

THE CONSTITUTION 8TH AMENDMENT CASE

Anwar Hossain Chowdhury vs. Government of the People's Republic of Bangladesh & others

1989 BLD (SPL) 1, 41 DLR (AD) 165

[The paragraphs referred herein relate to the Judgment reported in 1989 BLD (SPL) 1]

Introduction

By this Judgment the doctrine of basic structure of the constitution has been introduced in our jurisdiction. Independence of Judiciary, Democracy, Unitary Character of the Government have been declared basic structures of the constitution. The concepts of the constituent power and the derivative power were also extensively discussed and concluded that the three organs (i.e. the Executive, the Legislature and the Judiciary) derive their power from the constitution and hence the supremacy of the constitution is entrenched in our constitutional scheme. The Parliament cannot go beyond the power granted by the constitution.

Short Facts

- A. The Appellant, in order to challenge the Order of stay, wanted to swear an affidavit-in-opposition approached the office of the Court. But the Commissioner of Affidavit refused to administer the affidavit and informed him that by virtue of the impugned amendment the Writ Petitioner stood transferred to the newly created Permanent Bench at Sylhet since the Writ Petition in question arose in the area assigned to the permanent Bench. Therefore, the Petitioner being aggrieved and dissatisfied with the decision of the Affidavit-Commissioner challenged the constitutionality of the Amendment Act.
- B. The High Court Division vide its Judgment and Order dated 31.10.1988 was pleased to summarily reject the Writ Petition. Thereafter, the Appellate Division considering the importance of constitutional interpretation granted leave and registered the same as Civil Appeal No. 42 of 1988. Thereafter, on 02.09.1989, the Appellate Division by majority allowed the appeal.

Counsels

Mr. Dr. Kamal Hossain, Mr. Syed Ishtiaq Ahmed, Mr. Amir-ul-Islam appeared for the Petitioners.

Mr. Md. Nurullah, the Attorney General appeared for the Respondent.

Mr. Asrarul Hossain and Mr. Khandkar Mahbubuddin Ahmed appeared as Amici Curi.

Submissions of the Counsels

Dr. Kamal Hossain

1. The 8th Amendment Act destroyed the Unitary Character of the Supreme Court of Bangladesh established under Article 94 of the Constitution. It has also destroyed the plenary jurisdiction of the Apex Court. Article 102 conferred powers upon the High Court Division irrespective of territorial limit. Similarly, admiralty jurisdiction also does not have territorial limit. It has also destroyed the superintendence and control over all the subordinate Courts under Articles 107 to 111 of the Constitution. (Pg-23, Para-01; Pg-24, Para-01).
2. The amending power under Article 142 of the Constitution is within the purview of the Constitution and not above the Constitution. The impugned amendment has limited the power of the Apex Court to a limited territorial jurisdiction. It further destroyed the structural pillar of the Constitution. It virtually amended Articles 44, 101, 102, 107, 109, 110 and 111 of the Constitution. It has also created seven mini High Courts. (Pg-23, Para-02; Pg-27, Para-02).
3. Setting up seven mini High Courts is as subversive as setting up seven mini Parliaments or even seven Appellate Division. If seven mini Parliaments are set up- would it not destroy the unitary character of the National Parliament? (Pg-23, Para-03). All Courts would be subordinate to a single High Court Division as part of the Supreme Court and not to 7 regional Courts with mutually exclusive territorial limits. (Pg-25, Para-01, last two lines from the bottom).
4. A permanent Bench cannot deal with contempt of itself or of subordinate courts committed outside its area of jurisdiction, nor can any permanent Bench of the High Court Division at the permanent seat deal with contempt of another permanent Bench. Thus the problem of uncertainty, ineffectiveness and multiplicity of proceedings could arise. (Pg-24, Para-02, 3rd line from the bottom).
5. Rule made by the Chief Justice under clause (6) of Article 100 are ultra vires and unconstitutional inasmuch as Article 142 does not authorize making of any amendment materially affecting the basic structure of the constitution, in particular, with regard to structure, status, jurisdiction, independence and

effectiveness of the High Court Division. Further Article 107 specifically empowered the Supreme Court to frame rules for both the divisions. Therefore, the rule making power conferred by the 8th Amendment is ultra vires the Constitution. (Pg-25, Para-03). Article 7 expressly empowers the Supreme Court to make rules to regulate the practice and procedure of both Divisions. (Pg-26, Para-03).

6. Original Article 100 was consistent with the concept of an integrated Supreme Court while providing for sessions outside the Capital. The sessions could be held anywhere within the country as might be thought appropriate in the interest of justice and in public interest. (Pg-26, 4th Para).
7. The 8th Amendment squarely violates the provisions of Art. 147(2) of the Constitution. (Pg-26, Para-05).
8. The bill did not incorporate long title and as such it has been a colorable legislation. (Pg-27, 3rd Para).

Syed Ishtiaq Ahmed

1. The Constitution has structural beauty on its three pillars. The supreme judiciary is one of those three pillars. The 8th Amendment destroyed one of the three pillars (Pg-28, Para-03).
2. Preamble is the key to open the mind of the makers of the Constitution. It is part and parcel of the Constitution. Therefore, referendum as an extra-ordinary measure is required to amend this provision. (Pg-28, Para-04).
3. Article 7 provided for sovereignty of the people, Republican character of the State, limited government, separation of power, supremacy of the constitution, voidability of the laws. (Pg-28, last Para).
4. Article 7 is the pole star which contains the fundamental premises of the democratic government. (Pg-29, Para-02). Mr. Ahmed has categorically summarized four-point principles of constitutional interpretation. (P-29, Para-03).
5. Ours is a controlled Constitution. It does not include any power to replace the Constitution. Amendment can be brought in order to make the Constitution more complete, perfect or effective. The 8th amendment has made this scripture of hope into scripture of doom. Parliament itself is creature of the Constitution and merely a donee of this limited power. Treating amending power as constituent power

would effectively replace the supremacy of the Constitution by the supremacy of the Parliament. (Pg-29, Last Para).

6. The concept of unlimited amending power as constituent power is opposed to the spirit of Article 7 of the Constitution. Article 7 is an express limitation on amending power. Principle of limited Government and separation of power are always unalterable. The word amendment having different meaning, literal construction leading absurdities and repugnancies should be avoided and harmonious interpretation should be given avoiding all absurdities. Assuming the amending power is unlimited and it is possible to amend Article 94 of the constitution by virtue of that amending power? (Pg-30, Para-02 and onwards).
7. Constitution provided only one superior court having plenary power over the whole territory. The situation in India, Sri Lanka and Pakistan is totally different from us. Our constitution is uniquely designed for maintenance of the supremacy of the Constitution. Our High Court Division is different from a high court in a federal setup. (Pg-31, Para-05).
8. The Supreme Court in its status has three attributes. It is Court of record, binding force it has rule making power. (Pg-32, Para-03).
9. The words 'High Court' conjure up in our mind an institution with which we are familiar for more than a century but conceptually high court division is altogether a unique component of the highest judicial organ under our constitution having no manner of similarity or comparison with a high court in a federal set-up in this sub-continent. (Pg-32, Para-06).
10. In enacting article 100 our constitution makers have drawn upon the accumulated wisdom and rich experience of past from the operation of various constitutions and sub-constitutional instruments relating to federal courts and Supreme Court. Article 100 has inbuilt system to address the needs of the future generation. It was included as a result of accumulated wisdom and rich experience of the past from the operation of various constitutional instruments. (Pg-32, last Para).
11. Seven mini High Court Divisions of mutually exclusive and limited territorial jurisdiction have been created. There is no more the high court division with plenary jurisdiction powers of the Republic which extended not only over the Republic but also beyond it. The integrity of the Supreme Court is lost. There is no more the High Court Division with plenary judicial power of the Republic.

Structural balance has been upset. Parliament cannot do it by exercising power under Article 142. (Pg-33, Para-02).

12. Parliament cannot set aside the judgment which has invalidated a law or action as that would be overriding the judicial power. Limitation is also implied on the power of adaptation of written constitution. (Pg-33, Para-03).
13. Article 100(5) by authorizing the President to assign areas for permanent benches and thereby curtailing the territorial jurisdiction of the High Court constitutes an impermissible delegation of amending power and is therefore void. (Pg-33, Last Para)
14. Provincial high courts of India and Pakistan are qualitatively different. They have limited territorial jurisdiction and cannot have writ jurisdiction beyond territorial limits. They are not creatures of the Constitution. No amendment of the Constitution is involved. The plenary power of the original courts is in no way be affected. (Pg-34, Para 02 & 03).
15. The rules framed under the amended article are void because the amendment itself is void. There is no procedure for pending cases. (Pg-34, last Para).

Mr. Amir-Ul-Islam

1. Unitary sovereign republic is our 'birth jacket' which we inherited and is not a jacket given to us by anyone. Unlike federal state, the unitary, independent & sovereign of the Republic is a consistent concept with integrated Supreme Court having two divisions. Sovereign power is distributed among various organs of the state and this separation of power is an essential feature of the Republic. Judicial power of the integrated Supreme Court is co-extensive with the Republic. (Pg-35, Para-02&03).
2. Unitary character of the Republic is basic feature and plenary judicial power of the Supreme Court in line with the unitary character is also a basic feature. Therefore, this amendment also undermines the unitary character of the Republic. (Pg-35, Last Para).
3. Amongst others, this amendment is an attempt to put the clock back to more than two hundred years. It was possible under the High Court of Judicature Act, 1861 to limit the territorial jurisdiction but not permissible under our jurisdiction. (Pg-36, Para-02).

4. Impugned amendment undermined the concept of equal justice because after this amendment the petitioner has to pass the threshold whether he is from Teknaf or Tetulia. (Pg-36, Para-03)
5. Rule of law, due process and inviolability of the judicial review are thus inalienable and unalterable feature of our Constitution. (Pg-36, Para-04).
6. The title of the bill was not in conformity with the Article 142 of the Constitution. (Pg-36, Para-05).

Attorney General

1. Amending power under Article 142 is wide subject to article 142(1A) of the Constitution. Previous incidents show that there is no limitation on amending power. He relied on several federal constitutions. (Pg-36, last Para).
2. History and precedents show that seat of the superior courts was not considered as an essential attribute of their power. It does not mean establishment of more than one high court. Justice was made available to the people at a less expense and in public interest. Justice has been taken to the doorsteps of the people. (Pg-37, Para-02& 03).
3. It has not affected the integrity of the High Court Division. Noting was curtailed. Articles 101, 102, 107, 109, 110 and 111 have not been violated. Everything remains as usual and it only provided that judges would seat at the permanent benches. They will exercise powers of the High Court Division. During vacation they can exercise the same power sitting there. It is done for expediency and convenience. It is an institution with powers and jurisdiction but not with the seat. It is functional re-arrangement. (Pg-37, Para-04; Pg-37, Para-01).
4. Rules are in conformity with Article 100(5) of the constitution and hence valid. (Pg-38, Para-02)
5. Supremacy of Article 7 does not curtail the amending power of the Parliament. Previous amendments changed the system of the Government despite existence of Article 7. Supremacy has to be understood with reference to the Constitution as it is today not in the past. (Pg-38, last Para).
6. The difficulty regarding admiralty jurisdiction is imaginary. It will be dependent on facts of each case. (Pg-38, Para-02).
7. Plenary jurisdiction means full and complete jurisdiction or power of court over the subject matter as well as the parties in controversy. The amendment did not

put any bar to exercise this plenary power. The court can still issue writ even beyond the area assigned to it. (Pg-39, Para-02).

8. Question of destruction of basic structure does not arise at all. This theory has to be applied in each case not in abstract. He admitted that independence of judiciary and separation of power are the basic structures and the impugned amendment did not affect any of them. (Pg-39, Para-03; Pg-40, Para-01).
9. The controversy regarding long title and short title- same process has been observed done in all previous amendments and nothing new was added in or subtracted from the instant amendment. (Pg-40, Para-02).
10. Analogy of Parliament does not at all fit in as Parliament must act as a whole but the High Court Division needs not to seat together. (Pg-40, Para-03).
11. Article 142 contains unqualified and absolute power to change the provisions of the Constitution except 142(1A). Parliament's amending power is the constituent power. Such power unless expressly limited can by its very nature has no limit. The Constitution makers have not imposed any limitation on it. The amending power cannot be limited by some vague doctrine of repugnancy.
12. Consultation between the President and the Chief Justice was ensured in order to protect individual rights of the judges. (Pg-40, last Para).
13. Transfer of pending cases- absence of provision is not bad because permanent seats are not different entities. It is consequential. It is mere re-location of businesses. (Pg-41, last Para).
14. Although Supreme Court is a complete Court, it is composed of two distinct entities with distinct powers. There are two separate rules dedicated for each division. (Pg-42, Para-03).

Asrarul Hossain (amicus curie)

1. Parliament is the creature of the Constitution and it cannot have unlimited power. Its power is within and under the Constitution. The Parliament is not omnipotent. Unless abrogated by extra-constitutional means, no way to replace or destroy the Constitution. (Pg-42, Para-05).
2. Interpretation of the Constitution- each word must be given meaning not to treat as surpluses. (Pg-43, Para-01).
3. Two divisions have plenary power over the Republic. In our Constitution, the preposition 'for' Bangladesh has been involved. Same as Parliament 'for'

Bangladesh. Use of different proposition is not without purpose. Constitution has placed the Supreme Court above the two organs. (Pg-43, Para-02).

4. Most important structural pillar has been destroyed. Dhaka High Court Division has become pigmy, dwarf, truncated and mutilated. Binding effect of Article 111 has been destroyed. Pg-43, Para-04)
5. The judges are oath bound to protect the Constitution and hence destroying the basic structure by the Parliament is liable to be judicially reviewed. (Pg-44, Para-03).
6. Consultation- no proper consultation was made under the provision of 8th amendment. (Pg-44, Para-04).
7. The bill did not provide long title complying with Article 142 of the Constitution. (Pg-44, Para-06).

Khandkar Mahbub Uddin Ahmed

1. The plenary power of the Supreme Court has been destroyed. (Pg-44, Para-07).
2. Impugned amendment is malice in law and fraud practiced upon the Constitution. It is in fact a devise for amendment. (Pg-45, Para-01).
3. The requirement of long title was not complied with. Many things were put in a single basket. Islam as a state religion and amendment of Article 100 have been put together in order to misguide the members of the Parliament. (Pg-45, Para-03).
4. Validation should be made prospective so as to avoid hardship and inconvenience. (Pg-56, Para-02).

Issues and Findings of the Court

A. Scope and Extent of Amending Power

Mr. Justice Badrul Haider Chowdhury

1. Power to frame a constitution is a primary power whereas power to amend a rigid constitution is a derivative power. [Para-145].
2. He rejected attorney general's argument on the point of doctrine of repugnancy and concluded that Article 142(1)(a) is the limitation on the legislative competence. [Para-163]

3. In reply to the argument advanced by the learned attorney general that amending power is a constituent power, the Hon'ble Judge answered in negative and further added that as per article 7, 8 and 26 constituent power lies with the people. Amending law becomes part of the Constitution but the same amending law may ultra vires the Constitution. Unlike Pakistan or Sri Lanka, there is no system of replacement in our Constitution. [Para-183 & 184]
4. Amendment will affect improvement or better carry the purpose of the Constitution. [Para-192]
5. Amending power is higher power than any other power given by the Constitution. Nevertheless, it is a power within and not outside the Constitution. [Para-195]
6. The structural pillars of the Parliament and Judiciary are basic and fundamental. [Para-255 & 256]

Mr. Justice Shahab Uddin Ahmed

1. Amendment is a change or alteration for the purpose of bringing in improvement in the statement to make it more effective or meaningful but it does not mean abrogation or destruction or a change resulting in the loss of its original identity and character. [Para-334 & 338]
2. Before the amendment becomes a part of the Constitution, it shall have to pass through some tests, because it is not enacted by the people through a constituent assembly. [Para-341]
3. Constituent power belongs to the people alone. It is original power. People gave this power to the Parliament, which is derivative power. The derivative power is not immune from challenge.
4. In reply to the Attorney General's submission that if so there is no scope for peaceful change and this may lead to change by violent and unconstitutional means such as revolution, the Hon'ble Judge conclude that there is hardly any revolution in the sense of French or Russian Revolution for radical change of social, economic structure. What is spoken of as revolution in the third world countries is the mere seizure of power by any means, fear or foul. If a real revolution comes, it cannot be prevented by a Constitution however flexible it might be. [Para-346]

5. Sovereignty belongs to the people, supremacy of the Constitution, Democracy, Republican Government, unitary state, separation of powers, independence of the judiciary, fundamental rights are basic structures of the Constitution. Sovereignty is equally distributed among the three organs of the state. [Para-376 & 377]

Mr. Justice MH Rahman

1. When the Parliament cannot amend the preamble directly, it cannot by amending a provision impair or destroy the fundamental aim of our society. [Para-388]
2. Validity of such amendment will be examined on the touchstone of the preamble. [Para-391]
3. Since basic structure is new and elegant in nature, it requires some more time for acceptance.

Miscellaneous

1. The Chief Martial Law Administrator Lt. General H.M. Ershad by writing a column titled 'The nation must ponder' published in the New Nation dated 30.03.1983 expressed his views on the role of the judiciary. [Para-396-397].
2. Mr. Asrarul Hossain has contended that as per Article 94 of the Constitution- there shall be Supreme Court for Bangladesh (In Bangla it has been described as 'Bangladesher').
3. He termed judiciary as the 'least dangerous' organ.
4. At times, I had the feeling that the Court is re-hearing Kasavananda. [Para-432].
5. Basic Structure has to be considered in each individual case, not in the abstract, but in the context of concrete problem- Justice Chandrachud in Indira Gandhi's case. [Para-433].
6. Facts of Indira Gandhi's election [Para-437]
7. Preamble is not a little star twinkling in the sky above, it can be called as pole star. [Para-456]

Mr. Justice ATM Afzal (dissenting)

1. Dictionary meaning of 'amend' means free from faults. For the purpose of this case, amendment will be understood in the sense of alteration. [Para-529]
2. Any provision mentioned in Art. 142 evidently includes all provision. There is no limitation on the power to amend any provision of the Constitution. [Para-530]
3. Basic feature theory does not appeal or reason on fundamental two grounds; firstly, it is inconceivable that the makers of the Constitution had decided on all matters for all people of all ages without leaving any option to the future generation, secondly, if it is right that they wanted the so called basic features to be permanent features of the Constitution, there was nothing to prevent them from making such a provision in the Constitution
4. There was no distinction in the Constitution what is essential and what are not essential features of the Constitution. Who will make this distinction? Actually there is no such distinction. [Para-550]
5. He admitted that the power of amendment can no way be interpreted so as to destroy or abrogate the Constitution.

Miscellaneous

1. He criticized the High Court Division for wrongly declined to decide upon a full consideration of the matter. [Para-511]
2. He specifically referred to the US, German and French constitution and concluded that in our constitution there is no such article. [Para-530].
3. Article 142 opens with non-obstante clause and hence no other interpretation is necessary. [Para-535].

B. Basic Structure Doctrine Was Not Invoked Earlier

Mr. Justice Shahabuddin Ahmed

1. It is not at all a valid ground to argue that since the earlier amendments were not challenged on the ground of ultra vires the basic structure doctrine, it would be barred to challenge now.

Mr. Justice ATM Afzal

1. There are special difficulties to accept this doctrine because the basic features have varied in such abandon and with such quick succession that the credibility in the viability on the theory of fundamentality is bound to erode. [Para-551]

C. Destruction of Plenary Power

Mr. Justice Badrul Haider Chowdhury

1. In our Constitution, no territorial concept is injected.
2. The structural pillar given in Article 98 has been destroyed.
3. Permanent bench is alien concept. It has indirectly destroyed the constitutional fabric. [Para-151 & 152]
4. High Court Division does not exist. It has withered away. It has created new parallel courts. [Para-162 & 190]
5. It has destroyed essential limbs of the judiciary. [Para-259]

Mr. Justice Shahabuddin Ahmed

1. Our Constitution is uniquely designed. Ours is unitary Republic and unitary judiciary. [Para-361]

Mr. Justice MH Rahman

1. Two divisions together form the Supreme Court. [Para-390]
2. Plenary jurisdiction of the Supreme Court has been totally undermined.
3. Rule of law is the only one basic feature.
4. Uncertainty in the mind of the judges. [Para-483]

Mr. Justice ATM Afzal

1. It is wrong assumption that the plenary power has been destroyed and sentence of death has been passed upon Supreme Court. [Para-512]
2. Plenary power remains unaffected. The limitation is not on the jurisdiction of the court but on the manner of its exercise. [Para-573]

3. High Court Division has been treated separately in the Constitution. Amendment is just an extension of that treatment. [Para-580]

D. Unitary Character of the State

Mr. Justice Badrul Haider Chowdhury

1. It has seed of regionalism. Next step would be dismantling the fabric of the Republic. [Para-238]

Mr. Justice Shahabuddin Ahmed

1. It has been organized as unitary state by our founding fathers leaving no scope for devolution of executive, legislative and judicial powers on different regions to turn into provinces. [Para-361 & 362]

Mr. Justice MH Rahman

1. Constitution makers devised only one court for the whole of Bangladesh.

E. Decentralization of the Judiciary

Mr. Justice Badrul Haider Chowdhury

1. Our Constitution did not leave any scope for decentralization of higher judiciary. [Para- 248]

Mr. Justice MH Rahman

1. The doctrine of doorstep justice is not applicable for higher judiciary. [Para-401]

Mr. Justice ATM Afzal

1. It is the policy decision. The Court is only concerned with the constitutionality not with the policy. Paras 598-600

F. Long Title of the Bill

For detailed dissenting opinion see Para Nos. 608, 613 and 614.

Conclusion

The jurisprudence of doctrine of basic structure incorporated by this judgment heavily influenced all subsequent constitutional cases of our jurisdiction. Specifically, 5th, 13th and 16th amendment cases laid foundation on the doctrine of basic structure settled by this case. In fact, the doctrine of basic structure has been entrenched in our constitutional jurisprudence.



Mohammad Shishir Manir

Advocate

Supreme Court of Bangladesh