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LAW OPINION

MISREADING OR LEAPFROGGING?

SC's power to review constitutional amendment

Since the SC is the guardian of the Constitution and serves as the ultimate arbiter of legality of functions of all other branches of the government, even the subtlest feeling of uneasiness about the court's assertion of jurisdiction, if left unaddressed, might harm its image in the public eye.

KAWSER AHMED

THE then Chief Justice in the case of *Abdul Mannan Khan* v *Bangladesh* [2012] 64 DLR (AD) 169 noted that the 13th constitutional amendment was challenged by way of a writ petition filed under article 102 of the Constitution. In fact, all of the five constitutional amendments hitherto annulled by the Supreme Court (SC) were challenged in lawsuits commonly known as 'writ petitions'. Writ petitions are filed exclusively under article 102, and therefore, in popular parlance, it is called the 'writ jurisdiction' of the SC. Since the SC has decided validity of constitutional amendments in an apparent exercise of the writ jurisdiction, the first and foremost question to arise should have been whether lawsuits challenging constitutional amendments are at all admissible under article 102, and also, whether article 102 invests the SC with the authority to invalidate a constitutional amendment. Interestingly, the SC in none of the five cases dealt with this question particularly. This essay argues that the so-called writ jurisdiction under article 102 does not envisage judicial review of constitutional amendment, and the SC actually decided all such cases in virtue of article 7(2) of the constitution.

Textual meaning of article 102

The text of article 102 shows that the supreme court has the power of judicial review only in two cases - first, declaring any executive or judicial acts, proceedings or laws unconstitutional on the grounds of their inconsistency with the provisions of fundamental rights and secondly, invalidating any 'acts done' or 'proceedings taken' on the grounds of want of lawfulness by any persons performing any functions of the republic or of a local authority.

A reading of article 102(1) along with articles 26, 44 makes it clear that the SC's jurisdiction thereunder is exclusively confined to judicial review of the laws which are inconsistent with the provisions of fundamental rights. Article 26, which although provides that laws inconsistent with the fundamental rights will become void, nevertheless excepts constitutional amendments from meeting the same consequences. The resultant effect is constitutional amendments are immune from judicial review even if they stand at odds with the fundamental rights part of the Constitution.

Judicial review of executive or judicial acts or proceedings done or taken in contravention of any lawful authority falls under article 102(2)(a)(ii). In the said provision, the words, 'act', and 'proceeding' do not mean any legislations or constitutional amendments. In common law tradition, the word 'act' refers to acts, words and omissions and does not include an Act of Parliament [*Compare* section 3(1a) with section 3(2) of the General Clauses Act, 1897]. Moreover, the Constitution provides that 'law' means any Act, ordinance, order, rule, regulation, bye-law, notification or other legal instrument, and any custom or usage, having the force of law in Bangladesh - which does not include either 'act', or 'proceeding'. Therefore, the wordings of both clause 1 and clause 2(a)(ii) of article 102 cannot be said to accommodate the notion of judicial review of constitutional amendment within their respective linguistic parameters.

Legislative intention

It is evident from the proceedings of the Constituent Assembly that although the framers of the Constitution wanted to incorporate the common law concept of prerogative writs in article 102 with a wider perspective, they did not actually envisage conferment on the SC the jurisdiction to declare a constitutional amendment repugnant. Dr. Kamal Hossain, the Chairman of the Constitution Drafting Committee, explained to the Assembly as follows:

"The way we have drafted article 102, if any authority or person - who exercises governmental authority does anything beyond jurisdiction and anyone suffers injury for that reason, the High Court may issue direction to the concerned authority or person if the aggrieved person makes such application." (translated by the author)

In addition, the framers were unanimous that the SC should be vested with the power to enforce fundamental rights. Dr. Kamal Hossain further explained:

"The 'writ petition' for the purpose of enforcement of fundamental rights, has been accommodated under the 'writ' jurisdiction. We have incorporated provisions to this effect. We believe the power to enforce fundamental rights should be a part of the Supreme Judiciary." (translated by the author)

As may be discerned from the foregoing, the Constituent Assembly did not give a thought to judicial review of constitutional amendment while deliberating over the scope of article 102.

The supremacy clause

Article 7, the supremacy clause of the constitution, provides that any law inconsistent with the Constitution will be void to the extent of its inconsistency. Relying on article 7, Justice Badrul Haider Chowdhury in *Anwar Hossain Chowdhury & Others* v *Bangladesh*, [1989] 41 DLR (AD) 165 reasoned out that the authority to decide constitutionality of any laws including any constitutional amendment lies with the SC. He said: "When Article 26 says about the inconsistency of any law with the fundamental rights to be void, article 7 operates in the whole jurisdiction to say that any law and that law includes also any amendment of the Constitution itself.... Therefore if any amendment which is an Act of Parliament contravenes any express provision of the Constitution that amendment act is liable to be declared void…But by whom this declaration is to be made?... - obviously the Judiciary." (para 167, at p. 214).

The aforesaid reasoning also featured in the subsequent cases where the SC declared constitutional amendments repugnant, for example, *Italian Marble Works Ltd* v *Bangladesh* [2010] 62 DLR 70, para. 150; *Siddique Ahmed* v *Bangladesh* [2011] 63 DLR 565, para. 243; *Abdul Mannan Khan* v *Bangladesh* [2012] 64 DLR (AD) 169, paras. 614-615; and, finally *Government of Bangladesh and Others* v *Advocate Asaduzzaman Sidddiqui and Others* [Civil Appeal No. 06 of 2017]. The article 7-based argument to justify the SC's jurisdiction over cases concerning validity of constitutional amendment begs at least one fundamental question – if the SC has the power to declare a constitutional amendment repugnant in virtue of article 7(2), why does it then admit such lawsuits under article 102? In other words, how does the SC's purported exercise of article 102 jurisdiction also extend to include remedies available under article 7(2), specially in view of the fact that article 102 itself provides for judicial remedies in definite terms for matters coming within its purview?

Apology and the epilogue

It is quite clear that the practice of admitting lawsuits challenging constitutional amendments under article 102 (or asserting article 102 jurisdiction to take in such cases) is not warranted by literal construction of the said provision, nor reflects the intention of the framers of the Constitution. If article 102 would have sufficed to deal with such cases, there wouldn't be any need for article 7 argument. At this point, one may still question the rationale for making article 102 an issue of academic discussion, specially in view of the fact that the SC's authority to decide validity of constitutional amendments has never been disputed. This particular issue, however immaterial it may look, deserves not to be sidestepped because it concerns credibility and uprightness of the Judiciary which is practically the most important source of legitimacy for any Judiciary. Since the SC is the guardian of the Constitution and serves as the ultimate arbiter of legality of functions of all other branches of the government, even the subtlest feeling of uneasiness about the court's assertion of jurisdiction, if left unaddressed, might harm its image in the public eye.

Finally, the difference between the dictate of law and the court practice can be addressed by amending the SC's rules of procedure so as to enjoin the litigants to file lawsuits challenging constitutional amendments under article 7. The power to make such changes in court procedure lies with the SC under article 107 of the constitution.

THE WRITER IS AN ADVOCATE, SUPREME COURT OF BANGLADESH.

JUDGMENT REVIEW

On the 16th constitutional amendment verdict - for and against

PSYMHE WADUD

HON'BLE Chief Justice, made it clear that unlike what is alleged, the judiciary is not beyond scrutiny and supervision. He said that apart from institutional accountability in respect of first instance and appellate decisions, individual Judges are accountable to the public in the sense that in general their decisions are made in public and are discussed in the media and by sections of the people affected by those decisions (p. 257). Since the Chief Justice has opined to this effect, in furtherance of the extra-institutional accountability he mentioned about, this endeavour is to analytically 'discuss' only a few 'immensely complex and unfathomably deep issues' of the judgment.

One of the basic arguments, as expected, on behalf of the State was that the procedure for removal of the Judges is absolutely a policy decision which is within the domain of the Parliament (p. 14). The Court answered this issue by saying, exactly as expected, that since the said policy has interfered with the independence of judiciary and thereby is in violation of some provisions of the constitution, the court can certainly intervene in the matter.

Another argument on part of the State was that the Constitution cannot retain a provision inserted in a martial law regime. In response Chief Justice mentioned that the parliament has retained Articles 2A, 42, 47, 6(2) which got changed in martial law regimes from what it was in the 1972 constitution. Here arises an open ended question regarding whether previous retention of amendments made in one martial law regime can be a ground for validating amendments made in different military regime(s). However, the retention at hand was justified saying that in content and spirit the provision of Supreme Judicial Council (SJC) is absolutely in harmony with the scheme of the constitution (p. 144 per Chief Justice) and by Fifteenth Amendment, the Parliament provided this provision, in wordings similar to as it was done in a martial law regime, by way of substitution. Since it was newly enacted, even though verbatim, by a democratic parliament and not an 'usurper', there was no problem in its retention (p. 665 per Justice Hasan Foez Siddique).

Basically the unanimous decision of

The constitution will live only if it is alive in the hearts and minds of the people of a country." Chief Justice S K Sinha in the 16th Constitutional Amendment Case

not vesting the removal mechanisms of judges upon the parliament, was made, keeping the, as the Chief Justice termed it, 'myopic politicisation' of our country in mind (p. 55). However, the reasoning based on the long-existing debate surrounding Article 70 (p. 86) was more 'legally' understandable than blaming the political culture as a 'rotting disease' (p. 54) straightaway.

The Supreme Court, while scrapping the 13th constitutional amendment, said that parliamentary elections may be held under caretaker system subject to the condition that the chief advisor shouldn't be from among the last retired chief justice or any of the retired judges of the AD. The idea was to prevent politicisation and ensure impartiality (reiterated in the 16th amendment judgment, p. 203). Politicisation is not something asymmetrical and it requires involvement from both the ends. And removal of judges requires impartiality no less than that required in a caretaker system.

The judgment basically viewed individual accountability of judges as being complementary to independence of judiciary and the 16th amendment as contravening Article 7B as well as the basic structure (judicial independence) of the Constitution. Interestingly, violation of another basic structure (namely, separation of powers) was pleaded by the State.

According to the Appellate Division, the judiciary is the only relatively independent organ of the State which is striving to keep its nose above the water though sinking (p. 229) and hence they were vested, as the 'independent and impartial body' for 'fairly and objectively' administering the disciplinary proceeding against judges in accordance with Commonwealth Latimar House Principles.

However, the Appellate Division also admitted that Judges being human, do make mistakes and in the Chief Justice's view, those mistakes may be rectified through several layers of appeal and review (p. 243). Unfortunately, to my understanding, such institutional checks for rectifying mistakes are not there in case of a decision made by the SJC.

Justice Hasan Foez Siddique categorically expressed his concern over the SJC and its disciplinary proceedings. He relied on the book "Independence and Accountability of Judiciary: A Critical Review" by Dr. Sarkar Ali Akkas. In light of the book, according to Article 96 (as it stood after 15th amendment), the President may receive information about the incapacity or misconduct of a judge from the SJC or from 'any other source'. There is no guideline as to what sources, as credible ones, will make their way to the president. In absence of a proper procedure of filing complaints, it may not be possible for an ordinary citizen to inform the President about the incapacity or misconduct of a judge.

According to him, as the only potential source of information, SJC has a dilemma to deal with in terms of filing complaints against fellow judges for being exclusively composed of judges (p. 744 per Justice Hasan Foez Siddique). While speaking for SJC, Chief Justice gave references of Bulgarian and Namibian provisions. However, it is to be noted that according to both these countries' constitutions, the respective bodies vested with identical responsibilities like SJC, do not consist exclusively of judges.

The judges drew a comprehensibly distinct line between parliamentary sovereignty in a country with unwritten constitution (United Kingdom) and the same in a country with a written constitution (Bangladesh) with explanation (amongst others, p. 559, per Justice M. Imman Ali). Jurisprudentially, thus, the concept of separation of powers was shown to be working differently in our context and this is how the argument regarding vesting the removal mechanism upon the will of the people through the elected representatives was dealt with.

For a layman, the judgment scrapped the 16th amendment and dismissed the appeal made by the Government. To put it in extra-legal words - 16th constitutional amendment dies, the Supreme Judicial Council survives.

THE WRITER WORKS WITH LAW DESK, *THE DAILY STAR*.

LAW NEWS

Remembering the dark history

IGNORANCE or concealment of major historical events constitutes an obstacle to mutual understanding, reconciliation and cooperation among peoples. Keeping this in mind, UNESCO has decided to break the silence surrounding the slave trade and slavery that concerned all continents and caused great upheavals giving our modern societies the shape they have today.

Circular CL/3494 of 29 July 1998 from the Director-General of UNESCO invited the Ministers of Culture of all the Member States to organize events to mark 23 August each year involving the entire population of their countries and particularly involving young people, educators, artists and intellectuals.

The night of 22 to 23 August 1791, in Santo Domingo (today Haiti and the Dominican Republic) saw the beginning of the uprising, in the context of the great Haitian Revolution that played a crucial role in the abolition of the transatlantic slave trade.

The aim behind observing the International Day for the Remembrance of the Slave Trade and its Abolition is to inscribe the tragedy of the slave trade in the memory of all peoples. In accordance with the goals of the intercultural project "The Slave Route", launched in 1994, the day should offer an opportunity for collective consideration of the historic causes, the methods and the consequences of this tragedy.

International Day for the Remembrance of the Slave Trade and its Abolition was first celebrated in a number of countries, in particular in Haiti (23 August 1998) and Goree in Senegal (23 August 1999). Cultural events and debates too were organised.

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