The Daily Star
FOUNDER EDITOR: **LATE S. M. ALI**

Stop retaliatory cases against journalists

Govt must take action against this injustice

A report in this paper on the occasion of World Press Freedom Day paints a worrisome picture. So far, 266 journalists face criminal cases, such as murder, attempt to murder, or assault. The bulk of these cases are related to the Awami League (AL) government's brutal clampdown on the student-led July-August uprising. The indiscriminate filing of criminal cases against journalists, along with other people perceived to be supporters of the AL, is a serious blow to press freedom and a violation of people's constitutional rights.

Many journalists are being lumped together with those who were directly responsible for ordering the shooting of protesters or being involved in the murders during the July-August uprising, which indicates that these cases have been filed due to personal and political vendettas. According to a report by this daily, only about 50 of the journalists prosecuted were politically aligned with the AL or benefitted from the regime. The majority were victims of retaliatory cases.

Many of the cases are against journalists working in districts other than Dhaka. In Brahmanbaria, for instance, retaliatory cases were filed against 16 journalists centring on crimes committed during the July-August movement and the protests during India's Prime Minister Narendra Modi's visit to Bangladesh in March 2021. A murder case has been filed against 14 journalists on allegations of electrocuting a boy to death. One journalist has been accused of intentionally connecting live wires to the bamboo and electric poles on the streets where the protests took place, leading to the student's death. The same journalist had previously been arrested during the AL regime under the Digital Security Act for his reporting on the 2018 national election and had to fight the case for two years.

These examples show the arbitrariness of these cases and the fact that the police readily accepted them regardless of how flimsy the premises were. The law adviser has said that the government cannot prevent anyone from filing a case, though the government has previously said that it will take legal action against individuals filing false cases and harassing people with lawsuits. No action was taken in this regard. The ground reality is that these cases continue against journalists and others. The government must show that it is serious about taking action against those individuals filing cases that are false and retaliatory. This is nothing but harassing journalists and creating an atmosphere of intimidation and fear.

Some journalists did play a partisan role and even went to the extent of tacitly supporting the AL regime's crackdown on protesters. Their roles should be clearly identified. But can they be held as liable for murder in the same way as those who were directly involved? Moreover, if justice is to be delivered, it is imperative that the cases against those who are in jail, some of them for many months, are disposed of through due process and without any kind of external influence. So far nothing has been done about these cases and those journalists are rotting in jail.

According to this year's Press Freedom Index, Bangladesh has moved up 16 notches and is ahead of India and Pakistan. Being 149th (from 165) in the world rankings does indicate progress but it is not something to write home about, especially when journalists continue to be haunted by retaliatory criminal cases.

Take urgent steps to curb dengue threat

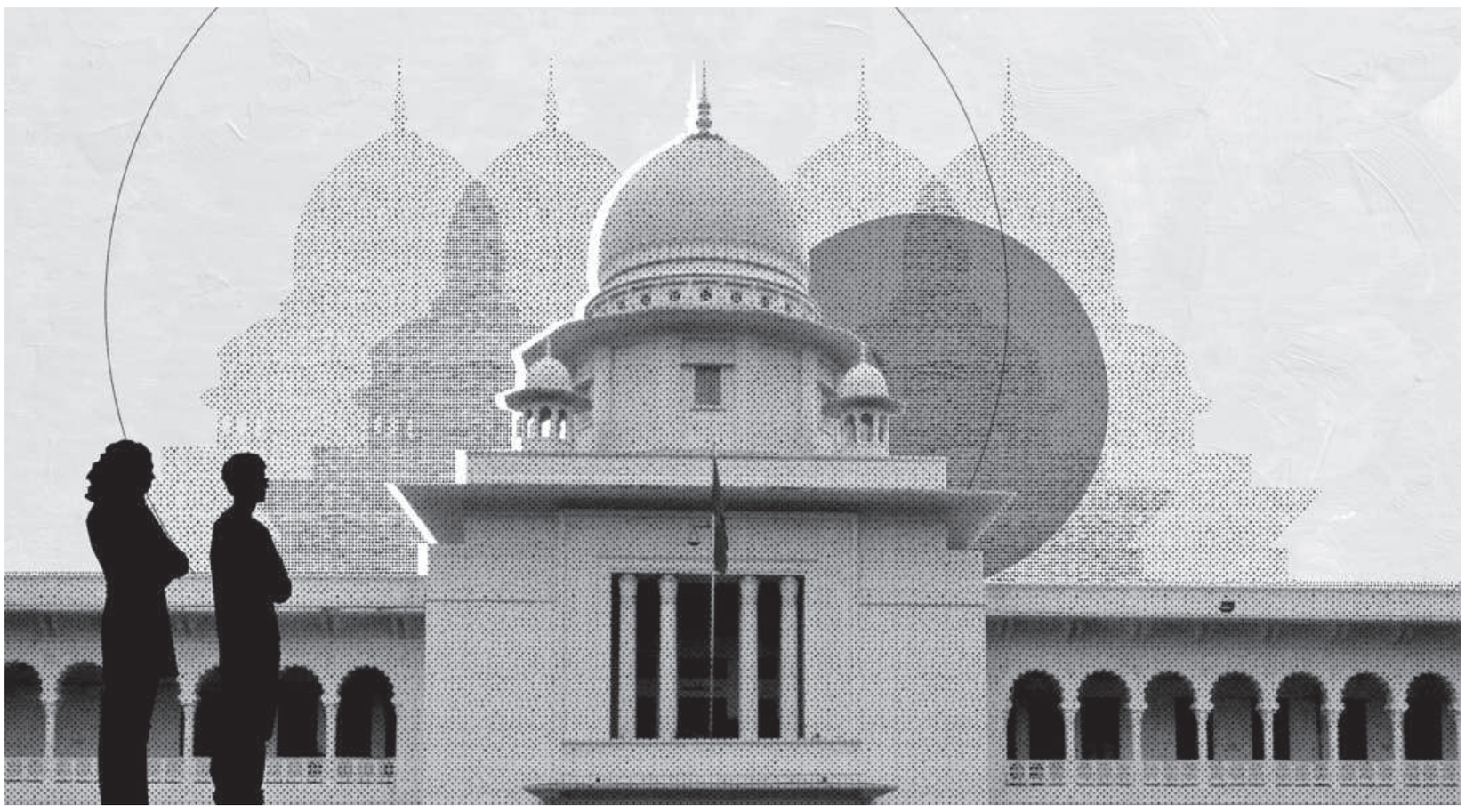
Avoiding a major outbreak will require timely govt interventions

We are concerned about the rising dengue cases across the country as the monsoon begins to set in. According to the Directorate General of Health Services (DGHS), 20 people have died from dengue so far this year (as of Friday morning), while 2,586 others have been hospitalised. The situation may further deteriorate in the coming months, with persistent rainfall and thunderstorms forecast by the Bangladesh Meteorological Department. Reportedly, there has already been a sharp rise in the Breteau Index (BI), a measure of Aedes mosquito density, across the country. The BI value was over 10 in April, compared to less than 10 on average last year. Experts have warned that if this trend continues, the BI could exceed 20 in June, which is alarming. Thus, the government needs to take early measures to prevent another deadly outbreak this year.

Reportedly, the government's dengue control measures were largely inadequate last year due to a lack of leadership and manpower in local government bodies following the fall of the Awami League government in August. But since we now have administrators in both DNCC and DSCC, as well as other cities and municipalities, we hope they will take organised measures before it is too late. Moreover, since dengue has already spread across the country, with cases outside Dhaka steadily rising, special focus needs to be given to other districts. Experts have suggested forming dedicated mosquito control units nationwide and establishing a specialised department comprising entomologists and epidemiologists to effectively address the heightened dengue risk this year. The government, therefore, should consider their suggestions and develop a year-long dengue control plan involving local communities. Additionally, the DGHS must conduct its regular dengue surveys to identify hotspots. At the same time, our hospitals and healthcare facilities—particularly those outside Dhaka—must be adequately prepared to treat the increasing number of dengue patients.

Since preventive measures are key to avoiding a major outbreak this year, the Ministry of Local Government, Rural Development and Co-operatives must urgently issue directives to its departments to control the spread of Aedes mosquitoes. Managing breeding grounds and controlling larvae should be our primary focus now. To this end, the authorities must immediately launch cleanliness drives across the country while also conducting regular fogging. They should establish a mechanism to inspect various construction sites, which are potential breeding grounds for Aedes mosquitoes. Moreover, regular awareness campaigns must be conducted to inform citizens about the dengue threat. Timely interventions are essential to prevent a situation similar to 2023, when 1,705 people lost their lives to this preventable disease.

Does the Eighth Amendment judgment prevent HC decentralisation?



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SHARIF BHUIYAN

There is very strong public support for decentralising the High Court Division of the Supreme Court. As part of its work, the Constitution Reform Commission (CRC), through the Bangladesh Bureau of Statistics, conducted a nationwide public opinion survey on constitutional reform, gathering responses through direct interviews with nearly 46,000 citizens. The results show that over 88 percent of the respondents support the establishment of a High Court in each administrative division (CRC Report, Part 2).

Recommendations of the CRC and the JRC

In view of public opinion, it is not surprising that both the CRC and the Judiciary Reform Commission (JRC) recommended decentralisation of the High Court, though their recommendations varied slightly. The CRC proposed establishing permanent seats of the High Court in all divisions, while the JRC recommended setting up permanent benches in each division. Both commissions also provided justifications for their recommendations.

Implementation of either of the recommendations—permanent seats or permanent benches—would require an amendment to Article 100 of the constitution. Article 100 provides as follows: "The permanent seat of the Supreme Court shall be in the capital, but sessions of the High Court Division may be held at such other place or places as the Chief Justice may, with the approval of the President, from time to time appoint."

Thus, under the existing constitutional provisions, only "sessions" of the High Court can be held outside Dhaka; neither permanent seats nor permanent benches can be established outside the capital.

Both reform commissions considered the existing provision regarding "sessions" in Article 100 inadequate for the decentralisation of the High Court for various reasons. Firstly, this provision has failed to result in any decentralisation over the past 50 years. Secondly, and more importantly, it lacks the capacity to ensure effective decentralisation. Thirdly, sessions held at the discretion of the chief justice, which are neither constitutionally mandatory nor permanent, cannot effectively facilitate the dispensation of judicial functions outside the capital. As a result, both commissions favoured a permanently decentralised High Court, either through permanent seats or permanent benches.

The Eighth Amendment Case

There were earlier attempts to permanently decentralise the High Court. Between 1982 and 1986, several permanent benches (initially four, and later three more) were established outside the capital through martial law proclamations. In 1988, Article 100 was amended by the Eighth Amendment to the constitution, creating six permanent benches in Barishal, Chattogram, Cumilla, Jashore, Rangpur, and Sylhet.

The constitutionality of the Eighth Amendment—specifically, its provisions regarding the decentralisation of the High Court—was challenged in the famous Eighth Amendment Case. In a groundbreaking judgment delivered on September 2, 1989, the Appellate Division of the Supreme Court of Bangladesh declared the amended Article 100, which established six permanent High Court benches outside Dhaka, to be unconstitutional.

The Eighth Amendment Case is remarkable for various reasons. In this case, the Bangladesh Supreme Court adopted and applied the constitutional law doctrine of basic structure for the first time. According to this doctrine, the constitution contains certain fundamental features that cannot be altered or destroyed through amendments. This case was argued by counsel and decided by judges who remain among the most distinguished in the history of the Supreme Court.

The case was pursued by the bar and decided by the court in the face of a military dictator whose sole purpose in decentralising the High Court was to weaken both the bar and the bench. The Eighth Amendment judgment marked a turning point in both the constitutional and political history of the country. It consolidated and catalysed a resistance that eventually led to the fall of the military regime in 1990.

Given that in the Eighth Amendment Case the Appellate Division declared the creation of permanent benches of the High Court unconstitutional, the question that arises is whether this case poses a bar to implementing the recommendations of the CRC or the JRC. This question can be approached in three ways, and in each case, the answer is an emphatic "no."

The first approach is to identify the reasons why the Eighth Amendment was declared unconstitutional and to avoid those features in any future amendment. The second approach, which may be more compelling, is to rely on the constitutional rules of interpretation that allow a departure from earlier interpretations in subsequent cases. The third approach is to have recourse to the constituent power to adopt the necessary constitutional amendment for the decentralisation of the High Court.

Avoiding the flaws of the Eighth Amendment

In the Eighth Amendment Case, the Appellate Division held that the amendment stripped the High Court of the plenary judicial power of the Republic vested in it, thereby seriously undermining—if not altogether destroying—a basic structural pillar of the constitution: the judiciary. By creating seven separate courts with exclusive territorial jurisdiction, the amendment fragmented the "oneness" of the High Court.

A future amendment to Article 100 could remedy these flaws by granting all permanent seats plenary jurisdiction, free from territorial limitations. The allocation of cases among these seats could then be managed through regulations framed by the Supreme Court itself. While all seats would retain full jurisdiction, the distribution of matters could be guided by considerations such as the location of the parties, the subject matter of the dispute or the origin of the cause of action, and the nature of the dispute. Additionally, individual seats could be granted discretionary authority to transfer cases if another seat is better suited to hear them. The chief justice could also have the discretion to transfer cases from one seat to another. With proper regulations, effective management, and technological support, it is entirely feasible to ensure an efficient and orderly distribution of cases among the permanent seats across the eight divisions.

These are not issues that would need to be addressed for the first time. Judicial systems around the world routinely deal with questions of territorial and subject-matter jurisdiction. While our High Court is currently free from such constraints, decentralisation will inevitably give rise to these issues. However, as with any other court, they can be effectively managed through appropriate procedures and regulations.

Departing from the Eighth Amendment Case

Even if a future change to Article 100 is designed to avoid legal issues related to plenary or territorial jurisdiction of the High Court, it might still face challenges for violating the broader finding of the Eighth Amendment Case, namely, that having multiple seats or benches of the High Court is unconstitutional. Therefore, the second approach mentioned above—departing from earlier interpretations in subsequent cases—is both more crucial and more compelling.

The rules for interpreting a constitution are markedly different from those applicable to other written instruments, including ordinary legislation. The conventional fetters of legal interpretation do not apply to a constitution, allowing the court greater flexibility to depart from its earlier interpretations.

A constitution is designed to endure, but its continued relevance depends on its ability to adapt to the evolving needs of society. It must be interpreted in light of the changing conditions and challenges of each era. A rigid approach cannot adequately address new developments. Therefore, the constitution should be seen as a living instrument—one that grows, adapts, and remains responsive to political, economic, and social change. Each generation has the right to shape the legal order under which it lives, and no constitutional provision, including Article 100, can remain unamendable forever. Since the framers could not anticipate every future circumstance, constitutional interpretation must provide not only stability but also ensure the flexibility to evolve. These principles are well recognised in constitutional jurisprudence across many countries, including Bangladesh (S Bhuiyan, *Revolutionary Constitutionalism* (UPL, 2025), pp 14-20).

The decisions of the US Supreme Court on segregation and abortion are well-known examples of departures from earlier interpretations in subsequent cases. In *Plessy v Ferguson* (1896), the Court upheld racial segregation, a decision that was later overturned in *Brown v Board of Education* (1954), when it unanimously ruled that racial segregation in public schools was unconstitutional. Similarly, in *Roe v Wade* (1973), the Court recognised a constitutional right to abortion. However, in *Dobbs v Jackson Women's Health Organization* (2022), the court overturned *Roe*, ruling that the constitution does not confer a right to abortion.

Since 1989, when the Eighth Amendment Case was decided, Bangladesh has undergone significant transformations in its demographics, economic activities, litigation patterns, and most notably, the volume of legal disputes and cases. These changes are critical to consider when assessing the constitutionality of any new attempts to decentralise the High Court.

Between 1989 and today, the population has grown from approximately 100 million to over 170 million. During the same period, the country's GDP has increased from $28 billion (roughly $7.5 billion at the current exchange rate) to $415 billion. The number of pending court cases has surged from a few hundred thousand to more than 4.5 million. These substantial shifts make it imperative to reconsider the 1989 decision in the Eighth Amendment Case, as the context has drastically evolved.

Moreover, treating a specific constitutional interpretation as eternally binding results in what could be described as a form of "necrocracy"—a situation where decisions made by past authorities disproportionately shape the present. While the majority of judges who ruled the decentralisation of the High Court unconstitutional in 1989 may have made the best decision given the context of their time, allowing that ruling to indefinitely bind future generations can have serious adverse effects on public governance.

Having recourse to constituent power

Another available safeguard against a future decentralisation of the High Court being declared unconstitutional by the Supreme Court lies in invoking constituent power to enact the necessary constitutional amendment.

The basic structure doctrine is grounded in the idea that legislative power under the constitution is limited. Legislative power is derivative—it is granted by the constitution and must operate within its framework. In contrast, constituent power refers to the authority to create or fundamentally alter a constitution. This power resides with the people themselves.

Under Article 142 of our constitution, parliament holds the power to amend the constitution. However, this is a derivative power and therefore subordinate to the constitution. As such, it cannot be used to alter the basic structure, which constitutes the inviolable core of the constitution.

A decentralisation of the High Court, enacted through a constitutional amendment approved directly by the people in a referendum, would constitute an exercise of constituent power. As this power exists outside the limits of the basic structure doctrine, such an amendment would not be subject to invalidation by the Supreme Court on the ground of unconstitutionality.

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