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Kazi Mukhlesur Rahman v. Bangladesh and Another

1. Case Citation

Kazi Mukhlesur Rahman v. Bangladesh and Another; 26 DLR (AD) 44¹

Appellate Division of the Supreme Court of Bangladesh, 1974

- **Bench Composition:** A.S.M. Sayem, C.J. (Author Judge), A.B. Mahmud Hossain, J., Abdullah Jabir, J., and Ahsanuddin Choudhury, J.
- **Counsels for the Appellant:** Ahmad Sobhan (Senior Advocate), Abdul Malek, Md. Ansar Ali, A.Z.M. Khalilullah, Md. Fazlul Karim, and Md. Ruhul Amin
- **Counsels for the Respondents:** Syed Ishtiaq Ahmed (Additional Attorney General), K.Z. Alom (Deputy Attorney General), Ismailuddin Sarker, Mahmudul Islam, and A.W. Bhuiyan (Assistant Attorney General)

2. Introduction

¹ Kazi Mukhlesur Rahman v. Bangladesh, 26 DLR (AD) 44 (1974).

The landmark constitutional case of *Kazi Mukhlesur Rahman v. Bangladesh* serves as a foundational precedent in Bangladeshi jurisprudence, deeply exploring the checks and balances governing executive power, territorial sovereignty, and the expanding horizons of public interest litigation². Brought forward to challenge the validity of the 1974 Delhi Treaty (popularly known as the Mujib-Indira Treaty), this case addresses whether the executive branch can unilaterally alter or cede state borders without Parliamentary intervention. Beyond its critical constitutional limits on foreign policy, the judgment fundamentally revolutionized the traditional, restrictive doctrine of *locus standi* (legal standing) within Bangladesh, establishing that issues of grave constitutional magnitude affecting the citizenry collectively can grant standing to a public-spirited individual.³

3. Facts of the Case

The roots of the dispute trace back to **September 10, 1958**, when the Prime Ministers of India and Pakistan signed the Noon-Nehru Pact to resolve various lingering territorial friction points. The pact horizontally split the Berubari Union No. 12, designating the southern half of the union along with adjacent enclaves to the share of erstwhile East Pakistan. However, actual physical possession of the southern Berubari Union was never delivered to East Pakistan due to prevailing geopolitical tensions. Following the Liberation War of 1971, Article 2(a) of the newly enacted Constitution of Bangladesh legally defined the sovereign territory of the Republic as comprising the territories that constituted East Pakistan on March 26, 1971.⁴

² M. Rafiqul Islam, The Land Boundary Agreement between Bangladesh and India: A Legal Analysis, 15 Bangladesh J. Int'l Aff. 45, 48 (2011).

³ Borhan Uddin Khan & Jahid Hossain Bhuiyan, The Evolution of Public Interest Litigation in Bangladesh, 51 J. Indian L. Inst. 481, 485 (2009).

⁴ Bangladesh Const. art. 2, cl. a.

On May 16, 1974, the Prime Ministers of Bangladesh and India signed a comprehensive agreement on the demarcation of land boundaries, widely known as the Mujib-Indira Treaty. Clause 14 of Article 1 of this new treaty stipulated that India would retain the southern half of the South Berubari Union No. 12. In exchange, Bangladesh would retain the Dahagram and Angorpota enclaves, and receive a perpetual lease of the "Tin Bigha Corridor". Crucially, unlike the older Noon-Nehru Pact, this 1974 Treaty explicitly contained a clause making it subject to future ratification and an exchange of instruments between both nations.

The Appellant, Kazi Mukhlesur Rahman, filed a writ petition under Article 102 of the Constitution before the High Court Division, directly challenging the lawful authority of the executive to execute the treaty. The High Court Division summarily rejected the petition but granted a fitness certificate under Article 103(2)(a) allowing the matter to be appealed to the Appellate Division.

4. Legal Issues

The Appellate Division was confronted with four primary procedural objections and two substantive questions of constitutional interpretation:

1. Whether the appeal was incompetent due to a mechanically issued, defective certificate from the High Court Division, and whether the underlying writ petition was premature.
2. Whether the Appellant—who was not a resident of the specific territories mentioned in the Delhi Treaty—had the *locus standi* (standing) to maintain the application as an "aggrieved person" under Article 102(2) of the Constitution.⁵
3. Whether treaty-making and the execution of international agreements constitute an unreviewable "Act of State," thereby ousting the jurisdiction of domestic courts.
4. Whether the Prime Minister can unilaterally determine or cede the boundaries of the country under the executive powers granted by Article 55(2) of the Constitution.

⁵ Bangladesh Const. art. 102, cl. 2.

5. Whether the retention of the southern Berubari Union No. 12 by India under the Delhi Treaty amounted to a "cession" of Bangladeshi territory, requiring a constitutional amendment under Article 142.⁶

5. Arguments Presented

5.1 Appellant's Arguments

- **Liberal Construction of Standing:** The Appellant argued that the remedies under Article 102(2) are discretionary and that the phrase "any person aggrieved" must be construed broadly to fit cases of profound public significance.⁷ Even if his personal interest was slight or remote, a constitutional infraction of this scale gave him cause.
- **Infringement of Pervasive Fundamental Rights:** It was contended that a cession of territory directly threatened the Appellant's fundamental constitutional rights—specifically his right to move freely, reside, settle in any part of Bangladesh, and exercise his franchise. These rights extend to every inch of national territory and are not merely localized.
- **Separation of Powers:** The Appellant asserted that under Article 143(2), the power to determine boundaries belongs strictly to Parliament. The executive cannot bypass legislative oversight when international agreements result in the structural reduction of the sovereign boundaries defined in Article 2(a).

5.2 Respondents' Arguments

- **Procedural and Standing Objections:** The state argued that the certificate granted by the High Court Division was plainly defective because it showed a lack of judicial application of mind and was dismissed summarily. Furthermore, because the Appellant did not reside in the affected

⁶ Bangladesh Const. art. 142.

⁷ Ridwanul Hoque, *Judicial Activism in Bangladesh: A Golden Mean Approach* 112 (2011).

enclaves, he suffered no distinct injury separate from the general public and was not an "aggrieved person".

- **Act of State and Prematurity:** The Respondents asserted that treaty-making is a core executive policy decision and constitutes an "Act of State" immune to judicial review.⁸ Additionally, because the treaty expressly required future ratification and the exchange of instruments, it was unexecuted and the lawsuit was entirely premature.

6. Court's Reasoning and Analysis

6.1 On Procedural Defects, Prematurity, and Act of State

The Court strongly rebuked the High Court Division's mechanical, summary approach to issuing certificates under Article 103(2)(a), stating that the evaluation of fitness is a solemn judicial function. However, the Appellate Division chose not to dismiss the case on this technicality, as the Appellant had also filed for leave to appeal out of abundant caution. On the issue of an "Act of State," the Court firmly ruled that during peacetime, the state cannot invoke this doctrine against citizens to deprive them of constitutional rights. The judiciary will always retain the jurisdiction to review executive defenses when citizens' liberties are at stake.

Nevertheless, the Court found great substance in the state's objection regarding prematurity. Because the document explicitly stipulated that it would only become operational upon future ratification and the exchange of instruments, it could not yet be declared to be without lawful authority. While the appeal was technically liable to be dismissed on this ground alone, the Appellate Division determined that due to the immense constitutional gravity of the territorial questions involved, it was duty-bound to deliver its opinion on the substantive merits of the case.

⁸ See Muhammad Waheduzzaman, *The Doctrine of Act of State and Executive Discretion in Bangladesh*, 12 Dhaka Univ. L.J. 89, 94 (2018).

6.2 On Locus Standi

The Court dramatically departed from restrictive Anglo-Saxon traditions of standing.⁹ It observed that because the enclaves in question were under the administrative control of India, it was highly unrealistic to expect an immediate local resident to bypass barriers and approach a Bangladeshi courtroom. The Court famously held that *locus standi* is not a strict issue of jurisdiction, but a matter of judicial discretion exercised upon the facts of each individual case. Given that the constitutional issues touched upon the potential cession of sovereign territory and the corresponding impairment of franchise and freedom of movement across the republic, the Appellant's rights were deemed pervasive. Thus, the gravity of the constitutional question itself paved the way for the applicant to be granted a hearing.¹⁰

6.3 On Executive Power and Cession of Territory

The Court analyzed the interface between Article 55(2) (executive power of the Prime Minister) and Article 143(2) (Parliamentary power over boundaries). It rejected any notion that the executive could unilaterally determine or cede territory. The state had argued that since Bangladesh never had physical possession of South Berubari, it could not be "ceded". The Court rejected this, holding that under international law, sovereignty passes by common consent and treaty recognition regardless of whether physical possession is handed over. Therefore, Berubari was an integral part of Bangladesh under Article 2(a). Consequently, transferring it away constituted an explicit cession of territory that could not be achieved by executive decree; it strictly required an act of Parliament under Article 143(2) for boundary determination, and an outright constitutional amendment of Article 2(a) under Article 142 to legally validate the cession.¹¹

⁹ Borhan Uddin Khan, *Locus Standi in Constitutional Litigation: Breaking Traditional Shackles*, 4 Bangladesh Legal Stud. 12, 16 (1998).

¹⁰ Kazi Mukhlesur Rahman, 26 DLR (AD) at para. 18.

¹¹ Bangladesh Const. art. 143, cl. 2.

7. Judgment and Ratio Decidendi

- **The Judgment:** The Appellate Division technically dismissed the appeal because the writ petition was legally premature, given that the Mujib-Indira Treaty had not yet been ratified. However, it issued a binding constitutional declaration that the treaty could not be lawfully ratified or implemented by the executive without Parliament first passing the necessary constitutional amendment to Article 2(a).
- **Ratio Decidendi:**
 1. *Locus standi* is a matter of judicial discretion rather than a rigid jurisdictional bar; a public-spirited citizen has the standing to claim a hearing if a challenged state action involves a constitutional issue of exceptional gravity affecting the territorial integrity or pervasive rights of the citizenry at large.¹²
 2. The executive branch cannot unilaterally cede national territory through an international treaty under the guise of general executive power; any agreement involving the cession of sovereign territory demands a formal constitutional amendment enacted by Parliament under Article 142 to adjust the legal boundaries of the Republic.

8. Critical Analysis

8.1 Significance of the Decision

The *Berubari Case* is arguably the most critical early constitutional anchor in the legal history of Bangladesh. It firmly established the supremacy of the Constitution over the foreign policy and treaty-making whims of the executive branch. By forcing the government to seek a constitutional amendment before altering state borders, the Appellate Division protected the young nation's

¹² Kazi Mukhlesur Rahman, 26 DLR (AD) at para. 17.

sovereignty from unchecked executive decisions. Furthermore, it sowed the seeds for modern Public Interest Litigation (PIL) in South Asia, moving away from rigid, archaic colonial rules of standing.¹³

8.2 Implications and Impact

The immediate practical effect of this decision was that the government of Bangladesh could not rush into implementing the Delhi Treaty. Following the court's clear directives, Parliament subsequently enacted the Constitution (Third Amendment) Act, 1974, to alter Article 2(a) and give legal authorization for the boundary adjustments and the eventual exchange of enclaves. In the long term, the relaxed standard of *locus standi* articulated here cleared a path for future human rights and environmental advocates to challenge systemic state overreach without needing to prove direct, individualized economic injury.¹⁴

8.3 Critical Evaluation

The Court's reasoning exhibits exceptional courage and structural balance. It deftly avoided an outright political confrontation with the executive by dismissing the case as "premature," yet it exercised its judicial review duties to lay down absolute legal limits before the state could finalize its international commitments. If there is a minor academic weakness, it lies in the tension created by deciding an issue on its full merits after declaring the application technically premature and liable to dismissal. However, this pragmatic approach was fully justified given the unique situation of the enclaves and the need to prevent an unconstitutional, irreversible transfer of sovereign land.

¹³ Jona Razzaque, *Public Interest Environmental Litigation in India, Pakistan, and Bangladesh* 204 (2004).

¹⁴ *id.* at 208.

9. Conclusion

In conclusion, *Kazi Mukhlesur Rahman v. Bangladesh* remains a monumental testament to judicial independence and structural constitutionalism. By ruling that the territory of the republic cannot be bargained away by executive action alone, the Appellate Division successfully preserved the legislative supremacy of Parliament and protected the sanctity of Article 2(a). Simultaneously, by taking a flexible, discretionary approach to *locus standi*, the Court ensured that the gates of justice remain open to vigilant citizens whenever questions of profound constitutional importance arise.

10. Bibliography

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