

THE DOCTRINE OF BASIC STRUCTURE IN BANGLADESH: FROM 'CALFPATH' TO *MATRYOSHKA* DOLLS

Rokeya Chowdhury*

ABSTRACT

The judicial entrenchment of the doctrine of basic structure through Anwar Hossain Chowdhury v Bangladesh (1981), popularly known as the Eighth Amendment Case (EAC) is considered as a milestone in the constitutional history of Bangladesh. Through invocation of the doctrine the parliament is restrained from amending certain basic or essential features of the Constitution though not expressly named. This article does not question the legitimacy or utility of the doctrine, rather critically examines the EAC judgment and its application in subsequent decisions leading to constitutional entrenchment of the doctrine by the Constitution (Fifteenth Amendment) Act, 2011. The article argues that: i) the dubious stand of the Supreme Court in times of political and constitutional turmoil reduced the viability of the doctrine in Bangladesh at the very outset, ii) the EAC suffered from inconsistencies making it short of a good precedent for a Constitutional Court long eclipsed by extra-constitutional authority, iii) in subsequent cases the Court either readily conceded to or subjectively applied the dicta of the EAC, and iv) the Parliament while constitutionally entrenching some immutable features has not only flouted judicial decisions with regard to basic features but also petrified the Constitution. Inspired by Sam Walter Foss's poem "The Calf Path" (1905) the article argues that following the crooked trail initiated by the EAC the Constitution has reached a crossroad where one finds not a single constitution, rather many constitutions within the Constitution each smaller in breadth than the other, as in Russian Matryoshka dolls.

I. INTRODUCTION

Sam Walter Foss's poem 'The Calf-Path' (1905) describes how people complainingly followed a crooked trail of a calf through a primeval wood eventually turning it to a curved metropolis street, where a hundred thousand people cumulatively lost over "hundred years a day". The morale of the poem is "reverence lent to well-established precedent" might make us blindly follow the "calf-paths of the mind" our predecessors left.¹ The poem has been generally attributed to the doctrine of *stare decisis*,² perhaps most succinctly by Justice Scott:³

* **Rokeya Chowdhury, PhD candidate at McGill University, Canada** is a Lecturer in the Department of Law, University of Dhaka.

¹ The full poem is available at <<http://www.poemhunter.com/poem/the-calf-path/>> (Last visited on April 14, 2015).

² See, for example, Summers, C. W., "Calf Path", 138 (1990) *University of Pennsylvania Law Review*, pp. 647-57 and Holland, J. and Webb, J., *Learning Legal rules: A Students' Guide to*

"If I may be permitted to suggest, for the consideration of courts and judges who feel impelled to sacrifice their sense of reason and justice upon the altar of the Golden Calf of precedent, the quaint philosophy of Sam Walter Foss."

This article argues that implantation of the doctrine of 'basic structure' in Bangladesh through *Anwar Hossain Chowdhury v Bangladesh*⁴ (hereafter Eighth Amendment Case, *EAC*) initiated one such calf-path, now entrenched by the Constitution (Fifteenth Amendment) Act, 2011.⁵ Following the crooked trail the Constitution has reached a crossroad where one finds not a single constitution, rather many constitutions within the Constitution, each smaller in breadth than the other, as in Russian *Matryoshka* dolls.⁶ The *EAC* is the most celebrated⁷ precedent in the constitutional history of Bangladesh, seen as a means to save the 'structural pillars' or 'basic features' of the Constitution from majoritarian whim by putting limits on Parliament's power to amend the Constitution. Rather than questioning the legitimacy of the doctrine, this article attempts to underscore some limitations of the doctrine as propounded in the *EAC*.

The article is divided into six parts. Following the introduction, Part II argues: *First*, the judicial or constitutional entrenchment in Germany, India and Pakistan show that the efficacy of the doctrine depends on separation of power and not petrifying the Constitution. *Second*, due to the dubious role of the Supreme Court of Bangladesh in times of political and constitutional turmoil the doctrine might not be efficacious to shield constitutionalism to the extent expected. Part III identifies certain lacunas of the *EAC*, which make it short of an epoch making judgment providing necessary undercurrent of change for a

Legal Method and Reasoning, Oxford University Press, 2013, at p. 153. Contra, Radin, M., "Trial of the Calf", 32 (1946) *Cornell Law Review*, pp. 137-60, where the author argues that doctrine of *stare decisis* does not entail slavish adherence as described in the poem.

³ Van Kleeck v Ramer, 62 (1916) Colo. 4

⁴ 41 (1989) DLR (AD) 165.

⁵ Act No. XIV of 2011.

⁶ They are also known as Russian Nesting Dolls, which is a set of wooden figures separating each top from bottom to reveal a similar but smaller figure one inside another. Roy, A. has used the metaphor "Matryoshka Dolls" in discussing the international politics regarding genocide, see, "Listening to Grasshoppers" in Roy, A. (ed.), *Listening to Grasshoppers: Field Notes on Democracy*, Penguin Books, 2013, pp. 139-68, at p. 151.

⁷ Hoque, R., *Judicial Activism in Bangladesh: A Golden Mean Approach*, Cambridge Scholars Publishing, 2011, at p.115, footnote 96. See, also, Haque, M. E., "The Concept of 'Basic Structure': A Constitutional Perspective from Bangladesh", 16: 2 December (2005) *The Dhaka University Studies, Part-F*, pp. 123-154, at p.123 and Alam, S., "The State-Religion Amendment to the Constitution of Bangladesh: A Critique", 24:2 (1991) *Law and Politics in Africa, Asia and Latin America*, pp. 209-225, at p. 216.

judiciary long eclipsed by extra-constitutional authority. Part IV examines few Supreme Court cases where the doctrine has been invoked or raised,⁸ dividing them into two categories, namely: *i*) question of representation and *ii*) question of identity. The departures made from the *EAC* in cases relating ‘question of representation’ do not signal strengthening of the judiciary, as most of them were made in politically conducive period and on a pick and choose criteria of nulling amending provisions. In cases relating to ‘question of identity’, the *EAC* was either readily conceded to or the cases not resolved. Part V argues that contrary to the popular view of legislative compliance to the doctrine; by the Constitution Fifteenth and Sixteenth Amendment⁹ Acts the Parliament has turned the table around for the judiciary. Not only some of the basic features have been amended contrary to the findings of the Court, but also the way for constitutional evolution and growth has been prevented by a rigid eternity clause. Part VI summarises the findings of the article.

II. CONSTITUTIONS, CONSTITUTIONALISM AND THE NEED FOR BASIC STRUCTURE

Constitutionalism not only implies limitations on the powers of those holding authority, but also provides room for the steady growth of the constitution through amendments. Although rigidity or flexibility of amendment procedure cannot be the sole determinant of constitutionalism or absence thereof, frequent and abrupt constitutional changes by transgression of power can affect constitutionalism. Immutability of “form of government” is not unknown to world constitutions; but after World War II immutability clauses have been expanded to guarantee fundamental rights and freedoms.¹⁰ In this context the idea of immutability of certain basic features has been identified as a “successful transplantation” across the globe.¹¹ The transplantation has taken place either through an “eternity clause” in the original constitution or insertion by amendment. In absence of such enumerated features courts have invoked the doctrine of basic structure to annul amendments which otherwise meet procedural requirements. The wide acceptance of the doctrine demonstrates its appeal to constitutionalism, but at the same time brings into focus self-restraint of the judiciary in not running aground constitutional growth and evolution. In

⁸ In examining the judgments, the time of pronouncement of the judgment, constitution of the bench, difference between the HCD and AD judgment, reasoning, use of precedents and dissent/assent with the author judge have been considered variably.

⁹ Act No. XIII of 2014.

¹⁰ Rozani, Y., “Unconstitutional Constitutional Amendments: The Migration and Success of a Constitutional Idea”, 61 (2013) *American Journal of Comparative Law*, pp. 658-719, at p. 668.

¹¹ *Ibid.*