THE CONSTITUTION 16th AMENDMENT CASE

SHISHIR MANIR

Government of Bangladesh & others vs. Advocate Asad-uz-zaman Siddiqui & others

5 CLR (AD) 214, 71 DLR (AD) 52

[The paragraphs referred herein relate to the Judgment reported in 5 CLR (AD) 214]

Introduction

This Judgment resulted in judicial earthquake in Bangladesh. During the hearing of the case, the government sensing the adverse situation attempted to influence the Apex Court for a favorable judgment. However, the Chief Justice did not give in their wishes. The Apex Court set aside the Constitution Sixteenth Amendment Act, 2014 and approved the removal process of the judges inserted by unconstitutional regime. In the aftermath of the judgment, the then Chief Justice was forced to leave the country and resign his office. After this incident, judicial independence has been seriously compromised.

Short Facts

The case is concerned with the removal of judges of the Supreme Court from office. The removal process is found in article 96 of the Constitution of Bangladesh. The original article 96 of the constitution of 1972 provided for removal by the president upon a resolution passed by parliament in two third majorities for proved misbehavior of misconduct. In 25January 1975, the fourth amendment to the constitution abolished the requirement of resolution by parliament. The amendment authorized the president to remove judges by orders.

Thereafter, when the military rule came, the Second Proclamation (Tenth Amendment) Order 1977 amended article 96 giving effect to the creation of Supreme Judicial Council for removal of judges. After the parliament had come into being, it passed Fifth Amendment of the constitution ratifying and confirming the above Martial Law proclamation along with others. On 11 April 1982, after military rule returned, the Martial Proclamation (First Amendment) Oder 1982 provided with provisions for arbitrary removal of judges from office by Chief Martial Law Administrator. After the parliament came back in 1986, seventh amendment ratified and confirmed the preceding provisions. However, the Constitution Final Revival Order, 1986 restored Article 96 with Supreme Judicial Council.

On 29 August 2005, the High Court Division declared the Fifth Amendment illegal and *void ab initio* giving effect to abolition of Supreme Judicial Council from the constitution. The Appellate Division in February 2010 dismissed the petition for Leave to Appeal and upheld the decision of the High Court Division. However, the Appellate Division condoned the provisions of Supreme Judicial Council observing that the substituted provisions are more transparent than the earlier ones and more safeguarding for the Independence of Judiciary. The Appellate Division in reviewing its judgment provisionally condoned the Second Proclamation (Tenth Amendment) Order 1977 until 31st December 2012 in order to avoid disastrous consequence to the body politic for enabling the parliament to make necessary amendment to the constitution.

On 30 June 2011, the parliament passed the Constitution (Fifteenth Amendment) Act, 2011. The amendment kept article 96 with the provisions of Supreme Judicial Council. Thus the Supreme Judicial Council remained as a constitutional body for removal of judges from office.

The impugned Constitution (Sixteenth Amendment) Act, 2014 was passed on 7 September 2014. The amendment substituted the provisions of Supreme Judicial Council with reviving the original article 96 of the 1972 constitution.

On 5 November 2014, a group of Supreme Court lawyers challenged the *vires* of the Sixteenth Amendment under article 102 of the constitution and obtained rule. On 5 May 2016, a Special Bench of the High Court Division made the rule absolute by majority and declared the impugned amendment colorable, void and *ultra vires* the constitution.

On 3 July 2017, the Appellate Division upon hearing the government appellant and the respondents along with the amici curie unanimously dismissed the appeal and declared the Sixteenth Amendment colorable, *ultra vires* and void. However, a review petition is pending before the Appellate Division which is yet to be heard by the Division.

Judges

Surendra Kumar Sinha CJ (author Judge), NajmunAra Sultana J, Abdul WahhabMiah J, Syed Mahmud Hossani J, M. Imman Ali J, Hasan Foez Siddiqui J, Mirza Hossain Haider J.

Counsels

Mr. MahbubeyAlom (Attorney General) with Murad Reza (AAG) (for the Appellants) Mr. ManjilMurshed (for the Respondents) Mr. T. H. Khan, Dr. Kamal Hossain, Mr. Abdul Wadud Bhuiyan, Mr. M. Amirul Islam, Mr. Rokanuddin Mahmud, Mr. Ajmalul Hossain QC, Mr. A. J Muhammad Ali, Mr. A. F. Hasan Ariff, Mr. M.I. Farooqi, Fida M. Kamal (Senior Advocates as Amici Curie)

Issues and Decisions of the Court

A. Locas Standi of the Petitioners

Mr. Murad Reza appearing for the Appellant submitted that the petitioners do not have *locas standi* to move with the writ petition and hence the instant writ petition is not maintainable.[1]

Mr. Justice Sk Sinha CJ delivering the majority judgment of the court held that the threshold of *locas standi* has marked a significant departure from the traditional understanding with development of philosophy of Public Interest Litigation. The Supreme Court of Bangladesh and other courts of the region have even ventured to formulate policy. The court has shifted from traditional rule of confining access to justice to ones who suffer an injury or legal wrong. Court adopted the view that when a legal wrong or legal injury is caused to a person or class of persons by reason of violation of any constitutional right or any burden is imposed in contravention of constitutional legal provision any member of the public can invoke its jurisdiction. Moreover, as per *8th amendment case*, a lawyer is entitled to challenge a constitutional amendment for the sake of independence of judiciary and rule of law.[2]

B. Applicability of the Doctrine of Judicial Restraint

The learned Amicus Curiae **Mr. Ajmalul Hossain** submitted that the sixteenth amendment is not unconstitutional and the procedure and mechanism for removal of judges must be made by the legislature. Moreover, Rules of natural justice i.e. rule against bias enshrined in the principle of *nemo judex in cauasa sua* restrains the judiciary from exercising its jurisdiction in this case as the judiciary has its own

[1] Para-105
[2] Para-106, 110

interest involved in the matter. Therefore, even if the exercises the matter, it should observe 'CAUTION and EXTREME CARE' in deciding the case.[3]

SK Sinha CJ held that a very onerous responsibility is reposed upon the Supreme Court by the constitution to judge any dispute in the highest court. Such conferment is made deliberately to stress the obvious that the fount of justice under the constitution is the apex court of the country. "When some enacted laws divert from the true course of justice, power is vested in the Supreme Court and the Supreme Court alone is competent under the constitutional mandate to make such orders as are necessary for doing justice."[4]

His lordship got astounded and surprised by the remarks of Mr. Ajmalul Hossain regarding interest of the judiciary. "If a senior counsel like him has this perception towards judiciary we feel sorry for him" he said. He affirmed that the judges and the judiciary do not have any interest in any cause while administering justice. Moreover, almost eighty percent of the pending litigations are against state or the state is seeking justice from the judiciary. So the executive, not the judiciary should be cautious so that independence of the judiciary is not hampered.[5]

Abdul Wahab Miah J held that the constitutional scheme is that the Supreme Court is the guardian of the constitution and article 44 and 102 of the constitution vested High Court Division with power of judicial review. On the other hand, article 103 vested Appellate Division with power to "hear and determine appeals from judgments, decrees, orders or sentence of the High Court Division. Moreover, when the High Court Division issues certificate in a case under article 103 (2) (a), the Appellate Division is bound by oath to hear and determine the constitutional question of law arose in the case. As the High Court Division issued certificate in this case that the case involves a substantial question of law as to interpretation of the constitution, no other authority, neither executive nor the legislature have the mandate to hear the same.

As for 'CAUTION' judiciary do never have and can never have any personal interest in a particular matter including the instant one.[6] When independence of judiciary

[3] Para-120, 222
[4] Para-121
[5] Para-223
[6] para-395, 399

and rule of law is at stake the judiciary cannot play the role of onlookers or shut its eyes on the plea that the constitutionality of the Act very much concerned the Judges of the Supreme Court.[7]

Mirza Hossain Haider J held that the judiciary shall have jurisdiction in all cases of judicial nature and shall have authority to decide the issue submitted to it for decision within its competence as defined by law.[8]

C. Supreme Judicial Council Is the Martial Law Legacy in The Constitution

The learned Attorney General **Mr. Mahbubey Alom** submitted that the Supreme Judicial Council is a Martial Law legacy. Such a provision should not be kept in our constitution, which was written by the blood of the martyrs.[9] The constitution cannot be subservient to Martial Law proclamations.

SK Sinha CJ held that the Fifteenth Amendment kept the Martial Law provisions of BISMILLAH-AR-RAHMAN-AR-RAHIM and state religion in the constitution. These two provisions violated the non-communal and secular character of our constitution. It was a compromise with the Martial Law legacy so far religion concerned.[10] Fifteenth Amendment also retained and regularized Martial Law legacies like article 6, 42, 47 etc. in the constitution. It is not clear why Mr. Attorney General just singled out article 96 as a Martial Law provision.

However, I agree with the learned Attorney General that a provision added by martial law government cannot be placed in our hard-earned constitution, but a provision which in content and spirit in harmony with the scheme of the constitution and was incorporated in the body by a democratic government and competent parliament by following amendment procedure cannot be all on a sudden conflicting just because the text of the provision is similar verbatim with the provision that was devised by a martial law regime.[11] A provision, which upholds independence of judiciary, cannot

[7] Para-397
[8] Para-793
[9] Para-136)
[10] Paras-136, 137
[11] Paras-142, 146

be equated with all ills. True, a usurper made the above constitutional amendment. This amendment was far better than that existed after the Fourth amendment.[12]

D. Condonation of the Provision of Supreme Judicial Council in 5th Amendment Case

The learned Attorney General **Mr. Mahbubey Alom** and learned Amicus Curiae Ajmalul Hosssain QC submitted that the condonation of clauses 2 to 7 of Article 96 in the Fifth Amendment case was provisional in order to avoid disastrous consequence. So this provision has neither been acquiesced by the parliament nor by the court.

The learned counsel Mr. **Manjil Morshed** and other **Amici Curiae** submitted that the court approved the clauses of article 96 providing the procedure of removal of judges through SJC instead of earlier method of removal.

SK Sinha CJ held that the Appellate Division while condoning the clauses of article 96 in Fifth Amendment case held that, "substituted provisions being more transparent procedure than that of the earlier ones and more safeguarding independence of judiciary…" So the court condoned the provisions in a clear and unambiguous language and also assigned reasons. The purpose is not only for interest of justice but also for independence of judiciary.

The meaning of 'condone' also extends to 'acceptance' and 'approval'. So this court willingly and carefully approved these clauses to be retained in article 96 for the interest of justice and independence of judiciary. In other words, the procedure entailed in Supreme Judicial Council mechanism is more in consonance with the spirit of the constitutional scheme.[13]

E. 15th Amendment Was Passed Hurriedly and Nothing but a Pasting[14]

The learned **Attorney General Mr. Mahbubey Alom** submitted that it cannot be said that the Supreme Judicial Council mechanism was retained by the parliament in Fifteenth Amendment because there was no discussion on retention of clauses (2) to

[12] Para-324
[13] para-131
[14] Para-431

(7) of article 96. It was overlooked by the Law Minister as the Fifteenth Amendment was passed hastily. The retention of article 96 in the constitution was nothing but a pasting!

The learned counsel **Mr. Manjil Morshed** submitted that the Fifteenth Amendment was not passed hastily. Rather a special committee was constituted with the Deputy Leader of the parliament as head of the committee. The special committee discussed article 96 among themselves and with the Prime Minister. He relied on a book named … Bangla book.

SK Sinha CJ held that the question whether removal of judges by parliament was discussed or not is an issue in this matter. Fact remains that this provision has been retained by the Fifteenth Amendment although a number of articles were amended and another number of articles were even deleted.[15]In amending the constitution, the special committee also thoroughly considered the provisions as to which should be retained and which should be removed as well; also took opinions from various legal luminaries on different occasions.[16] So there is no merit in the contention that the amendment was made hurriedly. In a democratic country and under a written constitution, amendment is made by the parliament not by the Law Minister. So it is incorrect to say the omission was unintentional.[17]

Abdul Wahhab Miah J held that the argument of Attorney General that article 96 was retained without any deliberation and "it remained in the fifteenth amendment for whatever reason it may be" is a bit absurd and not factually correct. It is inconceivable that the SJC could escape the eye of so many veteran politicians. Such argument would be derogatory for the members of the special committee as well as members of parliament.[18]

The argument that the Fifteenth Amendment was nothing but a pasting is also devoid of any substance and absurd as well as unknown to the constitutional jurisprudence. "Once an amendment is made in the constitution it becomes a part of the constitution and an amendment to that constitutional provisions must be dealt with seriously

[15] para-126
[16] Para 127
[17] Para 129
[18] Para 429

deliberating on its consequence." There cannot be an amendment just for the sake of amendment without considering its implication.[19]

Mr. Justice Hasan Foez Siddique held that it is difficult to accept that article 96 was simply a pasting. The meaning of 'substitute' is to replace. The fifteenth amendment substituted the new provision of article 96 replacing the previous void legislation.[20]

F. Supreme Judicial Council Violates Separation of Power and Rule of Law and Article 70[21] of the Constitution

The learned **Attorney General** submitted that the judiciary being an organ of the state should not administer justice, on its own, which is contrary to the rule of law. The judiciary's accountability being kept within itself violates the separation of power theory. It indicates a lack of checks and balance among the organs of the state and inconsistent with article 7.[22]

SK Sinha CJ held that the Attorney General has made a hotchpotch of his submissions. It is evident he is in confusion about the separation of power theory. Such arguments are more befitting for British parliament which is sovereign in its function. As for us, constitution is sovereign and judiciary is the guardian of the constitution.[23] In contradiction to the parliamentary sovereignty, separation of power theory limits the parliament's scope of law making which is always subject to judicial review.[24]

G. Parliamentary Sovereignty

The learned **Attorney General** submitted that the High Court Division undermined the authority of parliament by declaring the sixteenth amendment unconstitutional and thereby destroyed the basic structure of the constitution.[25]

The learned **Amici Curiae** except Mr. Ajmalul Hossain submitted that the tenure of judges is very much part of the integrity of the judiciary and pivotal to uphold and maintain independence of judiciary. The removal procedure should not be the

[19] Para 431
[20] Para 651
[21] Para 244
[22] Paras 221, 244
[23] Para 247
[24] Para 250
[25] Para 256

subject of voting in parliament which is a political process. The amendment will make the judges susceptible to capricious political process of voting in parliament.[26]

SM Hossain J held that under our constitutional dispensation it is the constitution, not the parliament which is sovereign. Legislative power is subject to the provisions of the constitution and any law to the extent of the inconsistency with the constitution is void. The Supreme Court has been given the power of judicial review to see the parliament does not overstep the limits set by the constitution.[27]

M. Imman Ali J held that the constitution of Bangladesh has outlined separation of power. Each of the three organs is bound to act in accordance with the power delineated in the constitution. No organ can claim superiority over any other organs. Thus when the judiciary declares any law enacted by parliament *utra vires,* the judiciary does not exercise any superior power; rather acts in line with the constitutional duty of judicial review.[28]

H. Removal of Judges Is Not Policy Decision

The learned **Attorney General** submitted that the superior judges' removal mechanism is a policy decision of the government and hence it is not the subject of judicial review. In declaring the Sixteenth Amendment unconstitutional, unelected judges travelled beyond jurisdiction and took the rule of legislature.

SK Sinah CJ held that making and executing policies are exclusively within the domain of the executive. Courts do not interfere with policy decisions of the government. But there are exceptional circumstances court is required to interfere like the present one. Court will interfere when a policy decision is one of violation of fundamental rights, interference with independence of judiciary or violation of provision of constitution or any other law. The court needs to satisfy itself before such interference that authority has acted arbitrarily or in violation of fundamental rights. In doing so courts shall act fairly and should not give impression that it is acting in any ulterior criteria or arbitrarily.[29] Court will not lay off its hands when the Executive

[26] Para 257
[27] para-504
[28] Para 549 [see also: 400, 401]
[29] Para 336

extends its hands to curtail independence of judiciary by using constitutional device.[30]

The policy decisions relate to future economic matter, trade and commerce, finance, communications, health, infrastructure project, public accountability in all govt. enterprise etc. Removal of judges is not a policy for a policy decision cannot take a democratic government forty-two years back system. To assume it such is a farce; as the policy makers took an unworkable devastating system for implementation with a view to create chaos, confusion, indiscipline and interference in the higher judiciary.[31]

I. Effects of Article 70 in Removal Process of the Judges

The learned **Attorney General** submitted that the High Court Division has given a wrong interpretation of article 70 in observing that it has imposed a tight rein on the members of the parliament. They cannot go against the will of their party on any issue in parliament, they have no freedom to question their party's stance, they cannot vote against their party, they are indeed hostage at their party high command bound to follow the dictates of the cabinet or the shadow cabinet of the opposition.

SK Sinha CJ held that there is no infirmity or nothing wrong in the above findings of the High Court Division on construction of article 70. According to article 70, members of parliament must toe to their party line in case of removal of judges of the Supreme Court. In consequence, the judges of the Supreme Court will be left at the mercy of the party high command.[32]However, certain uncalled and unwarranted observations of the High Court Division regarding members of parliament are expunged. The parliament and judiciary should act in a harmonious way as no absolute separation of power is possible in unitary system of governance.[33]

J. Restoration of the Articles of the Original Constitution

The Attorney General argued that the amendment restored the article 96 of the original constitution. The original constitution not being subject to judicial review,

[30] Para 338
[31] para-340
[32] Para- 275
[33] Para- 277

the Sixteenth Amendment is not justifiable the by the High Court Division. The amendment itself reverted to the original constitution of 1972. So it is not open to challenge.

Abdul Wahab Miah J held that the argument put forward by the Attorney General is cheap, populistic and sentimental. The concept of restoration of a *non est* provision in the constitution and is unknown to the constitutional jurisprudence. The constitutionality of an amendment has to be tested with the constitutional scheme and provisions as it stood on the date of amendment not what was in the original constitution.[34]

M. Imman Ali J held that the original constitution of 1972 is not open to question since it is the 'mother law' and there is no yardstick to test its validity. However, it was not engraved in stones. Though it bore sacrosanctity it was amenable to amendment under article 142. When an amendment is passed by the parliament, it becomes part of the very constitution itself. Hence, any subsequent amendment should be tested with yardstick of the existing constitution which is the touchstone of validity and constitutionality of legislation and amendment.[35]

By taking resort to reverting to 1972 constitution, an amendment cannot be made more sacrosanct and thus unquestionable. There cannot be an amendment except the procedures mentioned in article 142 i.e. addition, alteration, substitution or repeal.[36]Going back to the 1972 constitution is like playing game to the psyche of the public; including the members of the parliament. It is like playing to the gallery to gain popularity by targeting the liberation war sentiment of the people.[37]

K. *Suo Motu* Decision and Judgment on Fourth Amendment and Act 6 & 7 of 2013[38]

SK Sinha CJ held that the Act nos. 6 and 7 of 2013 were not passed through following proper law making procedure. The Acts were passed to ratify and confirm certain laws passed during Martial Law regime after the Supreme Court declared the Fifth and Seventh amendment unconstitutional. Confirmation and ratification is not any

[34] Para- 432
[35] Para- 562, 565
[36] Para 570
[37] Para 611, Hasan Foez Siddique J
[38] Paras- 364, 538, 578, 775

recognized mode of law making in Bangladesh. The court feels embarrassed when the matters are heard upon these laws. The parliament has failed to discharge it duty of proper law making after the Appellate Division condoned those laws.[39]

The article 116 of the constitution as amended by the Fourth Amendment is directly in conflict with article 109 as well as article 116A. The substitution of the word 'President' for 'Supreme Court' in article 116 totally impaired curtailed and whittled down the independence of the lower judiciary. The amendment, therefore, violates the basic structure of the constitution. The substitution of the word 'P resident' is *ultra vires* the constitution.[40]

The Attorney General's explanation that the word 'president' was substituted in the fourth amendment in the context of presidential form of government introduced in the amendment is ex facie not tenable. There is no nexus between independence of judiciary and form of government. Independence of judiciary should always remain beyond question.[41]

Chief Justice Sinha observed that the question to be decided in this case is whether under the provisions of the present constitution independence of judiciary is curtailed or not. Judiciary includes both the higher and lower judiciary. So Attorney General's objection that article 116 is not an issue in this case has no force at all.[42] However, their Lordships S M Hossain, M Imman Ali and Hasan Foez Siddiqui JJ agreed with the Attorney General and held that the above mentioned laws and article 116 are not issue in this case. And no judgment can be passed on these issues since the opportunity of submitting arguments has not been given.[43]

L. 16th Amendment Curtailed Independence Of Judiciary[44]

The learned Amicus Curiae **Ajmalul Hossain** submitted that the fear of judiciary about parliament's removal mechanism is entirely unwarranted. There is no evidence before the curt to infer that the impugned amendment would curtail the independence of judiciary and that apprehensions are based on conjectures and surmises. There is no inherent contradiction between judge's subjective

[39] Para-214
[40] Para- 358, 360
[41] Para- 359
[42] Para-364
[43] Paras- 538, 578 and 775
[44] Para- 278

independence and subjective accountability. The impugned amendment undoubtedly ensures the accountability of the judges to the people of Bangladesh.[45]

SK Sinha CJ held that parliamentary removal mechanism is available in countries like the USA, India, Sri Lanka, Malaysia. In recent days, those countries had bad experiences in procedure of removal of judges. Those countries' experiences towards the parliament's removal mechanism for removal of judges are pathetic, politicized and unworkable. The system is not working and these countries are facing criticism from home and abroad.[46]Similar incidents may arise in Bangladesh where election disputes are heard by the High Court Division. It may lead towards destruction of judicial independence.

In the context of Bangladesh parliamentary democracy did not flourish with its full fledge. It is seen that an undisputed and acceptable election could not be held under the authorities of the politician. As a result, our election mechanism and parliament remain in infancy. When the parliament is not matured enough, it would be suicidal attempt to give parliament the power to remove judges of the higher judiciary. [47]Reserved women members of parliament will also take part in judges' removal mechanism which is not acceptable in a matured democracy. Such unelected members taking part in the process is also incompatible with the spirit of preamble and article 7 of the constitution.[48]

Political powers were grabbed by a number of power mongers since the independence of Bangladesh. Their unholy alliances made Bangladesh a 'banana republic and they maintained a rubber stamp parliament. In the backdrop of such derailment by the executive and the legislature, only judiciary remained on the track facing endless challenges.[49]

M. The Sixteenth Amendment Affected the Security of Tenure of Judges

The learned Amicus Curiae **Ajmalul Hossain QC** submitted that the Sixteenth Amendment in no way affected the basic structure of the constitution i.e. security of

[45] Para- 148
[46] Para-195
[47] Para-199
[48] Para-205
[49] Para 220

tenure of judges which is a considered as one of the conditions of the judicial independence.

SK Sinha CJ held that the submissions from the Bar unanimously agreed that the independence of judiciary is a basic structure of the constitution.[50]The Appellate Division in *Masder Hossain case* and *8th amendmencase* held that security of tenure includes security against interference from the executive and judges of the higher judiciary can only be removed under article 96 that is the Supreme Judicial Council. B. H Choudhury observed that it is a unique feature because a judge is tried by his own peer and thus there is freedom from political control. Thus it is clear that the Supreme Judicial Council mechanism for removal of judges are essential for safeguarding the independence of judiciary. This provision is related to self-regulation of judiciary for safeguarding the judges in administration of justice independently and impartial free from external interference. Such self-regulation was introduced by the Fifth Amendment and approved and ratified by the court in the Fifth Amendment case and the same was retained by the fifteenth amendment.[51]

By reason of article 70 the parliament is under absolute control of the executive, to be specific the party in power. The members of the parliament are not independent to vote neutrally and impartially. Such situation leads to irresistible conclusion that the new mechanism cannot be expected to function independently and neutrally if a judge attracts displeasure from the party in power. Without a healthy political tradition where there will be no article 70 the purported impeachment process of sixteenth amendment would clearly undermine the independence of judiciary and will definitely alter the basic structure of the constitution. (Para- 284)

N. Reasons for Which 16th Amendment Is Unconstitutional

SK Sinha CJ held that the Sixteenth Amendment was passed abruptly for no reason without removing the inconsistencies in the provisions of the constitution. It is also a colorable legislation, as the parliament cannot do anything indirectly which it cannot do directly. The parliament sometimes purports to act within its jurisdiction; but in substance, it transgresses its power. That is what happened in the impugned

[50] Para 280
[51] Para-283

amendment. The amendment if kept intact would seriously hamper the independence of judiciary.[52]

Abdul Wahab Miah & M. Imman Ali JJ held that the Sixteenth Amendment gave the parliament supervisory power over the judiciary which is not the scheme of the constitution. It violates the theory of separation of power. The amendment also gave power to investigate and judge the incapacity or misbehavior of the judges of the higher judiciary, which is obviously a judicial power. The constitution does not contemplate of giving such judicial power to parliament. The people did not give any mandate to 10th parliament to constitute them as constituent assembly and bring fundamental change in the constitution. Nowhere in the election manifesto or elsewhere such power was sought or given[53].

O. There Would Be a Deadlock

Learned **Attorney General** submitted that there will be a deadlock in removal of judges of higher judiciary if the sixteenth amendment is declared unconstitutional.[54]

SK SInha CJ held that there is no question of such deadlock. The law when a substituted provision of law is declared void the earlier provision revives automatically. Hence, the provisions of Supreme Judicial Council will be revived in the constitution.[55]

P. Supreme Judicial Council Was Not Dysfunctional

Learned **Attorney General** submitted that the Supreme Judicial Council was nonfunctional in the absence of the Code of Conduct.

SK Sinha CJ held that it is not correct that there is no Code of Conduct for judges. The Appellate Division in its decision on Idrisur Rahman vs. Bangladesh reported in 13 ADC 220 formulated Code of Conduct. To avoid any misgiving and confusion, Code of Conduct comprising 39 guidelines is formulated afresh in this case.

Q. Parliamentary Removal Procedure Should Not Be Incorporated Following Other Countries

[52] Para-367
[53] Paras-405, 605
[54] Para- 373
[55] Para- 374

The amendment in its preamble referred to other countries with parliamentary removal mechanism of judges. The state counsels also argued in favor of removal of judges by parliament referring to those countries. Article 23 of the Beijing Statement on …. states that it is recognized that due to difference of history and culture the procedure adopted for removal of judges may differ from country to country. Besides, the experience of parliament-led removal mechanism in those countries is not happy at all.[56]The constitution of Bangladesh is an autochthonous constitution. This constitution should not be amended by following the constitution of other countries. Parliamentary removal procedure will not suit in our country given the socio-economic and political culture of our country. The solution must be within the constitution itself.[57]

R. To Whom Judges Should Be Accountable? Who Judge the Judges?

Learned **Attorney General** submitted that the constitutional scheme is that people are the supreme. All constitutional bodies including the president and prime minister are accountable to people through their representatives. The judges of the higher judiciary should also be accountable to the people through their elected representatives. The Attorney General even put a question that, are the judges of the Supreme Court too big, too great and too superior to the representatives of the people?[58]

Mr. Justice Abdul Wahab Miah held that this argument is 'populistic and easy consumptive'. Judges should not be accountable to parliament like president, speaker, prime minister and the cabinet. The reason is that the judges are not elected by the members of the parliament like in the United States of America. The constitution did not give any mandate to parliament to impeach the judges of the Supreme Court. Under the present scheme of the constitution, parliament does not have any say in appointment and removal of judges. The constitution provided with an inbuilt mechanism for electing president and other executives. On the contrary, the constitution emphasized on the independence of judges which is absent in

[56] Paras- 306, 195
[57] Para-455
[58] Para-433

regards to others. There is also a fundamental difference between the duties of the judges and duties of the executives.[59]

S. Writ Is Not Premature

Learned Additional Attorney General **Mr. Murad Reza** submitted that the writ petition is a premature one. The petitioners should have waited for the Act to be passed upon the new amendment.

Abdul Wahab Miah J held that the argument is bereft of any legal substance. A citizen of country need not wait for follow up enactment when he finds an amendment *ultra vires* of the constitution. Further, waiting for an enactment under a void Act would amount to "the doctors came after the patient had died." If an amendment of the constitution is *ultra vires* the constitution it should not survive even for a time.[60]

Observations of the Court

- Preamble of our constitution is very much unique comparing to other countries. [Para- 60]
- Judicial review. A creative approach in our constitution. [Para 79]
- "The power of judicial review is therefore implicit in a written constitution and unless expressly excluded by the provisions of the constitution, the power of judicial review is available in respect of the exercise of powers under any provision of the constitution." [para-84]
- Petitioners of Public Interest Litigation (PIL) cannot withdraw petition at their sweet will unless the court permits withdrawal on reasons. The underlined reason is that the court cannot remain silent after taking into matter of public importance for its consideration. PIL is not a litigation of adversary character to hold the government or its officers responsible to make reparation rather it requires cooperative and collaborative effort from all the parties involved. [para-112]
- The court utterly disregarded the resentment expressed by the Additional Attorney General towards the learned amici curiae. [para-113]
- Self-regulation of judiciary is enshrined in the constitution [para- 510, 362]
- "Collective political wisdom" of a nation

[59] Paras- 436, 437, 439
[60] Para- 447

- 'We' vs 'I': "No nation- no country is made of or by one person… we must keep ourselves free from this suicidal ambition and addiction of 'I'ness." [para-67]
- "we must get rid of this obnoxious 'our men doctrine and suicidal 'I' alone doctrine. Not party allegiance or money but merit alone should be given the highest priority at all levels of national life and institution building." [para-68]
- The liberation war was an adventure participated by all the people. [para-76]
- Judicial accountability: institutional and individual, internal and external
- Parliament cannot bind its successor; article 7A & 7B.
- Validity of the constitution lies in the social fact of its acceptance by the people. [Para-724[
- Focus should be on Appointment of Judges. [para- 795]
- Supreme Judicial Council reform
- Supreme Judicial Council is a safety valve against executive onslaughts. [para-479]
- 'Misbehavior' or 'incapacity' is not defined in the constitution. [para- 734]
- Observations of the Draft bill submitted in the court. [para- 739, 743]
- Judiciary is the lifeblood of constitutionalism. [para- 763]
- The Supreme Court is a 'Balance wheel' as the 'lamp' of the constitution. It is a lighthouse whose benignant rays of liberty and justice illumine the troubled surface of the water. [para- 774]
- Consultation in appointment; CJ has become 'post box'! [para- 804]
- Use of parliamentary debate in interpretation. [para-98]
- Malice in law and malice in fact. [para- 370, 371]
- Fifteenth amendment retained and legalized the Martial Law provisions of Bismillah and state religion for religious sentiment which directly goes against the spirit and aspiration of the liberation war. The principle of secularism was totally compromised and thus buried the spirit of original constitution and liberation. [para-138]

Effects on the Constitutional Law

- Restoration of Supreme Judicial Council
- Approval of Code of conduct
- Declaration of Fourth amendment unconstitutional specifically article 116 (by majority)

Quotations in the Judgment

- "Exercising power under a written constitution is as if working with a jigsaw puzzle." [para-13]
- "The ideal judge of today, if he is to be a constitutional mentor, must move around, in and outside court, with the constitution in his pocket, like the priest who is never without the Bibel. Because the more you read the provisions of our constitution, the more you get to know of how to apply its provisions to present day problems."- **Before Memory Fades,** Fali S. Nariman. [para- 16]
- "It is emphatically the province of the province and duty of the Judicial Department to say what the law is." Chief Justice Marshal in *Marbury* (para-28)
- "The court must be quite untouchable by the legislature or the executive authority in the performance of its duties." Harilal Kanai, CJ of India. "Judges should be, and perceived to be unmoved by the 'extraneous considerations feared likely to influence them." [Para-85, 8]
- Public policy is an unruly horse and dangerous to ride on. [Para-341]

Conclusion

Following this judgment, the then Chief Justice was forced to leave the country and the independence of judiciary has been questioned. The Supreme Judicial Council has been accepted as transparent method to deal with issues raised against the Judges of the higher judiciary. Recently, the Hon'ble Chief Justice took steps against three Judges of the High Court Division. We hope the Supreme Judicial Council would take proactive steps in all further violation of Code of Conduct by the Judges.

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