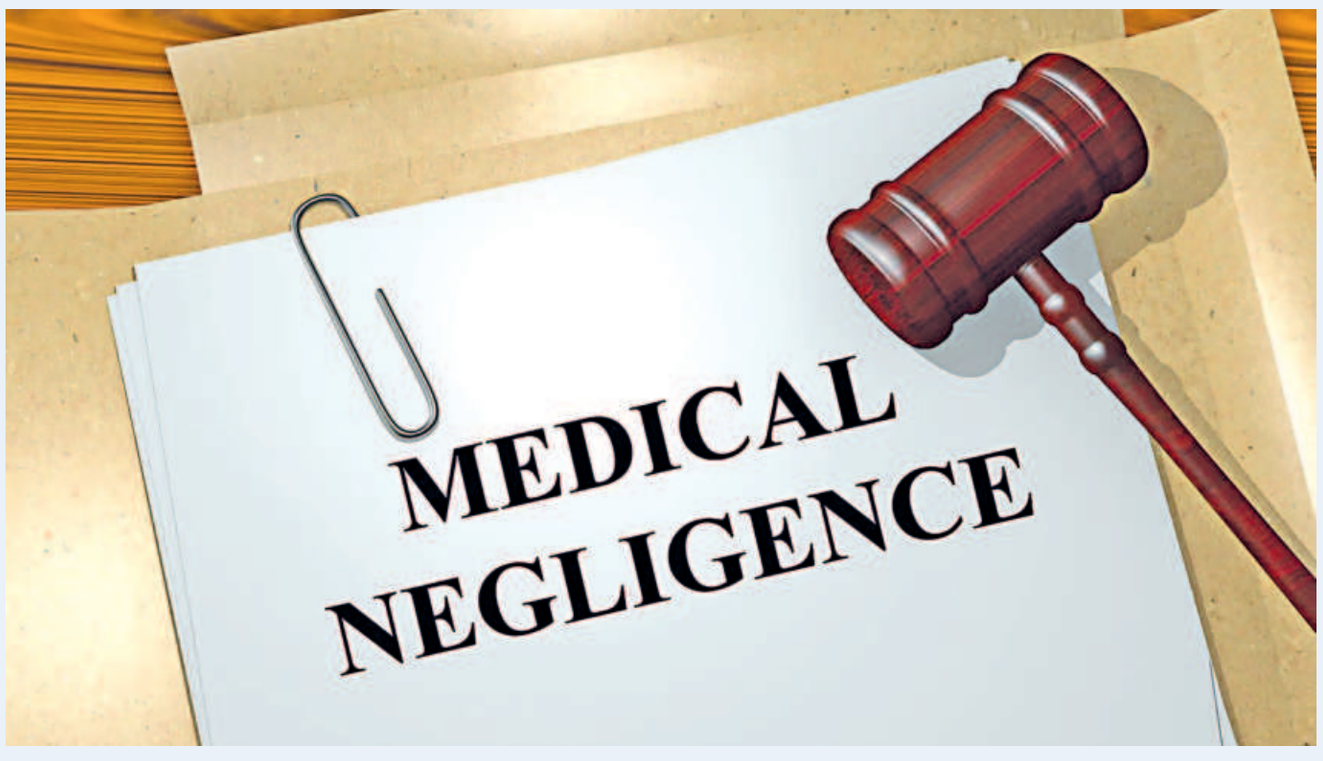
One year back, on 19 February 2024, the death of Raahib Reza due to a sudden cardiac arrest, at the capital's Labaid Hospital, Dhanmondi, shocked the country. It was alleged that the cardiac arrest happened while undergoing endoscopy, a relevantly low risk procedure. On 11 March same year a writ was filed on behalf of Raahib's family seeking an independent investigation into the death of victim and claiming Tk 10 crore in compensation for the alleged negligence of doctors. A High Court Division (HCD) bench issued a rule on the same day, ordering an investigation accordingly.

The inquiry report, submitted on 19 September 2024, was supplemented with a clarification letter from the Ministry of Health. The report found gross negligence before, after and during Raahib's endoscopy. It was also found that Raahib's consultant, Dr. Mamun conducted 67 endoscopy the day alone on which Raahib was admitted to the hospital. The report further revealed that seven out of the eight members of the team that conducted the endoscopy had no credible certification to conduct such procedures. The report however could not determine whether anaesthetic (Propofol) or sedative (Merozolyn) was administered to the victim thus showing gross negligence on the part of the hospital administration as well.



The framework is therefore a patchwork, and a codified law could have been far better in helping the claimants opt for a forum and a process to navigate.

Unfortunately, this is one of many cases where a patient's death owes to healthcare professionals. Such situation would be more avoidable and less fatal if we had a medical negligence tort law. Tort refers to an act or omission, other than a breach of contract, which gives rise to injury or harm to another and amounts to a civil wrong, for which courts may impose damages or compensation.

However, there do exist a few legal provisions under which medical negligence may be addressed in Bangladesh. Our Constitution has incorporated the right to life and personal liberty as one of the fundamental rights in Article 32. However, the State is yet to enforce this fundamental right on a satisfactory level in respect of medical negligence. Again, Section 304A of the Penal Code, 1860 is titled 'causing death by negligence' which mentions that a negligent act causing death not amounting to culpable homicide is an offence and provides maximum punishment of 5 years or fine or both. This section is not exclusive to negligence by medical professionals, but it is one of the predominant provisions that are invoked in case of medical negligence. Further provisions which are relevant, but not exclusive to dealing with medical negligence, include sections 314, 323, 325, 336-338, with the terms of imprisonment ranging from three months to ten years. But provisions such as sections 88 and 89 do excuse any such act done if done in good faith.

Another significant provision lies in section 53 of the Consumer Protection Act, 2009 which mentions that an act done in negligence by a 'service provider' which causes damage to the life or health of a 'service receiver' shall be subject to imprisonment up to 3 years or fine of not more than 2 lac taka or both. The term service provider undoubtedly is capable of including healthcare professionals, clinics and private hospitals. While the punitive remedy seems reasonable to some extent, it is to be noted that any loss to life or limb is worth much more than the said amount.

The framework is therefore a patchwork, and a codified law could have been far better in helping the claimants opt for a forum and a process to navigate. In recent years, medical negligence has been, notably, acknowledged by the High Court Division in several cases in the form of Public Interest Litigation (PIL). Seeking remedy through PIL skyrocketed in jurisprudential value throughout the last decade. But whether invoking PIL is sustainable in cases of medical negligence without a codified distinctive law is not clear. Articles 15 and 18 of the Constitution, if read together, provides ample scope for the State to legislate on medical negligence tort. Its high time Bangladesh introduced medical negligence tort to uphold the constitutionally guaranteed fundamental rights.

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