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REVIEWING THE VIEWS

Revisiting the majority opinion in the 16th amendment case

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WHILE writing the majority opinion in *the Government of Bangladesh and Others* v *Advocate Asaduzzaman Sidddiqui and Others* (2017) CLR (Spl) 1 [hereinafter 'the 16th Amendment Case'], the then Chief Justice, Surendra Kumar Sinha [hereinafter 'the CJ'] noted that the only issue he thought worth considering was whether the 16th constitutional amendment had violated any basic features of the Constitution. Since the CJ's opinion constitutes the mainstay of the court's decision and also entails a sense of general endorsement of the court's attitude, this essay will critically look into the CJ's argument from various perspectives.

The 16th Amendment Case has witnessed the first ever application of article 7B. The CJ has categorically stated in his opinion that article 7B bars amendment to the provisions that relate to the basic structures of the Constitution. He has then argued that the independence of judiciary as envisaged in article 94(4) is a basic structure of the Constitution and article 96 embodying the Supreme Judicial Council buttresses the independence of judiciary (paras. 352-354). These findings inescapably lead to the conclusion that the 16th amendment is repugnant because in violation of article 7B it has sought to amend provisions (the supreme judicial council) relating to the basic features of the Constitution (the Independence of Judiciary).

From the above discussion, it is clear that while deciding the 16th Amendment Case the CJ adopted a formalistic approach which is mostly based on the literal interpretation of article 7B of the Constitution. Since the CJ has relied on article 7B in deciding validity of the 16th Amendment, it would have been rather thoughtful on his part to examine whether article 7B is itself a valid constitutional amendment. One might argue that the constitutionality of article 7B never came into question at any stage of the proceedings, and hence, it does not call for scrutiny by the court. To counteract this argument, it should suffice to ask whether a sound judicial decision is at all possible to come by without resolving the validity issue of the norm which the court relies on to gauge validity of another norm. What if the court adjudges article 7B unconstitutional at any time in the future? In the legendary *William Marbury* v *James Madison*, 5 US (1 Cranch) 137 (1803), the then US Chief Justice John Marshall scrutinised the Judiciary Act of 1789 although the Act was not called into question by the parties to the case.

A closer look at article 7B suggests that it has affected application of at least two provisions namely, article 142 and article 7 (a basic feature) of the Constitution. Article 7B has curtailed so much power of the parliament to amend the Constitution under article 142 as would ipso facto warrant a judicial scrutiny. The relationship between article 7 and article 7B is more complex. Article 7 declares the Constitution as the supreme law to the effect that any law (including a constitutional amendment), if inconsistent with the Constitution, will be void. Thus, article 7 contemplates that the Constitution in its entirety is the supreme law and all of its provisions have a prima facie co-equal status. Instead, article 7B designates at least more than one-third provisions of the Constitution as ones constituting the basic features and makes them immutable by barring any amendments thereto. Such denomination gives rise to the impression that certain constitutional provisions rank above the others. Therefore, while article 7 envisages a horizontally configured Constitution, article 7B introduces hierarchy among constitutional norms.

In addition to the foregoing, it will also be worthwhile to revisit contextually the relationship between 'Independence of Judiciary' (as a basic feature) and its relationship with the Supreme Judicial Council, the parliamentary system of government and the parliamentary mechanism for removal of supreme court judges featured in the original Constitution of 1972. The Constituent Assembly unanimously adopted the draft text of article 96 of the Constitution Bill as it was and without any change. Clearly, the framers of the Constitution thought the parliamentary mechanism for removal of judges to be in line with both the parliamentary system of government and the independence of judiciary (both of which have later come to be regarded as basic features of the Constitution). The mechanism for removal of judges by the parliament was conceived as an effective safeguard against interference of the executive in the judiciary. After introduction of the presidential system of government by the 4th constitutional amendment, the parliamentary mechanism for removal of judges was replaced with a more president-centric mechanism. Later, while the presidential system of government was still continuing, the supreme judicial council was incorporated in which the president retained a predominant role.

In 1991, the country switched back to the parliamentary system of government, but the parliamentary mechanism for removal of judges was not reinstated. Rather, the supreme judicial council continued to exist as the mechanism for removal of judges. After restoration of the parliamentary system of government, the prime minister has become the single depository of almost all the executive power of government and the president has assumed the role of the nominal head of the government. The fact that the Constitution makes the president act exclusively on the advice of the prime minister has effectively allowed the supreme judicial council remain under the control and influence of the executive.

For example, the formal authority to set the supreme judicial council in motion to conduct inquiry against any judge, or to remove a judge from office as per the supreme judicial council's recommendation lies with the president. However, in point of fact the president will have to look to approval of the prime minister to trigger off any such inquiry to be conducted by the supreme judicial council. As regards removal of judges, it may be argued that the supreme judicial council's recommendation should serve as the finality because no judge will be removed unless recommended so by the said council, however, whether the president can remove a judge in pursuance of the supreme judicial council's recommendation alone without the prime minister's advice still remains an open question.

In this backdrop, the issue whether the supreme judicial council is in tune with the parliamentary system of government did call for serious consideration by the court. One might argue that the supreme judicial council was already designated as a basic feature in the 8th Amendment Case. However, this argument does not fare well because the 8th Amendment Case was decided during a time when the country had a presidential system of government and the issue whether the supreme judicial council was compatible with the parliamentary system of government actually never came into discussion.

The CJ's opinion also does not explain how his argument of independence of judiciary in sealing the 16th amendment's fate justifies application of the Supreme Judicial Council mechanism to remove incumbents from a number of constitutional or statutory non-judicial offices such as the Election Commissioners, the Comptroller and Auditor General, the Chairman and the Members of the Public Service Commission the Chairmen, the Members of the National Human Rights Commission, the Anti-Corruption Commission, etc.

In the end, the readers might wonder why the government did not raise all those issues discussed herein above while making its argument before the court during the appeal hearing of the 16th Amendment Case. It is quite understandable that the government cannot take the position that article 7B is unconstitutional, and therefore, the 16th constitutional amendment does not have to go through the basic provision test. The government also cannot flatly dismiss the supreme judicial council as unconstitutional because the selfsame government had re-enacted it by way of the 15th constitutional amendment. Having regard to the foregoing, the Attorney General seems to have been left with very limited provisions to make out a strong case for the 16th amendment. One option for the Attorney General could have been to argue that the supreme judicial council, after restoration of the parliamentary system of government, has lost its relevance as an element of independence of judiciary, and hence, an amendment thereto would no longer be controlled by article 7B. The other option could have been to press for a narrow teleological interpretation of article 7B to the effect that the purpose of article 7B was limited to preventing unconstitutional amendments at the threshold point, and then make the above-mentioned argument.

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LAW ANALYSIS

Analysing the draft Bangladesh Labour (Amendment) Act 2018

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The draft of Bangladesh Labour (Amendment) Act, 2018 aims to make labour law worker-friendly while regulating the conduct of workers and owners in compliance with the standards of International Labour Organization (ILO). In the proposal, 2 new sections, 4 sub sections and 8 clauses have been added, 6 sub-sections have been repealed and reform in 41 sections have been proposed. After the Rana Plaza collapse, Bangladesh had to raise its standard of labour law to international standards in order to obtain the GSP plus status in the European Market. The proposed amendment attempts to fulfil these conditions by a margin.

Under this amendment, the government, after consultations with different stakeholders, has proposed to reduce the minimum support needed to form a trade union to 20 percent from 30 percent stipulated by the existing law. But the ILO Convention prescribes that even if only 10 workers want to form a trade union, they have to be granted permission. The proposed provision in this regard is not consistent with the ILO conventions. Moreover, the draft prescribes that a worker of an industry can be a member of only one trade union and in case of dual membership, the new law suggested one month imprisonment. The proposed amendment also curtails discretionary power of the Director General of the labour department in cancelling registration of a trade union. In the existing law, to form a trade union, the workers from the informal sector need identity card whereas there is no authority to provide them with one.

The proposed amendment does not bring any good news for the domestic workers who are the most neglected ones in the country. According to the proposed amendment, the government would prepare a standard operating procedure (SOP) for registration of the labour organizations. A labour organization would apply for registration in specific form and the Director General of the Labour Directorate would resolve the application within 55 days. Previously the time period was 60 days.

The draft has also incorporated tougher provisions to prohibit misconducts on the part of owners and workers. A worker or owner would get one year imprisonment or penalty of Taka 10,000 or both for any misconduct including violation of the law. The law suggested punitive actions for workers' acts that include mounting undue pressure, threat or physical assault to compel the owners to sign any agreement, disrupting power, gas or water supplies and unlawful shutdowns.

According to the proposed amendment, to organise a strike, the workers also have to notify the employers 21 days prior to the day of such event. Then the entire process of strike would require a long bureaucratic process which can definitely create a bar to legitimate strikes. In the existing law, there is provision for one year imprisonment, five thousand taka fine or both in case of participation in any illegal strike or lock-out. In the proposed amendment Act, the punishment has been decreased to 6 months imprisonment. Under the existing law, there is a provision for a resting room. In the proposed amendment, along with a resting room, a new requirement of dining room has also been added if there are more than 25 workers in the factory.

According to proposed amendment, expectant mothers would mandatorily be entitled to get eight weeks maternity leave and other benefits within three days of submission of necessary of documents. An owner may face penalty of Taka 25,000 on charge of depriving an expectant mother from maternity leave. Under the existing law, a child can be employed for light work on condition that it would not be harmful to his health and his education would not be hampered. The draft seeks total ban on child labour in factories. At the same time the law prohibited engagement of children and physically challenged persons in any risky job.

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LAW EVENT

Conference on 'Law, Justice and Society' held at DU

THE Faculty of Law, University of Dhaka organised the '1st Senior Advocate Ozair Farooq Memorial Law Conference 2018' on September 16-17, 2018. The inaugural ceremony was held at the Nabab Nawab Ali Chowdhury Senate Building. The Honourable Chief Justice of Bangladesh, Mr. Justice Syed Mahmud Hossain graced the occasion as the chief guest while the Honourable Vice Chancellor of University of Dhaka, Professor Dr. Md. Akhtaruzzaman chaired the programme.

The Honourable Attorney General of Bangladesh, Senior Advocate Mr. Mahbubey Alam and the President of the Supreme Court Bar Association, Senior Advocate Mr. Zainul Abedin were also in attendance as the special guests. Professor Dr. Md. Rahmat Ullah, Dean, Faculty of Law, University of Dhaka delivered the welcome speech while Professor Dr. Md. Nazrul Islam, Acting Chairman, Department of Law, University of Dhaka delivered the vote of thanks at the event.

Professor Dr. Mizanur Rahman, Former Chairman, National Human Rights Commission also spoke at the inaugural ceremony. Furthermore, Barrister Imtiaz Farooq, Advocate, Supreme Court of Bangladesh also spoke at the programme on behalf of the family of the late Senior Advocate Ozair Farooq. Numerous faculty members of various universities of Bangladesh, legal researchers and practitioners, academics, law students, etc. were present at the programme.

Chief Justice Mr. Syed Mahmud Hossain remarked that such a time-befitting initiative will certainly benefit the academia, bar and bench on pressing national and global legal issues. He also reminisced the late M. Ozair Farooq and acknowledged his contributions to our legal system.

On the following day of the conference, 22 papers authored by faculty members from various universities of Bangladesh, researchers from national and international NGOs and legal practitioners from the Supreme Court were presented in the plenary sessions. With the theme - 'Law, Justice and Society', the plenary sessions were further divided into four parts, namely – Constitutional Rights and Remedies; Digital Security and Cyber Crime; Environment, Natural Resources and Climate Justice; and Human Rights, Refugee Rights and Realities.

THE EVENT WAS COVERED BY ALI MASHRAF, A CONTRIBUTOR OF LAW & OUR RIGHTS, THE DAILY STAR.