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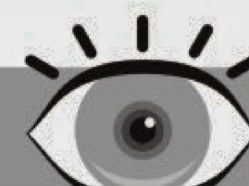
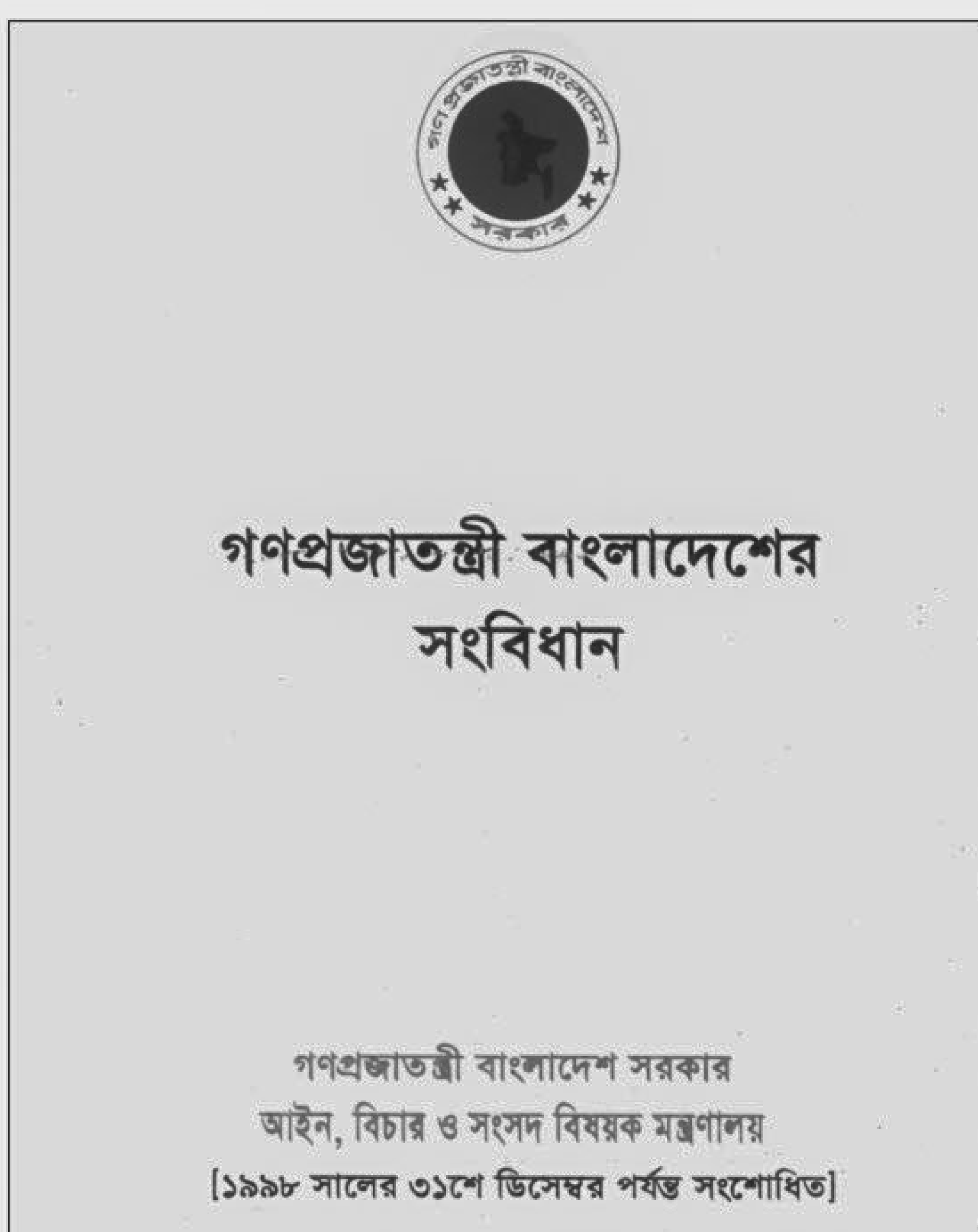
LAW vision



Negotiating Article 142(1A) for the 'Basic Structure'

M. JASHIM ALI CHOWDHURY

TO borrow words from Justice Mustafa Kamal, some provisions of the constitution are considered to be 'basic' while others may be termed as circumstantial. The constitutional lawyers and judges may discern some fundamental structural designs in a constitution as when an architect views a building. Call it basic structures or structural pillars or by whatever name they are there (Constitution: Trends and Issues, p 14). By now this fascinating doctrine of Basic Structure has become a vibrant tool of judicial activism to protect the constitutional edifice from ruination in hands of the invincible parliamentary super majority. The substance of the claim is that the structural pillars of the constitution cannot be dismantled by parliament in the name of amendment. It was planted strappingly in the judicial culture of Bangladesh by famous *Anwar Hossain Chowdhury* v. *Bangladesh* 1989 BLD (Spl) 1. A majority of 3:1 of the Appellate Division of the Supreme Court struck down the Constitution (8th) Amendment Act, 1988 establishing six permanent benches of the High Court Division outside Dhaka on the charge of destroying the unitary character of Republic, a basic structure of the Constitution as it was claimed.



Article 142(1A): The patent ills

Clause (1A) was inserted in Article 142 by the Second Proclamation (Fifteenth Amendment) Order, 1978 (Second Proclamation Order no IV of 1978). It provided that the renovated and express mandate of the people through Referendum shall be required along side the 2/3 majority in the House to amend some designated provisions of the Constitution. Looking at the list of provisions specially designated therein (Preamble, Articles 8, 48, 56, 58, 80 or 92A) it *prima facie* appears that General Zia couldn't have trust enough on the servile Parliament to be 'established' through the Second Parliamentary Election. To perpetuate the already settled omnipotent presidency along with the philosophical distortion in the Preamble, he needed something like clause (1A). Hence, Advocate Mahmudul Islam put a sharp question mark over the legality of this clause being an extra-constitutional insertion (Constitutional Law of Bangladesh, p 394). Then in it was Honorable Justice ABM Khairul Huq who unveiled the secrets:

"Addition of clause (1A) was craftily made. In the one hand the President and the Chief Martial Law Administrator was not only merrily making all the amendments in the Constitution of the People's Republic of Bangladesh according to his own whims and caprices by his order.......... but at the same time, made provision in Article 142 itself in such a manner so that the amended provisions cannot be changed even by the two thirds majority members of the parliament short of a referendum. In short by executive order of one person, amendment of the Constitution can be made at any time and in any manner but even the two thirds majority of the representative of the people cannot further amend it. We are simply charmed by the sheer hierocracy of the whole process" (The *5th Amendment Case* 14 BLT (Spl) p199).

Article 142(1A): The latent cure

In spite of the patent ills in Clause 1(A), looked upon from a different angle, it may reveal a latent cure. Just consider the 4th Amendment to the Constitution. Many of us, including me, firmly believe that it was a right but much belated step. Yet this 4th Amendment has blemished Bangabandhu's glorious patriotism and devotion towards the cause of his countrymen to a considerable extent, we may like it or not. It provided a ready tool in the hands of the anti-liberation force to propagate against the Patriot. It was a Parliament elected in a multi-party-democracy that attempted to introduce a one party system. Theoretically it is always a good question to ask. Had the people mandated the parliament to destroy the very system under which it took birth? In 1975 there was no parliamentary supremacy in Bangladesh. Given the situation it might have been the wisest on the part of Bangabandhu to seek a fresh mandate from the people on his new political standing before starting the second revolution. I'm sure the people of this country would never turn back on him.

Now come to Article 142(1A). By requiring Referendum in certain cases, didn't it subconsciously put a clog on a parliamentary super-majority acting in an unaccountable fashion? We should not forget that this is a country where the winners habitually tend to do everything they wish until they are de-elected in the next election!

Article 142(1A) healing the dilemmas of 'Basic Structure'

The Basic Structure carries with it some inborn fogginess and controversies. In *Golak Nath* v. *State of Punjab* AIR 1967 SC 1643 the Indian Supreme Court candidly conceived the idea that there is a distinction between plenary legislative power and constituent power of parliament. Parliament's plenary legislative power is subject to judicial review while the constituent power is not. Hence the Court may invalidate a law but not a constitutional amendment. This again has been sharply rejected in *Kehsavananda Bharati* v. *State of Kerala* (1973) in India and *Anwar Hossain Chowdhury* v. *Bangladesh* (1989) in Bangladesh. Now the Court, the guardian of the Constitution, is not ready to leave the constitutional edifice vulnerable at the hands of the Parliament.

But should it not mean that some principles would be so permanently fixed to allow the dead rule the world from the grave? Do the ideologies of one generation bind the later? Then where to accommodate the supremacy of the people? What to do in case the people overwhelmingly support an amendment violating the basic structure? So many people in Bangladesh still believe that decentralization of the Supreme Court in 1988 was a right step! Here the judiciary not only trumps over the 'general will of the people' expressed through an elected legislature, but also over the 'absolute will of the people' on a particular issue. Moreover the Judiciary gets a free hand in defining 'basic structure' making the concept a fluctuating one and hence bad. The Judiciary may come out with new 'basic structures' whenever convenient. It is indeed the case in India.

Article 142(1A) nicely answers those dilemmas. In one sense Article 142(1A) provides a sort of constitutional recognition to the judicial claim of 'basic structure'. By this the Constitution itself recognizes that there are something which are 'basic' (B.H Chowdhury J in *Anwar Hossain Case*, Para 256) and these need higher protection than the bulk so that Parliament may not manipulate them in its whim and caprices. In the other sense, it cures the iron fist immutability of 'basic structures' by saying that basic structures are particularly hard to be amended but not un-amendable. Now inter-generational adaptation is reconciled with the need for stability. Again, the basic structures are concretized by specification in the Constitution itself.

Article 142 (1A) be reconsidered not camouflaged

No doubt Article 142(1A) is an illegal inclusion in the Constitution by an illegal authority through an illegal exercise of power. After the Appellate Division ruling on the *5th Amendment case* it is now almost at the vanishing point. The Government is bound to re-print the Constitution deleting this, if Appellate Division so directs. But whatever motive the then military 'President' had in his mind, the Clause as it stands now may serve a very useful purpose of safeguarding constitutional fabric from the fanaticism of a winner-takes-all politics. The government is planning to consult the Law Commission on 5th Amendment issue. The Commission may seriously consider recommending adapted re-insertion of the gist of Article 142(1A) *de novo* by the incumbent Parliament.

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RIGHTS corner

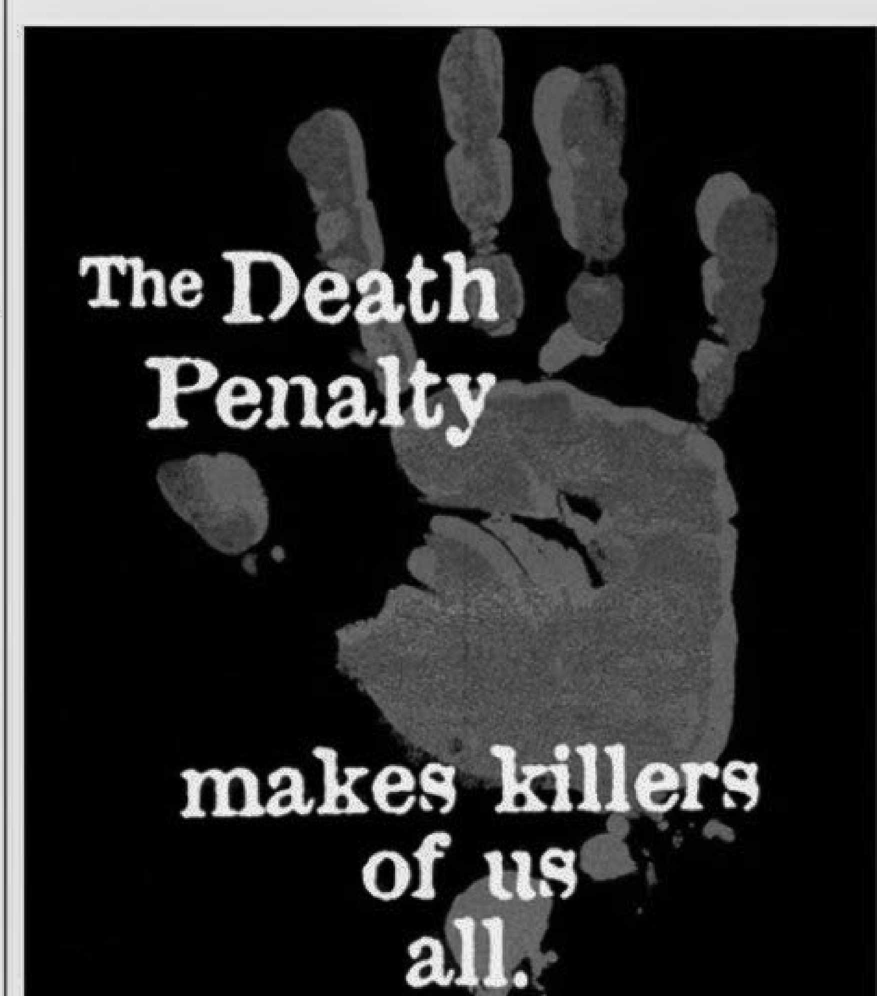
World is 'winning' battle against death penalty

AMNESTY International's interim Secretary General has hailed recent global efforts to end the death penalty but warned that more needs to be done to achieve the goal of full abolition. Claudio Cordone told delegates at an anti-death penalty summit in Geneva that campaigners were "winning" the fight against capital punishment.

"The day is coming when we can see an end to the death penalty worldwide. We must push on to consign the death penalty to join apartheid, slavery and torture as embarrassments to human history," Cordone told members of the 4th World Coalition Against the Death Penalty on February 25, 2010.

In 2009, for the first time in modern history, the whole of Europe was execution-free. Burundi and Togo became the 94th and 95th countries worldwide to entirely remove state killings from their law, while several other nations reduced - or stopped - executions.

Among them was Pakistan, which carried out no executions in 2009 compared to at least 36 killings the year before. Other countries who did not execute in 2009 include Indonesia, India, Mongolia, Algeria, Bahrain, Morocco, Tunisia, Lebanon and Jordan.



However, the progress was tempered by the use of executions for political purposes in Iran. China and Saudi Arabia also continued to carry out frequent executions, while Saudi Arabia and Iran continued to execute child offenders.

"We don't know exactly how many thousands of people are being executed in China, it's still a shameful state secret," said Cordone. While in the USA we still see grotesque incidents such as the botched execution of a man who after two hours of failed attempts to kill him obtained a reprieve, now awaits a new date for his death. "Those countries which persist in pursuing such an obscene punishment are steadily isolating themselves from the international community, becoming a hard core that we need to challenge with increased assertiveness," said Cordone, welcoming the cooperation between civil society, governments and intern-governmental organizations in the fight to rid the world of the death penalty.

More than 1900 activists from over 100 countries were expected to gather at the World Congress Against the Death Penalty in Geneva on 24, 25, 26 February.

Source: Amnesty International.

HUMAN RIGHTS watch

Women, Asylum and the UK Border Agency

The system is too fast to be fair. There is a general lack of information on women's rights in the countries they come from, women's credibility is sometimes wrongly assessed, and not enough time is allowed to talk about sensitive issues such as rape and other forms of gender-based violence. Gauri van Gulik, woman's rights researcher at Human Rights Watch, elaborates on the issue.

GAURI VAN GULIK

THE Home Office Minister Meg Hillier said on the BBC's Woman's Hour programme that the UK Border Agency ensures that very complex cases brought by women asylum seekers do not go through the UK's so-called "detained fast-track" asylum process, a route designed for straightforward asylum claims that can be decided quickly.

The experience of Laura from Sierra Leone suggests otherwise. According to her asylum claim, Laura witnessed her father's beheading, was raped several times, was imprisoned, was forced to have an abortion by having her stomach cut open, and was trafficked into the UK. Cases are rarely more complicated than Laura's. Yet she was still sent into the "detained fast-track" system designed for straightforward claims.

Human Rights Watch's new report "Fast-Tracked Unfairness: Detention and Denial of Women Asylum Seekers in the UK", looks at how women end up being locked up in Yarl's Wood immigration removal centre in the "detained fast-track" system, despite complex claims, and what they go through once they are there. We did not assess the validity of claims but simply looked at whether these women are getting a full and fair examination of their asylum claim which is everyone's right under international law.

The conclusion of the research is that women with complex asylum claims are regularly put into a system designed for straightforward ones. The claims involve female genital mutilation, trafficking, rape and domestic violence.

They are complicated for two reasons. Firstly, the majority of women claim asylum based on violence inflicted on them by their husbands, relatives or other non-state people. That means that they also have to prove in their asylum claim that their home country does not offer them protection from that violence. These claims are legally complex and require expert evidence.

Secondly, these types of claims require sensitivity, time to build a basic level of trust, and knowledge of women's rights and how they react to trauma. That's why the fast-track rules already make an exception for torture and trafficking claims. The same exception should apply to claims based on sexual and gender-based violence.

We're talking about a small group of about 500 women a year, all from countries outside Europe, including Nigeria, Iran, Pakistan, Uganda, Sierra Leone and the Democratic Republic of Congo, places where women have suffered profound violations of their human rights.

The system is too fast to be fair. There is a general lack of information on women's rights in the countries they come from, women's credibility is sometimes wrongly assessed, and not enough time is allowed to talk about sensitive issues such as rape and other forms of gender-based violence. On top of this the asylum claim takes place while the claimant is locked up in detention.

Human Rights Watch's main recommendation is that the screening process should improve drastically so that cases that do not belong in a fast-track asylum system stay out of it.

The writer is a Women's Rights Researcher. The article was published in Reuters UK, March 2, 2010.

Global economic crisis exposed rights violations

THE top United Nations human rights official said on March 3, 2010 that the economic and financial crises have exposed existing violations and increased the number of victims of abuse and hardship.

"The financial and economic downturns together with food shortages, climate-related catastrophes and continuing violence have shattered complacent or over-optimistic notions of expanding security, prosperity, safety and the enjoyment of freedoms by all," High Commissioner for Human Rights Navi Pillay said in her opening statement to the 13th session of the Human Rights Council, which runs until 26 March.

She recalled that she addressed the Council for the first time last year against the background of worsening financial and economic crises.

"These sudden and cascading upheavals exposed and exacerbated existing violations of human rights. They also widened the areas and increased the number of victims of abuse and hardship," she noted.

The UN General Assembly created the Council in 2006 with the main purpose of addressing situations of human rights violations and make recommendations on them.

"To counter deeply rooted and chronic human rights conditions in many countries, such as repression, discrimination, and strife, as well as rapidly unfolding man-made and natural challenges to human welfare, such as those we have recently experienced, five years ago the United Nations initiated a process of reform that proposed several innovations, including the creation of the Human Rights Council," said Ms. Pillay.

"This new institution was conceived as a forum where responses to inequality, repression, and impunity could be crafted and advocated to help build a world in larger freedom," she told the 70 dignitaries in Geneva for the 1 to 3 March high-level segment.

"The review of the Council, now forthcoming, would help the international community to assess whether the fundamental principles of this body's mandate had been solidly and consistently upheld," she added.

Ms. Pillay praised the Council's accomplishments thus far, including the Universal Periodic Review (UPR) which involves a review of the human rights records of all 192 UN Member States once every four years.

Despite its accomplishments, the High Commissioner noted areas of improvement for the Council, including improved coordination among various human rights mechanisms and the Council's ability to influence policy change in human rights situations.

"No matter how well intentioned, determined, and incisive the Council's action is, this body cannot by itself or through remote control, change realities on the ground. Producing this change is, primarily, the responsibility of States which need to act in partnership with civil society and national protection systems," she said.

Source: UN News Centre.