

**TOPIC ON CASE COMMENT: ANWAR HOSSAIN  
CHOWDHURY VS. BANGLADESH, 1989 B.L.D. (SPL) 1, 41  
D.L.R. (AD) 165 (1989)**

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**ABSTRACT**

**INTRODUCTION**

The case of Anwar Hussain Chowdhury vs. Bangladesh commonly known as 8th amendment case is an important judgment in the constitutional history of independent Bangladesh. This is the first decision whereby the Supreme Court of Bangladesh overruled an amendment to the constitution by the parliament. In this case, the supreme court of Bangladesh in a 1989 famous decision case recognized the basic structure doctrine or the idea of ‘unconstitutional constitutional amendment’ ruling that parliament lacks authority to amend the Constitution in a system that would abolish its basic structure.<sup>i</sup> The case which judicial review is shown in sub-article 5 of article 100 is inconsistent with articles 44 and 114. However, *Mohammad Moin Uddin and Rakiba Nabi, who said that*

*“While judicial review itself is a debated phenomenon in democratic countries, its use in constitutional amendments adds further complexity to the debate”.*<sup>ii</sup>

Because the amending power of the parliament does not extend to that which can change the basic structure of the constitution. This case is in relation to changing six benches of high court division outside of the Dhaka, which is contradictory to Bangladesh constitution. The aim of this paper is to maintain the basic structure of the constitution, which the parliament eliminated through their amendment powers. Nevertheless, this paper will firstly the fact of the case and then will do critical analysis what was the problem in the 8th amendment of independence Bangladesh which goes against public laws.

## THE FACT OF THE CASE

Bangladesh Parliament amended article 100<sup>iii</sup> of the constitution in 1988 incorporating the provision for six permanent benches of a High Court for, Sylhet, Rangpur, Barisal, Chittagong, Jessore, and Comilla. The fact is that one division of the Supreme Court was in the capital city Dhaka, but at the time of the 8th amendment, the parliament said that one division is not needed in only capital city Dhaka as should be outside of Dhaka also as six divisions. That's why Anwar Hossain Chowdhury challenges that 8th amendment as viewing inconsistent of the constitutional article 102<sup>iv</sup> because the fundamental principle cannot be changed by a political majority.

## PUBLIC LAW ISSUES AND ANALYSIS

The following issues will be discussed.

### *The Amendment Impaired the Rule of Law and Amending Power is Limited*

I agree with the judges that they provide the right decision regarding this case. However, the permission of the amending power is given by the Constitution to Parliament, although there is an implied limitation to amend the constitution.<sup>v</sup>

Nonetheless, the alteration was struck down not only on the ground of doubts or irreconcilability of the existing provisions but also on the ground of the amendment's irreconcilability with the rule of law, as envisioned in the preamble of articles 27, 31,32,44,94 to 116A which are mainly incorporated in the constitution. It is noticed that unlimited power is used in the power of government and rule of law is not applied from the consent of the people. Since it is derived from the people it is supreme and absolute but cannot be unconstitutional.

**According to B.H. Chowdhury**, ‘the power to frame a Constitution is a prime power, where a power to amend a rigid constitution is a derivative power derived from the constitution.<sup>vi</sup> Yet, there is no amending power limitation, except article 142. However, Shahabuddin, J rightly

commented that "As to, the implied limitation on the amending power which is inherent in the word 'amendment' of art 142.<sup>vii</sup>

There is another argument in this case that the government does not use the rule of law because he can face multiple questions in front of the media when that six-permanent bench will be created outside of Dhaka and another one is in Dhaka as a permanent seat. Consequently, the rule of law is shown by the government where he does not use arbitrary power exercise which goes against the public interest.

### ***The Amendment of the Constitution is Declared as Ultra Vires***

It is my view that the court mentions the right decision as a constitutional amendment is not 'law' within the sense of article 7 as well as article 26. Consequently, the court was right when the parliament used ultra vires as its power by amending one of the basic structures of the constitution.<sup>viii</sup> Implied limitation on legislative competence and modification of the Constitution are declared as ultra vires for the first time. For whom article 7B<sup>ix</sup> is a good example of the Bangladesh constitution, whereas impugned the amendment of article 100. The modified art 100 is ultra vires because it demolishes three vital branches of the judiciary by setting up rival courts to the High Court Division (HCD) in the name of permanent branches deliberating full jurisdiction, power and function of the HCD.<sup>x</sup>

### ***Basic Structure of the Constitution is Broken by the Parliament***

I think that the court was in right decision when certain provisions of a constitution are beyond the limit of the powers of amendment of a parliament as breaking the basic structure.<sup>xi</sup> With that, the amended sub-article (5) of 100 has disturbed the organizational stability that was cautiously initiated in Part VI of the Bangladesh constitution. The modification of this Bangladesh constitution has unswervingly violated article 44<sup>xii</sup>, 102 and disrupted Article 94. However, as I view it goes against the republic of the people of Bangladesh constitution and breaks the elementary building of the constitution.

The best example is *in the case of woman Rao vs. Union of India 1980*<sup>xiii</sup> whereas the parliament cannot alter the constitution to abolish its basic features is again repeated and then applied by the Supreme Court. Similarly, in the case of *Golak Nath Vs. The state of Punjab case*, it is decided that parliament has no power to amend the fundamental right to take away any of them. **My view is here that** the basic structure is not amendable like human rights law when **Dr. Kamal Hossen**<sup>xiv</sup> remarked that

*“Basic structures of the Constitution mean structural pillars on which the Constitution rests and that if these structural pillars are demolished the entire constitutional framework will crumble.”*

It is also noticed that the basic structure is not applied in the acts of parliament. So, how the parliament wants to change the structural pillar of the constitution, the question remains here?

Nevertheless, article 100 is void because it discusses the power of the executive to describe the territorial bounds of the permanent benches which is alien to the basic structure of the Supreme Court of Bangladesh. If the parliament does this one, the judicial power is broken.

**As my estimation**, the doctrine of bar to variation of the basic structure is an effective guarantee against frequent alterations of the Constitution in sectarian or party interest in countries where democracy is not given any chance to develop, although the Constitution does not cover any straight provision regarding the basic structure as a theory of basic construction ultimately restricts absolute amending power.<sup>xv</sup> But, Badrul Haider Chowdhury, J provided clear and a long list of 'unique features' which are 21 in number which cannot be desecrated.

There is a case of *Hamidul Haque corduroy vs. Bangladesh, (1982) 34 DLR.*<sup>xvi</sup> In this case, the court decides that the basic and vital structures of the constitution are destroyed and altered, but do not declare the amendment to be invalid. **From my sight**, the real number of the basic structure is ambiguous, due to the absence of clear judicial authority in this regard. However, this basic structure is seriously affected in India subcontinent countries like Bangladesh.<sup>xvii</sup> It is submitted that the refusal to declare the invalidity of the amendment is wrong. High court division losses its unique existence charisma as well as

most of its regional jurisdiction, although there are no written constitutional articles where it is said that no branch will be outside of the Dhaka.

## **THE JUDICIAL DECISION OF THIS CASE**

A division bench of high court division summarily dismissed the two petitions brought by the petitioners; upon an application to the appellate court, leave was granted for an appeal. The appeal court after considering the case held that the power of amendment of the constitution under article 142 is limited power and conflicts with the concept of the supremacy of the constitution contained in article 7. The court further held that article 7 among others, are basic features of the constitution and therefore cannot be amended and declared the amendment made by the parliament as ultra vires.<sup>xviii</sup>

According to Justice M.H. Rahman, J, in deciding the constitutionality of the amendment, recourse should be made in the preamble. He observed that the constitution has an entrenched provision which cannot be amended by the Parliament alone.<sup>xix</sup> On the contrary, the government cannot use arbitrary power as the court decision. However, the constitutionality of this amendment was challenged over the judiciary system in the above case popularly referred to as the 8<sup>th</sup> amendment.<sup>xx</sup>

## **SIGNIFICANCE OF THE CASE TO PUBLIC LAW**

The legitimacy of a law is verified by the touchstone of the Constitution, whereas such legitimacy is inherent and as such it is unchangeable. At trial, the legitimacy of any amendment article 7 is the touchstone in this case and thus no article is unamended especially which is inconsistent the constitution. The parliament cannot use the rule of law over the judiciary body because the constitution is not ordinary legislation. It's a basic structure how a country is governed and how it reflects history, ethos, and aspirations of people of a country.<sup>xxi</sup>

In this case, the basic principles are broken which must be preserved according to the Bangladesh constitution.<sup>xxii</sup> As there exists an unsatisfactory relationship of power between the state and individuals and then public law is particularly important because it provides checks and balances. This means that the area of law guarantees that the government does not abuse its power over individuals as against public law<sup>xxiii</sup> and they use their power in a fair and proper method.

On the other hand, a constitution is the body of fundamental doctrines and rules of a nation which a constitution establishes the basis for relations between citizens and governmental bodies and all those who are vested with public authority. It guards the rights of the people and clarifies their commitments when it expressed what their powers are, and how they may use their powers. It sets the rights of the people, how Parliament and the other legislatures work, how the national, provincial executives and courts work. The Constitution is the supreme law in Bangladesh and constitutional democracy. That means that the Constitution is the highest law of the land, but parliament cannot pass a law which is contrary to public law and the constitution. Finally, no person, not even the president, can get-up-and-go against it. The courts and the government must also make sure what they do is constitutional.

## CONCLUSION

Last but not least, it is understandable that judicial independence should be protected from Parliament.<sup>xxiv</sup> If the judiciary is controlled by the executive body, the rule of law must immune to their impacts. I think that parliament can do a modification of the error of commission or omission or alters the system without fundamentally changing its nature because it operates within the theoretical parameters of the existing constitution. Additionally, People can get a brief instance of constitutional supremacy through this historical decision Constitutional amendment. The yardstick to justify a constitutional modification is not only a basic structure but also public interest according to the Bangladesh constitution. However, the supreme court of Bangladesh faces some real and convincing challenges in this case relating to its

constitutional authority.<sup>xxv</sup> Lastly, the government of every democratic country should be independent as their own organically.

## REFERENCES

- <sup>i</sup> Hoque, R. (2018). Eternal Provisions in the Constitution of Bangladesh: A Constitution Once and for All?. In *An Unamendable Constitution?* (pp. 195-229). Springer, Cham.
- <sup>ii</sup> Nabi, R., & Moin Uddin, M. (2017). Judicial Review of Constitutional Amendments in Light of the "Political Question" Doctrine: A Comparative Study of the Jurisprudence of Supreme Courts of Bangladesh, India and the United States. at 314.
- <sup>iii</sup> Before 1989, the article 100 of the Bangladesh constitution said that the permanent seat of the Supreme Court shall be in the capital city Dhaka, but sessions of the high court division may be held at such other place or places as the chief justice may, with approval of the president, from time to time. Nevertheless, parliament wanted to pass a bill that the permanent Supreme Court will be in six divisions outside of the Dhaka.
- <sup>iv</sup> Artic 102 said regarding fundamental rights that the High Court Division on the application of any person aggrieved, may give such directions or orders to any person or authority, including any person performing any function in connection with the affairs of the Republic, as may be appropriate for the enforcement of any of the fundamental rights conferred by Part III of this Constitution.
- <sup>v</sup> See, the article 7 of the Bangladesh i.e if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void.
- <sup>vi</sup> *Infra note 16 at 135.*
- <sup>vii</sup> *Infra at 16.*
- <sup>viii</sup> *Infra at 21.*
- <sup>ix</sup> Notwithstanding anything contained in article 142 of the Constitution, the preamble, all articles of Part I, all articles of Part II, subject to the provisions of Part IXA all articles of Part III, and the provisions of articles relating to the basic structures of the Constitution including article 150 of Part XI shall not be amendable by way of insertion, modification, substitution, repeal or by any other means.
- <sup>x</sup> Karim, M. M. (2008, 04 23). *Anwar Hussain .Vs. Bangladesh or 8*. Retrieved 10 12, 2018, from <<https://www.scribd.com/doc/2599676/Anwar-Hussain-Vs-Bangladesh-or-8th-Amendment-Case>>
- <sup>xi</sup> Rahaman, M. (2014). *Basic Structures of the Constitution of Bangladesh*. (University of Dhaka)<doi:<https://dx.doi.org/10.2139/ssrn.2439906>>
- <sup>xii</sup> Article 44 said that 1) The right to move the High Court Division in accordance with clause (1) of article 102, for the enforcement of the rights conferred by this Part is guaranteed and Without prejudice to the powers of the High Court Division under article 102, Parliament may by law empower any other court, within the local limits of its jurisdiction, to exercise all or any of those powers.
- <sup>xiii</sup> *Women Rao Vs Union of India (AIR 1981, Supreme Court, 271)*.
- <sup>xiv</sup> Basunia, J. (n.d.). *On Bangladesh Constitutional 8th Amendment Case*. Retrieved 26 09, 2019, from <[https://www.academia.edu/7000979/On\\_Bangladesh\\_Constitutional\\_8th\\_Amendment\\_Case](https://www.academia.edu/7000979/On_Bangladesh_Constitutional_8th_Amendment_Case)>
- <sup>xv</sup> Haque, M. E. (December 2005). THE CONCEPT OF 'BASIC STRUCTURE': A CONSTITUTIONAL PERSPECTIVE FROM BANGLADESH. XVI (2), 123—154. At 133.
- <sup>xvi</sup> *Hamidul Hoque chodury vs. Bangladesh, (1982) 34 DLR*
- <sup>xvii</sup> Malek, M. A. (2017). Vice and virtue of the Basic Structure Doctrine: a comparative analytic reconsideration of the Indian sub-continent's constitutional practices. *Commonwealth Law Bulletin*, 43(1), 48-74.
- <sup>xviii</sup> *Supra at 11.*
- <sup>xix</sup> Rashid, M. M. (2012). Judgment Analysis Road to decentralisation of the High Court blocked. *Law and Our Right (Daily Star)*(281). Retrieved 26 08, 2019, from <<https://www.thedailystar.net/law/2012/08/01/index.htm>>
- <sup>xx</sup> Anwar Hossain Chowdhury Vs. Bangladesh, 1989, 18 CLC (AD)
- <sup>xxi</sup> Togor, M. R. (n.d.). Amendment of Bangladesh Constitution and basic structure doctrine. In *Lmitation of Amendment of Constitution* (pp. 20-28). Bangladdsh. Retrieved 26 09, 2019, from

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<sup>xxii</sup> *Id* at 23.

<sup>xxiii</sup> Hossaini, M. R. I. (2018). Secretary, Ministry of Finance vs Md. Masdar Hossain and others: A note on the case that ascertained the independence of the subordinate judiciary of Bangladesh. *International Journal of Law and Management*, 60(2), 563-570.

<sup>xxiv</sup> Siddiky, C. I. A. (Ed.). (2018). *The Rule of Law in Developing Countries: The Case of Bangladesh*. Routledge.

<sup>xxv</sup> Naznin, S. A., & Shawkat, A. L. A. M. (2018). Judicial Remedies for Forced Slum Evictions in Bangladesh: An Analysis of the Structural Injunction. *Asian Journal of Law and Society*, 1-31.

