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Research Monograph

On

“Judicial Power and Basic Structure Doctrine: An Appraisal from the Perspective of Bangladesh Constitution”.

This Research Submitted for the partial fulfillment of the award of the degree in
LLB (Hon’s) Department of Law Sonargaon University (SU), Dhaka.

Submitted To:

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Letter of Transmittal

To

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Subject: Submission of Research Monograph on “Judicial Power and Basic Structure Doctrine: An Appraisal from the Perspective of Bangladesh Constitution”.

Dear Sir,

I do hereby please to submit the Research Monograph on the topic “Judicial Power and Basic Structure Doctrine: An Appraisal from the Perspective of Bangladesh Constitution”. It is a great pleasure to work on such important topic. This Research work has been done according to the requirements of the Sonargaon University for the fulfilment of my LL.B (Hon’s) years course under the Department of Law.

I respectfully acknowledge your guidance, leadership and help for the preparation of this paper. It is worthwhile to mention that there might be some errors and mistakes in my report due to limited time and knowledge. I am still at learning stage. So I respect that you will pardon my unintentional mistakes in preparing this paper.

Sincerely. Yours,

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Solemn Affirmation

I do thereby solemnly declare that the work presented in this research has been carried out by me and has not been previously submitted to other University/College/Organization for any academic qualification, publication or a personal Degree. I hereby ensure that the work presented here not breach any existing copyright.

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Guide Certificate

This is to certified that the Research Monograph on “**Judicial Power and Basic Structure Doctrine: An Appraisal from the Perspective of Bangladesh Constitution**” is prepared by Tahera Naznin, ID No.: LL.B 1603009033 for partial fulfillment of the requirement of the Program: LL.B (Hon’s) from Sonargaon University, Dhaka. It also certified that the research work has been carried out under my supervision and intensive guidance.

It is to be certified that this research work is original and suitable in its style and contents for submission and fulfillment of his LL.B (Hon’s).

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Acknowledgement

I express my sincerest gratefulness to Almighty ‘**Allah**’ for his kindness on me in accomplishing this research monograph. I express my heart-string gratitude to my ‘Honorable’ and distinguished cooperative supervisor **Md. Deedarul Islam Bhuiyan**, Assistant Professor & Head, Department of Law, Sonargaon University, Dhaka who inspire and guide me throughout the work. He provide me resources that I needed to carry out the work and gave me important guidelines whenever I was in a Dilemma.

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Thank you.

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TABLE OF CONTENTS

Particulars	Page No.
Chapter- 1	
Introduction	
1.1. Abstract	1
1.2. Introduction	1
1.3. Objectives	2
1.4. Methodology	3
1.5. Limitations	3
Chapter- 2	
Conceptual Analysis	
2.1 Conceptual Framework	4
2.2 Background	6
2.3 The origin of the concept of "Basic Structures" of the constitution	8
2.4 Types of Basic Structure	8
2.5 Basic Structure principle in general sense or Numerable sense	8
2.6 Basic Structure principle in real or substantive sense	8
2.7 The Basic structure of the constitution of Bangladesh	9
Chapter-3	
Analysis of Judicial Power and Basic Structure Doctrine of Bangladesh Constitution	
3.1 The Emergency (1975)	11
3.2 Development	12
3.3 Implied Limitations of the Amending Power	12
3.4 Evolution of the doctrine	12
3.5 Recognition	14

Chapter- 4 **Constitution of Bangladesh**

4.1 Written Constitution	17
4.2 Definition of Constitution	17
4.3 Rigid Constitution	17
4.4 Constitutional of Amendment	17
4.5 Preamble	18
4.6 Supremacy of the Constitution	18
4.7 Unitary Government System	18
4.8 Unicameral Legislature	18
4.9 Fundamental Principle of State Policy	18
4.10 Fundamental Rights	19
4.11 Parliamentary form of Government:	19
4.12 Independence of Judiciary	19
4.13 Doctrine of Basic Structure of the Constitution	19
4.14 Constitutional Amendments Legislative Versus Judicial	20
4.15 How Did It Amend	20

Chapter- 5 **Judicial Power and Basic Structure Doctrine Appraisal of Bangladesh Constitution**

5.1 Judicial Power Doctrine of Basic Structure of Bangladesh Constitution	32
5.2 Delimitation of Basic Structures	33
5.3 Independence of judiciary is a part of the basic structure	33
5.4 Philosophy Underlying the Doctrine of Basic Structure	34

Chapter- 6 **Recommendation and Conclusion**

6.1 Conclusion	36
6.2 Recommendation	37
Bibliography	38

Chapter 1

Introduction

1.1 Abstract:

I have to know that, what the basic structure of the constitution is. This doctrine is not a settled principle of constitutional law. It is a growing principle of Constitutional Jurisprudence. The basic structure doctrine is the judge made doctrine whereby certain features of a constitution are beyond the limit of the powers of amendment of a parliament. This doctrine also applies only to the constitutionality of amendments and not to the ordinary Acts of the parliament which must conform to the entirety of the constitution.

1.2 Introduction

The Constitution of Bangladesh, officially the Constitution of the People's Republic of Bangladesh is the supreme law of Bangladesh. The document provides the framework that demarcates the Bangladeshi republic with a unitary, parliamentary democracy, that enshrines fundamental human rights and freedoms, an independent judiciary, democratic local government and a national bureaucracy. The four fundamental principles of the Constitution are nationalism,¹ socialism, democracy and secularism.² The Constitution endeavors to create a socialist society in which the rule of law, fundamental human rights and freedom, equality and justice, political, economic and social, is secured for all its citizens. It commits Bangladesh to “contribute to international peace and co-operation in keeping with the progressive aspirations of mankind”.³

It invokes Constitutional supremacy, as opposed to parliamentary supremacy since it was created by a constituent assembly not Parliament and was adopted by the people of Bangladesh in its preamble. Parliament cannot quash parts of the Constitution.

Judicial precedent is enshrined in Bangladesh's Constitution under Article 111,⁴ which makes Bangladesh an integral part of the common law world. Judicial review is also

¹ Article 9 of the Constitution of Bangladesh". Legislative and Parliamentary Affairs Division, Ministry of Law, Justice and Parliamentary Affairs. Retrieved 29 June 2021.

² *Ibid.*, Article 12 .

³ *Ibid.*, Article 8.

⁴ Article 111 of the Constitution of Bangladesh". Retrieved 18 June 2021.

supported by the Constitution. It was adopted by the Constituent Assembly of Bangladesh on 4 November 1972 and became effective on 16 December 1972. The Constitution replaced the Proclamation of Independence as the country's fundamental instrument of government. The Constitution became effective on Bangladesh's Victory Day, precisely one year after the signing of the Instrument of Surrender.⁵

The Constitution of Bangladesh is the highest ruling of Bangladesh. It represents Bangladesh as a democratic republic nation where all the power is in the hands of Bangladeshi people and characterizes basic political principles of the state and stands for the fundamental rights of citizens. It was approved by the Assembly of Bangladesh on November 4, 1972; it was exercised from December 16, 1972. The constitution stands as the most powerful evidence to state Bangladesh as a unitary, independent and Republic, founded on a struggle for national liberation, and that is how we achieve the People's Republic of Bangladesh. It lays a strong foundation of nationalism, secularity, democracy and socialism as the essential ethics that stands for the Republic and declares the quest of a society that gives its citizens- the rule of law, fundamental civil rights and independence as well as fairness and evenhandedness, political, economic and social.

1.3 Objectives of the Study

The **main objective** of this research monograph is to “**Judicial Power and Basic Structure Doctrine: An Appraisal from the Perspective of Bangladesh Constitution**”. In order to achieve main objective of this research there are some **specific objectives**, are as follows:

1. To find out the judicial power and basic structure doctrine of constitutionalism in Bangladesh.
2. To trace out the historical background of the constitutionalism is Bangladesh.
3. To find out the procedure to appraisal from the perspective Bangladesh constitutionalism.
4. To suggest ways for better constitutionalism is Bangladesh its start and problem.

⁵ Mahendra Prasad Singh; Veena Kukreja (7 August 2014). *Federalism in South Asia*. Routledge. p. 92. ISBN 978-1-317-55973-3.

1.4 Methodology of the Study

I have used secondary sources for completing the study. Firstly, I have collected relevant books on constitutionalism and Law journals relating to Right to freedom expression Laws and its benefits, advantages & disadvantages. Next, I collect necessary information about Bangladesh constitution and its relevant with this research. Secondly, I have discussed with my fellow friends and seniors about the topics and it helps me to adorn my topic. In several times I consult with my guide to get his advice to prepare this research monograph and he helps me to prepare this research work. I also get help from various web site in the present context of Bangladesh.

1.5 Limitations of the Study

It is true that every research has some limitations. So, this research monograph is not the exception of this limitation and reduced the scope of the study in some changes constitutionalism is Bangladesh.

1. In view of my research topic allotted time is scanty and short.
2. The main limitation of the study is the limited writings and publications on the concern topic and maximum are with political views behind. These give me information as well as confusion.
3. My research topic is judicial power and basic structure doctrine. But I tried.

Chapter- 2

Conceptual Analysis

2.1 Conceptual Framework

The basic structure doctrine is a common law legal doctrine that the constitution of a sovereign state has certain characteristics that cannot be erased by its legislature. The doctrine is recognised in India, Bangladesh, Malaysia, Pakistan, Kenya, and Uganda. In Kenya, it was noted during the delivering of the judgement for constitution change through the building bridges initiative (BBI). It was developed by the Supreme Court of India in a series of constitutional law cases in the 1960s and 1970s that culminated in *Kesavananda Bharati v. State of Kerala*, where the doctrine was formally adopted. Bangladesh is perhaps the only legal system in the world which recognizes this doctrine with an expressed, written and rigid constitutional manner through article 7B of its Constitution.

In *Kesavananda*, Justice Hans Raj Khanna propounded that the Constitution of India has certain basic features that cannot be altered or destroyed through amendments by the Parliament of India. Key among these "basic features", as expounded by Justice Khanna, are the fundamental rights guaranteed to individuals by the constitution.⁶ The doctrine thus forms the basis of the power of the Supreme Court of India to review and strike down constitutional amendments and acts enacted by the Parliament which conflict with or seek to alter this "basic structure" of the Constitution. The basic features of the Constitution have not been explicitly defined by the Judiciary, and the claim of any particular feature of the Constitution to be a "basic" feature is determined by the Court in each case that comes before it.

The Supreme Court's initial position on constitutional amendments had been that any part of the Constitution was amendable and that the Parliament might, by passing a Constitution Amendment Act in compliance with the requirements of article 368, amend any provision of the Constitution, including the Fundamental Rights and article 368. That the Constitution has "basic features" was first theorised in 1964, by Justice J. R. Mudholkar in his dissent, in the case of *Sajjan Singh v. State of Rajasthan*. He wondered whether the ambit of Article 368 included the power to alter a basic feature or rewrite a part of the Constitution. He wrote,

⁶ The basic features". *The Hindu*. 2004-09-26. Archived from the original on 2012-07-25. Retrieved 2012-07-09.

It is also a matter for consideration whether making a change in a basic feature of the Constitution can be regarded merely as an amendment or would it be, in effect, rewriting a part of the Constitution; and if the latter, would it be within the purview of Article 368?

In 1967, the Supreme Court reversed its earlier decisions in *Golaknath v. State of Punjab*. It held that Fundamental Rights included in Part III of the Constitution are given a "transcendental position" and are beyond the reach of Parliament. It also declared any amendment that "takes away or abridges" a Fundamental Right conferred by Part III as unconstitutional. In 1973, the basic structure doctrine was formally introduced with rigorous legal reasoning in Justice Hans Raj Khanna's decisive judgment in the landmark decision of *Kesavananda Bharati v. State of Kerala*.^[4] Previously, the Supreme Court had held that the power of Parliament to amend the Constitution was unfettered. However, in this landmark ruling, the Court adjudicated that while Parliament has "wide" powers, it did not have the power to destroy or emasculate the basic elements or fundamental features of the constitution.⁷

Although *Kesavananda* was decided by a narrow margin of 7–6, the basic structure doctrine, as propounded in Justice Khanna's judgement, has since gained widespread legal and scholarly acceptance due to a number of subsequent cases and judgments relying heavily upon it to strike down Parliamentary amendments that were held to be violative of the basic structure and therefore unconstitutional. Primary among these was the imposition of a state of emergency by Indira Gandhi in 1975, and her subsequent attempt to suppress her prosecution through the 39th Amendment. When the *Kesavananda* case was decided, the underlying apprehension of the majority bench that elected representatives could not be trusted to act responsibly was perceived as unprecedented. However, the passage of the 39th Amendment by the Indian National Congress' majority in central and state legislatures, proved that in fact such apprehension was well-grounded. In *Indira Nehru Gandhi v. Raj Narain* and *Minerva Mills v. Union of India*, Constitution Benches of the Supreme Court used the basic structure doctrine to strike down the 39th Amendment and parts of the 42nd Amendment respectively, and paved the way for restoration of Indian democracy.⁸

⁷ *Kesavananda Bharati ... vs State Of Kerala And Anr on 24 April, 1973*. Indian Kanoon. Para. 787. Archived from the original on 2014-12-14. Retrieved 2012-07-09.

⁸ *Revisiting a verdict*. Vol. 29, no. 1. Frontline. Jan 14–27, 2012. Archived from the original on 2013-12-03. Retrieved 2012-07-09.

The Supreme Court's position on constitutional amendments laid out in its judgements is that Parliament can amend the Constitution but cannot destroy its "basic structure". The basic structure doctrine was rejected by the High Court of Singapore. It was initially also rejected by the Federal Court of Malaysia, but was later accepted by it. Conversely, the doctrine was initially approved in Belize by the Supreme Court.

2.2 Background

The Supreme Court's initial position on constitutional amendments was that no part of the Constitution was unamendable and that the Parliament might, by passing a Constitution Amendment Act in compliance with the requirements of article 368, amend any provision of the Constitution, including the Fundamental Rights and article 368. In *Shankari Prasad Singh Deo v. Union of India* (AIR. 1951 SC 458), the Supreme Court unanimously held, "The terms of article 368 are perfectly general and empower Parliament to amend the Constitution without any exception whatever. In the context of article 13, "law" must be taken to mean rules or regulations made in exercise of ordinary legislative power and not amendments to the Constitution made in exercise of constituent power, with the result that article 13 (2) does not affect amendments made under article 368. In *Sajjan Singh v. State of Rajasthan* (case citation: 1965 AIR 845, 1965 SCR (1) 933), by a majority of 3–2, the Supreme Court held, "When article 368 confers on Parliament the right to amend the Constitution, the power in question can be exercised over all the provisions of the Constitution. It would be unreasonable to hold that the word "Law" in article 13 (2) takes in Constitution Amendment Acts passed under article 368."⁹ In both cases, the power to amend the rights had been upheld on the basis of Article 368.

Golaknath case

Main article: I.C. Golak Nath and Ors. vs. State of Punjab and Anr.

In 1967, the Supreme Court reversed its earlier decisions in *Golaknath v. State of Punjab*.¹⁰ A bench of eleven judges (the largest ever at the time) of the Supreme Court deliberated as to whether any part of the Fundamental Rights provisions of the constitution could be revoked or limited by amendment of the constitution. The Supreme Court delivered its ruling, by a majority of 6-5 on 27 February 1967. The Court held that an

⁹ "Constitution Amendment: Nature and Scope of the Amending Process" (PDF). Lok Sabha Secretariat. pp. 14–20. Archived from the original (PDF) on 3 December 2013. Retrieved 1 December 2013. This article incorporates text from this source, which is in the public domain.

¹⁰ *Ibid.*

amendment of the Constitution is a legislative process, and that an amendment under article 368 is "law" within the meaning of article 13 of the Constitution and therefore, if an amendment "takes away or abridges" a Fundamental Right conferred by Part III, it is void. Article 13(2) reads, "The State shall not make any law which takes away or abridges the right conferred by this Part and any law made in contravention of this clause shall, to the extent of contravention, be void." The Court also ruled that Fundamental Rights included in Part III of the Constitution are given a "transcendental position" under the Constitution and are kept beyond the reach of Parliament. The Court also held that the scheme of the Constitution and the nature of the freedoms it granted incapacitated Parliament from modifying, restricting or impairing Fundamental Freedoms in Part III. Parliament passed the 24th Amendment in 1971 to abrogate the Supreme Court ruling in the Golaknath case. It amended the Constitution to provide expressly that Parliament has the power to amend any part of the Constitution including the provisions relating to Fundamental Rights. This was done by amending articles 13 and 368 to exclude amendments made under article 368, from article 13's prohibition of any law abridging or taking away any of the Fundamental Rights.¹¹ Chief Justice Koka Subba Rao writing for the majority held that:

- A law to amend the constitution is a law for the purposes of Article 13.
- Article 13 prevents the passing of laws which "take away or abridge" the Fundamental Rights provisions.
- Article 368 does not contain a power to amend the constitution but only a procedure.
- The power to amend comes from the normal legislative power of Parliament.
- Therefore, amendments which "take away or abridge" the Fundamental Rights provisions cannot be passed.

¹¹ https://en.wikipedia.org/wiki/Constitution_of_Bangladesh(last visited on 11 March 2022)

2.3 The origin of the concept of "Basic Structures" of the constitution:

The concept of the basic structure of the constitution can be found in the sub-continent in the case of Pakistan Supreme Court in -Fazlil Quder Chowdhury vs. Abdul Haque. It was held that Franchise and form of government are fundamental features of a constitution. The power conferred upon the presidency by the constitution of Pakistan to remove difficulties does not extend to making an allegation in a fundamental feature of the constitution.

2.4 Types of Basic Structure:

On the basis of treatment given by the Judges over "Basic Structure" principle in Bangladesh it would be appropriate to use this doctrine in two senses.

- a) Basic Structure principle in general sense or Numerable sense and
- b) Basic Structure principle in real or substantive sense.

2.5 Basic Structure principle in general sense or Numerable sense:

Most of the judges so far have treated this doctrine from enumerative point of view. Some Judges says that there are 21 basic structures, some are says for 6 and some are says for 3. No unanimity can be found among the judges as to the substance of this doctrine. If this doctrine is meant from this general or numerable sense then there are some dangers: Firstly, The judiciary may be applying any provision of the basic structure principle, reduce or narrow down the justifiable scope of amending power of the parliament. The absolute judicial dictation, the whim of judiciary may take the place of constitutional limit in respect of amending power of the constitution. Secondly, The judiciary may, by applying any provision under the basic feature principle, reduce or narrow down the justifiable scope of amending power of the parliament. Thirdly, In some cases the judgment of the court will be reduced into nullity, reducing the dignity and institutional value of the judiciary. It has been seen in the judgment of the case of *BADRUL HAIDER CHOWDHURY Vs. BANGLADESH* in the eighth amendment case.

2.6 Basic Structure principle in real or substantive sense:

In real or substantive sense, the doctrine of the basic structure means those fundamental principles and objectives of the constitution which are its structural pillars. On which the whole edifice of the constitution is erected. If these principles are taken away or destroyed, the constitution will lose its original and inherent identity and character. If it is found that a constitution amendment is made by parliament and it has affected or likely to destroy any

of the basic features of the constitution, then the amendment should be declared unconstitutional and void.

2.7 The Basic structure of the constitution of Bangladesh:

The constitution shall be the supreme law of the land for all times. Nothing can be done which brings about a violation of the constitution and its basic features. That means the constitution of Bangladesh being the embodiment of the WILL of the republic of Bangladesh which mentioned in Article 7 of the Bangladesh constitution. In the case of *ANWAR HOSSAIN Vs. Bangladesh*,

This case is also known as the eighth amendment case. Here Article 7 prevailed. This is the first case whereby the Supreme Court of Bangladesh struck down an amendment to the constitution made by the parliament. By two writ petitions the amended article 100 and the notification of the chief justice were challenged. A division bench of the High Court Division (HCD) dismissed the petition summarily. Leave was granted by the Appellate Division (AD) by a majority of 3 to 1 striking down the 8th amendment. The principle argument of the judgment is that the constitution stands on certain fundamental principles which are the structural pillars. These basic features are¹²:

- 1) Supremacy of the constitution which states in article 7 of the constitution.**
- 2) Democracy which states in the preamble.**
- 3) Republican government which states in the article 1 of the constitution.**
- 4) Independence of judiciary which states in article 22 of the constitution.**
- 5) Unitary state which is mentioned in article 9 of the constitution.**
- 6) Separation of powers which is mentioned in article 22 of the constitution.**
- 7) Fundamental rights which is mentioned in from article 26 to 47A of the constitution.**

These structural pillars of the constitution stand beyond any change by amendatory process. If these principles are curtailed more than one permanent seat of the Supreme Court by exercising the amending power, then it destroys the unitary character of the judiciary. The amended article 100 is Ultra vires because it has destroyed the essential limb of the judiciary by setting up rival courts to the HCD in the name of permanent Benches conferring full jurisdiction, power and function of the HCD. The amended article 100 is

¹² *ibid.*

inconsistent with article 44, 94, 101, and 102. It also reduced article 108 to article 111 of the Bangladesh Constitution. It directly violated article 114, this amendment is illegal because there is no provision of transfer which is an essential requisite for dispensation of justice.

Chapter-3

Analysis of Judicial Power and Basic Structure Doctrine of Bangladesh Constitution

3.1 The Emergency (1975)

The Court reaffirmed and applied the basic structure doctrine in *Indira Nehru Gandhi v. Raj Narain*, popularly known as Election case. The constitutionality of Article 329A, which had been inserted by the 39th Amendment in 1975 was challenged in this case. Shortly after the imposition of the Emergency, a bench of thirteen judges was hastily assembled to hear the case. Presided over by Chief Justice Ajit Nath Ray, the court had to determine the degree to which amendments were restricted by the basic structure theory. Ray, who was among the dissenters in the Kesavananda Bharati case, had been promoted to Chief Justice of India on 26 April 1973, superseding three senior Judges, Shelat, Grover and Hegde (all in the majority in the same case), which was unprecedented in Indian legal history. On November 10 and 11, the team of civil libertarian barristers, led by Nanabhoy Palkhivala, argued against the Union government's application for reconsideration of the Kesavananda decision. Some of the judges accepted his argument on the very first day, the others on the next; by the end of the second day, the Chief Justice was reduced to a minority of one. On the morning of 12 November, Chief Justice Ray tersely pronounced that the bench was dissolved, and the judges rose.¹³

The 39th Amendment attempted, among other provisions, to legitimize the election of Indira Gandhi in 1971. Article 329A put the elections of the Prime Minister and Lok Sabha Speaker outside the purview of the judiciary and provided for determination of disputes concerning their elections by an authority to be set up by a Parliamentary law. The Supreme Court struck down clauses (4) and (5) of the article 329A, which made the existing election law inapplicable to the Prime Minister's and Speaker's election, and declared the pending proceedings in respect of such elections null and void.

¹³ "Constitution Amendment: Nature and Scope of the Amending Process" (PDF). Lok Sabha Secretariat. pp. 14–20. Archived from the original (PDF) on 3 December 2013. Retrieved 1 December 2013. This article incorporates text from this source, which is in the public domain. "Constitution Amendment: Nature and Scope of the Amending Process" (PDF). Lok Sabha Secretariat. pp. 14–20. Archived from the original (PDF) on 3 December 2013. Retrieved 1 December 2013. This article incorporates text from this source, which is in the public domain.

3.2 Development

Constitutional lawyer A. G. Noorani notes that the doctrine has "now spread far and wide beyond its frontiers.", but that the eventual attribution to Dietrich Conrad is absent, who propounded the arguments in a lecture to the law faculty in the Banaras Hindu University. The argument, Noorani narrates made way to M K Nambyar who read the excerpt out in *Golaknath*.

3.3 Implied Limitations of the Amending Power

"Perhaps the position of the Supreme Court is influenced by the fact that it has not so far been confronted with any extreme type of constitutional amendments. It is the duty of the jurist, though, to anticipate extreme cases of conflict, and sometimes only extreme tests reveal the true nature of a legal concept. So, if for the purpose of legal discussion, I may propose some fictive amendment laws to you, could it still be considered a valid exercise of the amendment power conferred by Article 368 if a two-thirds majority changed Article 1 by dividing India into two States of Tamilnad and Hindustan proper. "Could a constitutional amendment abolish Article 21, to the effect that forthwith a person could be deprived of his life or personal liberty without authorisation by law? Could the ruling party, if it sees its majority shrinking, amend Article 368 to the effect that the amending power rests with the President acting on the advice of the Prime Minister? Could the amending power be used to abolish the Constitution and reintroduce, let us say, the rule of a mogul emperor or of the Crown of England? I do not want, by posing such questions, to provoke easy answers. But I should like to acquaint you with the discussion which took place on such questions among constitutional lawyers in Germany in the Weimar period - discussion, seeming academic at first, but suddenly illustrated by history in a drastic and terrible manner."

3.4 Evolution of the doctrine

The basic structure doctrine was further clarified in *Minerva Mills v. Union of India*. The 42nd Amendment had been enacted by the government of Indira Gandhi in response to the Kesavananda Bharati judgment in an effort to reduce the power of the judicial review of constitutional amendments by the Supreme Court. In the *Minerva Mills* case, Nanabhoy Palkhivala successfully moved the Supreme Court to declare sections 4 and 55 of the 42nd Amendment as unconstitutional.^[13] The constitutionality of sections 4 and 55 of the 42nd Amendment were challenged in this case, when Charan Singh was caretaker Prime

Minister. Section 4 of the 42nd Amendment, had amended Article 31C of the Constitution to accord precedence to the Directive Principles of State Policy articulated in Part IV of the Constitution over the Fundamental Rights of individuals articulated in Part III. Section 55 prevented any constitutional amendment from being "called in question in any Court on any ground". It also declared that there would be no limitation whatever on the constituent power of Parliament to amend by way of definition, variation or repeal the provisions of the Constitution. On 31 July 1980, when Indira Gandhi was back in power, the Supreme Court declared sections 4 & 55 of the 42nd amendment as unconstitutional. It further endorsed and evolved the basic structure doctrine of the Constitution.¹⁴ As had been previously held through the basic structure doctrine in the *Kesavananda* case, the Court ruled that Parliament could not by amending the constitution convert limited power into an unlimited power (as it had purported to do by the 42nd amendment).

In the judgement on section 55, Chief Justice Yeshwant Vishnu Chandrachud wrote, Since the Constitution had conferred a limited amending power on the Parliament, the Parliament cannot under the exercise of that limited power enlarge that very power into an absolute power. Indeed, a limited amending power is one of the basic features of our Constitution and therefore, the limitations on that power can not be destroyed. In other words, Parliament can not, under Article 368, expand its amending power so as to acquire for itself the right to repeal or abrogate the Constitution or to destroy its basic and essential features. The donee of a limited power cannot by the exercise of that power convert the limited power into an unlimited one.¹⁵

The ruling was widely welcomed in India, and Gandhi did not challenge the verdict.^[16] In the judgement on Section 4, Chandrachud wrote:

Three Articles of our Constitution, and only three, stand between the heaven of freedom into which Tagore wanted his country to awake and the abyss of unrestrained power. They are Articles 14, 19 and 21. Article 31C has removed two sides of that golden triangle which affords to the people of this country an assurance that the promise held forth by the preamble will be performed by ushering an egalitarian era through the discipline of fundamental rights, that is, without emasculation of the rights to liberty and equality which alone can help preserve the dignity of the individual.

¹⁴ Raghav Sharma (2008-04-16). "Minerva Mills Ltd. & Ors. v. Union of India & Ors: A Jurisprudential Perspective". Social Science Research Network.

¹⁵ Minerva Mills Ltd. & Ors. vs. Union of India & Ors". Open Archive. Archived from the original on 2012-04-04. Retrieved 2012-07-17.

This latter view of Article 31C was questioned, but not overturned, in *Sanjeev Coke Manufacturing Co v Bharat Cooking Coal Ltd.* (case citation: AIR 1983 SC 239). The concept of basic structure has since been developed by the Supreme Court in subsequent cases, such as *Waman Rao v. Union of India* (AIR 1981 SC 271), *Bhim Singhji v. Union of India* (AIR 1981 SC 234), *S.P. Gupta v. President of India* (AIR 1982 SC 149) (known as Transfer of Judges case), *S.P. Sampath Kumar v. Union of India* (AIR 1987 SC 386), *P. Sambamurthy v. State of Andhra Pradesh* (AIR 1987 SC 663), *Kihota Hollohon v. Zachilhu and others* (1992 1 SCC 309), *L. Chandra Kumar v. Union of India and others* (AIR 1997 SC 1125), *P. V. Narsimha Rao v. State (CBI/SPE)* (AIR 1998 SC 2120), *I.R. Coelho v. State of Tamil Nadu and others* (2007 2 SCC 1), and *Raja Ram Pal v. The Hon'ble Speaker, Lok Sabha and others* (JT 2007 (2) SC 1) (known as Cash for Query case). The Supreme Court's position on constitutional amendments laid out in its judgements is that Parliament can amend the Constitution but cannot destroy its "basic structure".¹⁶

3.5 Recognition

Bangladesh

The basic structure doctrine was adopted by the Supreme Court of Bangladesh in 1989, by expressly relying on the reasoning in the Kesavananda case, in its ruling on *Anwar Hossain Chowdhary v. Bangladesh* (41 DLR 1989 App. Div. 165, 1989 BLD (Spl.) 1).¹⁷ However, Bangladesh is the only legal system to introduce this concept through constitutional provisions. Article 7B of the Constitution of Bangladesh introduced some parts of it as basic provisions of the constitution and referred to some others (which are not properly defined) as basic structure of the constitution and declares all of these as not amendable.

Belize

The basic structure doctrine was invoked by the Supreme Court of Judicature of Belize in *Bowen v Attorney General BZ 2009 SC 2* in rejecting the Belize Constitution (Sixth Amendment) Bill 2008, which had sought to exclude certain deprivation of property rights from judicial review. The court recognised the fundamental rights granted by the constitution, respect for the rule of law and the right to the ownership of private property as basic features of the Belizean constitution, as well as the separation of powers, which Chief

¹⁶ India - The Constitution". Countrystudies.us. Archived from the original on 2012-10-14. Retrieved 2013-12-01.

¹⁷ Archived copy". Archived from the original on 2010-12-20. Retrieved 2013-12-02.

Justice Abdulai Conteh noted had been recognised by the Judicial Committee of the Privy Council in *Hinds v The Queen* [1977] AC 195 which was not a constitutional amendment case as implicit in Westminster model constitutions in the Caribbean Commonwealth realm.¹⁸

The Supreme Court affirmed the doctrine in *British Caribbean Bank Ltd v AG Belize Claim No. 597 of 2011*¹⁹ and struck down parts of the Belize Telecommunications (Amendment) Act 2011 and Belize Constitution (Eighth) Amendment Act 2011. The amendments had sought to preclude the court from deciding on whether deprivation of property by the government was for a public purpose, and to remove any limits on the National Assembly's power to alter the constitution. This was found to impinge on the separation of powers, which had earlier been identified as part of the basic structure of the Belizean constitution.

Malaysia

In Malaysia, the basic features doctrine was initially found to be inapplicable by the Federal Court in *Phang Chin Hock v. Public Prosecutor*. The Court remarked that the Indian constitution was drafted by a constituent assembly representative of the Indian people in territorial, racial and community terms, and not "ordinary mortals", while the same could not be said for the Malaysian constitution, which was enacted by an ordinary legislature. The basic structure doctrine was first cited with approval by the Federal Court in *obiter dicta* in *Sivarasa Rasiah v. Badan Peguam Malaysia*, before ultimately being applied by the same court in *Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Daerah Hulu Langat & Ano'r Case*²⁰ and *Indira Gandhi a/p Mutho v. Pengarah Jabatan Agama Islam Perak & 2 O'rs & 2 Other Cases*. In those cases, the Federal Court held that the vesting of the judicial power of the Federation in the civil courts formed part of the basic structure of the Constitution, and could not be removed even by constitutional amendment.

Pakistan

The basic structure doctrine was recognised in *Constitution Petition No.12 of 2010, etc.* by the Supreme Court of Pakistan in 2015. The case was heard by the full 17-member bench,

¹⁸ O'Brien, Derek (2013-05-28). "Derek O'Brien: The Basic Structure Doctrine and the Courts of the Commonwealth Caribbean". *UK Constitutional Law Blog*. UK Constitutional Law Association. Archived from the original on 2020-10-21. Retrieved 2020-11-22.

¹⁹ "British Caribbean Bank Limited v. The Government of Belize PCA 2010-18". Permanent Court of Arbitration. 2014-12-19. Archived from the original on 2020-11-22. Retrieved 2020-11-22.

²⁰ *ibid*

of which a plurality of 8 accepted the basic structure doctrine as a basis for limiting the ability of the Parliament of Pakistan to amend the Constitution, 4 rejected the premise of such limitations, describing the basic structure doctrine as a "vehicle for judicial aggrandisement of power", and 5 accepted that some limitations exist but did not endorse the basic structure doctrine. The judgement identified democracy, federalism and independence of the judiciary as among the characteristics protected by the doctrine. Before this decision, it was unclear whether the basic structure doctrine applied in Pakistan. The doctrine was considered and rejected shortly after the *Kesavananda* decision, revived in 1997, and rejected again in 1998.²¹ The 2015 decision addressed the issue directly and accepted the doctrine.²¹

Singapore

The High Court of Singapore denied the application of the basic features doctrine in Singapore in *Teo Soh Lung v. Minister for Home Affairs*. Justice Frederick Arthur Chua held that the doctrine was not applicable to the Singapore Constitution: "Considering the differences in the making of the Indian and our Constitution, it cannot be said that our Parliament's power to amend our Constitution is limited in the same way as the Indian Parliament's power to amend the Indian Constitution."²²

Uganda

In December 2017, the Ugandan parliament passed a Constitutional Amendment which removed age limit of 75 years for the President and Chairpersons of the Local Council. The President Yoweri Museveni, who has been President of Uganda since 1986, signed the amendment into law in January 2018, aged '74 years' (Unsubstantiated evidence is available that the alleged dictator is in his late 80's). Several opposition leaders and the Uganda Law Society, challenged the constitutionality of the amendment before the Constitutional Court, which (majority) upheld the validity of the amendment. Taking note of the judgments in *Kesavananda Bharati v. State of Kerala*, AIR 1973 SC and *Minerva Mills v. Union of India*, AIR 1980 SC 1789, the Supreme Court of Uganda in *Mabirizi Kiwanuka & ors. v. Attorney General*, 2019 UGSC 6, unanimously upheld the Constitutional Court (majority) finding.

²¹ Rizvi, Majid (2015-09-18). "South Asian Constitutional Convergence Revisited: Pakistan and the Basic Structure Doctrine". *I-CONnect*. Oxford University Press. Archived from the original on 2020-08-08. Retrieved 2020-11-22.

²² *Teo Soh Lung* (H.C.), p. 479, para. 47.

Chapter -4

Constitution of Bangladesh

4.1 Written Constitution:

The Constitution of the People's Republic of Bangladesh is a written document. It was formally adopted by the Constitution Assembly on 4th November 1972. It contains 153 articles, one preamble and 7 schedules.

4.2 Definition of Constitution

The basic principles and laws of a nation, state, or social group that determine the powers and duties of the government and guarantee certain rights to the people in it.²³ A constitution is an aggregate of fundamental principles or established precedents that constitute the legal basis of a polity, organisation or other type of entity, and commonly determine how that entity is to be governed.²⁴ When these principles are written down into a single document or set of legal documents, those documents may be said to embody a written constitution; if they are written down in a single comprehensive document, it is said to embody a codified constitution. Some constitutions (such as that of the United Kingdom) are uncodified, but written in numerous fundamental Acts of a legislature, court cases or treaties.²⁵

4.3 Rigid Constitution:

The Constitution of Bangladesh is a rigid. An amendment can be passed only by votes of two-thirds members in the total members of parliament.

4.4 Constitutional of Amendment:

An amendment is essentially a correction. It comes in many varieties, up to and including the process of altering something through either parliamentary or constitutional procedure. In the Bangladesh Constitution, the word is often used specifically of a change to the Bangladesh. A constitutional amendment may be proposed by Congress with a two-thirds majority vote in both the Senate and the House of Representatives or through a

²³ <https://www.merriam-webster.com/dictionary/constitution>(last access date on 10 November 2019).

²⁴ The New Oxford American Dictionary, Second Edn., Erin McKean (editor), 2051 pp., 2005, Oxford University Press, ISBN 0-19-517077-6.

²⁵ R (HS2 Action Alliance Ltd) v Secretary of State for Transport [2014] UKSC 3, [2017]

constitutional convention with majority votes in two-thirds of state legislatures. Once it is ratified by Congress, it must be approved by three-fourths of the states.²⁶

Definition of Amendments

The process of altering or amending a law or document (such as a constitution) by parliamentary or constitutional procedure rights that were granted by amendment of the Constitution.

4.5 Preamble:

The constitution of Bangladesh starts with a preamble which is described as the guiding star of the Constitution. This Preamble contains the legal as well as moral basis of the Constitution. It also identifies the objectives and aims of the state.

4.6 Supremacy of the Constitution:

The Constitution Supremacy has been ensured in the Constitution of Bangladesh. Article (7) provides that, this constitution is as the solemn expression of the will of the people, the supreme law of there public, and if any other law is inconsistence with this Constitution that other law shall, to the extent of the inconsistency, be void.

4.7 Unitary Government System:

Article (1) of the Constitution provides that Bangladesh is a unitary people's republic. Unitary government means all power centralized under the constitution.

4.8 Unicameral Legislature:

Article (65) of the Constitution provides Unicameral Legislature for Bangladesh. It is only one house, which known as "House of the Nation

4.9 Fundamental Principle of State Policy:

Article (8) of the Constitution provides four major fundamental principle of state policy. a) Nationalism b) Democracy c) Socialism d) Secularism.

²⁶ <https://dictionary.cambridge.org/dictionary/english/amendment>(last access date on 11 March 2022).

4.10 Fundamental Rights:

Part 3 of the Constitution provides for 18 fundamental rights. The enjoyment and enforcement of those rights have been guaranteed in the constitution. No authority can make any law which is inconsistent with the provisions of fundamental rights and if any law made shall be void to the extent of inconsistency

4.11 Parliamentary form of Government:

The Constitution of Bangladesh provides the Westminster type of parliamentary system. This form of government means that the governments run by cabinet of ministers headed by prime minister. President becomes a titular head but real executive power is exercised by the cabinet.

4.12 Independence of Judiciary:

The constitution of 1972 ensured the independence of Judiciary. The Chief Justice would be appointed by the President and other justice of the Supreme Court appointed after consultation with the Chief Justice, according to the constitution. Appointment of subordinate judges and magistrates was also to be exercised with consultation of the Supreme Court. Secondly, a judge could not be removed from his office except by an order of the President passed to a resolution of parliament supported by a two-third members of the parliament.

4.13 Doctrine of Basic Structure of the Constitution:

Basic structures of the constitution mean structural pillars on which the constitution rests and that if these structural pillars are demolished the entire constitutional edifice will crumble.²⁷ The basic structure doctrine applies only to the constitutionality of amendments and not to ordinary Acts of Parliament, which must conform to the entirety of the constitution and not just to its basic structure.²⁸ Sovereignty of the people, supremacy of the constitution as the solemn expression of People's will, unitary character of the state, as an independent sovereign Republic, Democratic form of Government, separation of powers between the three organs of the state, Executive, legislature and judiciary along with the rule of law and judicial review, Independence of judiciary and Fundamental Human Rights

²⁷ A.K.M.Shamsul Huda, *The Constitution of Bangladesh, First edition, 1997.* volume-2,p.974.

²⁸ Visit on http://en.wikipedia.org/wiki/Basic_structure#Extending_the_doctrine_.281981.29

are the basic Features of the constitution. Mr. Justice B.H. Chowdhury J, (as he then was) enumerated as many as 21 (twenty one) unique features of B Bangladesh constitution.²⁹

4.14 Constitutional Amendments Legislative Versus Judicial:

As of 2012 the Constitution of the People's Republic of Bangladesh has been amended by the Parliament fifteen times by its fifteen Constitutional Amendment Acts. It is to be noted that of these fifteen Amendments, the first three amendments are still valid and exists in the Constitution without any substantial change. However, with regard to the rest of the ten amendments (4th to 14th) there have been two types of changes: Legislative changes (by way of constitutional amendments); and Judicial changes (by way of judicial declaration with judicial declaration with judicial review power).³⁰

4.15 How Did It Amend?

The Parliamentary Standing Committee on the Ministry of Law, Justice and Parliamentary Affairs had proposed the legislation, now adopted as law, that suggested replacement of sections 2 through 8 of article 96 with the sections 2, 3, and 4. The draft amendment was passed with a 327-0 vote, based on the recommendation of the Parliamentary Standing Committee.

The Parliament on Wednesday unanimously passed the Constitution (Sixteenth Amendment) Bill restoring its power to remove Supreme Court judges on grounds of misconduct or incapacity scrapping the existing constitutional provisions for Supreme Judicial Council inquiry into such allegations. The bill was passed by 327 votes to zero, as no lawmakers voted against the bill either in voice vote or in division vote and the rest 22 of the 350 members of parliament either abstained from voting or did not join the session on the day. AL has 277 lawmakers, HM Ershad-led Jatiya Party faction 40, Workers Party of Bangladesh 7, Jatiya Samajtantrik Dal 6, Bangladesh Tariqat Federation 2, Anwar Hossain Monju-led Jatiya Party (JP) 2 and Bangladesh Nationalist Front has one lawmaker in the current parliament. The rest are independent lawmakers.

According to the constitution, the amendment to the constitution will come into effect with the president's assent to the bill. According to Article 142((b) of the constitution, however, the president would need to assent to the bill in seven days after it is presented to

²⁹ A.K.M. Shamsul Huda, *The Constitution of Bangladesh, First edition, 1997 volume-2, p.974.*

³⁰ <https://www.lawyersnjurists.com/article/amendment-of-the-constitution-of-bangladesh> last access date on 11 March 2022

him and 'if he fails so to do he shall be deemed to have assented to it on the expiration of that period. The new amendment to the constitution stipulates that parliament 'may by law' regulate the procedure of 'investigation and proof of the misbehavior or incapacity of a judge. The law minister, Anisul Huq, placed the bill before the house for passage as parliamentary session resumed at 7:00pm with speaker Shirin Sharmin Chowdhury in the chair and the bill was passed at about 11:00pm. The law minister promised that his ministry would frame rules on appointment of judge's soon. Most of the lawmakers including the leader of the house, Sheikh Hasina, the leader of the opposition in parliament, Raushan Ershad, and the Jatiya Party chairman, HM Ershad, joined the sitting that passed the bill. The Jatiya Party (JP) chairman, Anwar Hossain Monju, also the environment minister, was absent. With the passage of the bill, parliament will also have the power to remove the chief election commissioner and other election commissioners, the Public Service Commission chairman and members, the comptroller and auditor general and the Anti-Corruption Commission chairman and commissioners on similar grounds.

According to the constitution and the Anti-Corruption Commission Act 2004, the holders of those offices 'shall not be removed from his office except in like manner and on like grounds as a judge of the Supreme Court. Anisul on September 7 tabled the bill saying that it would restore the original Article 96 of the constitution adopted in 1972. The house sent the bill to the standing committee on law ministry for scrutiny. The standing committee on September 14 submitted its report recommending some changes to the bill and it was passed as amended by the committee. A total of 30 proposals for amendment to the bill were submitted by lawmakers of Jatiya Party, ruling Awami League's alliance partners Workers Party of Bangladesh and Jatiya Samajtantrik Dal and independent ones and 15 lawmakers submitted notice for soliciting public.

First Amendment

The Constitution (First Amendment) Act 1973 was passed on 15 July 1973. It amended Article 47 of the Constitution by inserting an additional clause which allowed prosecution and punishment of any person accused of 'genocide, crimes against humanity or war crimes and other crimes under international law'. A new Article 47A was also inserted, making certain fundamental rights inapplicable in those cases.

Second Amendment

The Constitution (Second Amendment) Act 1973 was passed on 22 September 1973. This act: amended Articles 26, 63, 72 and 142 of the Constitution; replaced Article 33; and inserted a new part (Part IXA). Provision was made through this amendment for the suspension of certain fundamental rights of citizens during an emergency.

Third Amendment

The Constitution (Third Amendment) Act 1974 was enacted on 28 November 1974. This amendment altered Article 2 of the Constitution to give effect to an agreement between Bangladesh and India for the exchange of certain enclaves, and the fixing of boundary lines between the two countries.

Fourth Amendment

The Constitution (Fourth Amendment) Act 1975 was passed on 25 January 1975. Major changes were brought into the Constitution by this amendment:

- a) A presidential form of government was introduced in place of the parliamentary system;
- b) A one-party system was introduced in place of a multiparty system;
- c) The powers of the Jatiya Sangsad were curtailed;
- d) The term of the first Jatiya Sangsad was extended;
- e) The judiciary lost much of its independence; and
- f) The Supreme Court was deprived of its jurisdiction over the protection and enforcement of fundamental rights.
- g) This Act:
- h) Amended articles 11, 66, 67, 72, 74, 76, 80, 88, 95, 98, 109, 116, 117, 119, 122, 123, 141A, 147 and 148 of the Constitution;
- i) Replaced Articles 44, 70, 102, 115 and 124;
- j) Repealed Part III of the Constitution;
- k) Altered the Third and Fourth Schedules;
- l) Inserted a new part (Part VIA); and
- m) Inserted new articles 73A and 116A.

Fifth Amendment

The Fifth Amendment Act was passed by the Jatiya Sangsad on 6th April 1979. This Act amended the Fourth Schedule to the Constitution by inserting a new paragraph 18. The effect of the amendment was that all amendments or repeals made in the Constitution from

15 August 1975 to 9 April 1979 (inclusive) by any proclamation or Proclamation Order of the Martial Law Authorities were deemed to have been validly made, and could not be called into question before any court or tribunal or other authority.

Sixth Amendment

The Sixth Amendment Act was enacted by the Jatiya Sangsad; it amended Articles 51 and 66 of the Constitution.

Seventh Amendment

The Seventh Amendment Act was passed on 11 November 1986. It amended Article 96 of the Constitution; it also amended the Fourth Schedule to the Constitution by inserting a new paragraph 19, which amongst other things provided that all proclamations, proclamation orders, Chief Martial Law Administrator's Orders, Martial Law Regulations, Martial Law Orders, Martial Law Instructions, ordinances and other laws made from 24 March 1982 to 11 November 1986 (inclusive) had been validly made, and could not be called into question before any court or tribunal or other authority.

A.B.M. Khairul Haque, CJ.

This appeal is by way of a certificate under Article 103 (2) (a) of the Constitution of the People's Republic of Bangladesh. Accordingly, this appeal was filed directly in this Division as provided in Order XII of the Supreme Court of Bangladesh (Appellate Division) Rules, 1988. It involves determination of the legality of section 3 of the Constitution (Seventh Amendment) Act, 1986 (Act 1 of 1986).

Facts of the Case : The facts leading to the filing of the writ petition are that one Abu Taher son of Md. Kala Miah was killed on 12.1.1984 and Siddique Ahmed, the writ-petitioner was arrested on 11.04.1985 in connection with the P.S. Case No.25 dated 24.12.1984 (corresponding to G.R. No.1676 of 1984). On his application, the learned Sessions Judge, Chittagong, enlarged him on bail in Criminal Miscellaneous Case No.421 of 1985. In the meantime, following an investigation, charge-sheet No.167 dated 14.10.1985, was filed against 3 (three) persons including the writ-petitioner under section 302 of the Penal Code.

In due course, the case was forwarded to the Court of Sessions, Chittagong, vide Order dated 16.01.1986 and was numbered as S.T. Case No.10 of 1986 and vide Order dated 10.02.2006, was transferred to the Court of Additional Sessions Judge, Chittagong, for trial (Annexure-G to the writ petition). The writ-petitioner apparently did not appear in

the trial and remained absconding. Meanwhile, on being asked, the records of the said Sessions Case was transferred to the Chairman, Special Martial Law Court No.3, Zone-C, Cantonment Bazar, Chittagong, for trial. There it was re-numbered as Martial Law Case No.12 of 1986 and charge was framed under sections 302/34 and the trial proceeded against the accused persons including the writ-petitioner in absentia. After conclusion of the trial, all the accused persons including the writpetitioner were convicted in absentia under sections 302/34 of the Penal Code and were sentenced to suffer imprisonment for life and also to pay a fine of Tk.1,000/- each, in default, to suffer rigorous imprisonment for a further period of 1 (one) year each (Annexure-L to the writ petition). The said conviction and sentence was confirmed in review by the Chief Martial Law Administrator by his Order dated 19.07.1986 (Annexure-M to the writ petition).

Eighth Amendment

The Eighth Amendment Act was passed on 7 June 1988. It amended Articles 2, 3, 5, 30, and 100 of the Constitution. This Amendment:

- (a) Declared Islam as the state religion;
- (b) Decentralized the judiciary by setting up six permanent benches of the High Court Division outside Dhaka;
- (c) Substituted the spelling 'Bengali' with 'Bangla', and 'Dacca' with 'Dhaka', in Article 5 of the Constitution;
- (d) Amended Article 30 of the Constitution by prohibiting the acceptance of any title, honours, award, or decoration from any foreign state by any citizen of Bangladesh without the prior approval of the president.

The amendment of Article 100 was subsequently declared invalid by the Supreme Court, as it altered the basic structure of the constitution.

Anwar Hussain .Vs. Bangladesh or 8th Amendment Case:

The case of Anwar Hussain .Vs. Bangladesh widely known as 8th Amendment case is a famous judgment in the constitutional record of independence Bangladesh. This is the earliest judgment whereby the Supreme Court of Bangladesh as salient down an amendment to the constitution ready by the parliament. By two court order appeal the amended Art 100 & the notification of the Chief Justice were confronted as mega vires. A division bench of the HCD discharged the appeal instantly. Leave was established by the Appellate Division by a majority of 3 to 1 striking down the amendment.

The standard argument of the judgment is that, the constitution rests on some fundamental main beliefs which are its structural supports which the parliament cannot amend by its amending power for; if these supports are discharged or damaged then the entire constitutional configuration will lose its validity. These structural pillars of the constitution are placed outside any change by amendatory procedure. If by implementing the amending power these principles are shortened more than one stable seat of the Supreme Court thus destroying the unitary quality of the Judiciary. The amended Art 100 is ultra vires for the reason it has destroyed the vital limb of the judiciary by setting up adversary courts to the HCD in the name of permanent Benches presenting full jurisdiction, power and role of the HCD. This amended Art 100 is conflicting with Art 44, 94, 101 & 102 also compact Art 108, 109, 110 & 111 of the constitution. It directly sullied Art 114 this amended is illegitimate since there is no provision of transfer which is essential obligation for relaxation of the rules of justice.

Ninth Amendment

The Constitution (Ninth Amendment) Act 1989 was passed in July 1989. This amendment provided for the direct election of the Vice-President; it restricted a person in holding the office of the President for two consecutive terms of five years each; and it provided that a Vice-President might be appointed in case of a vacancy in the office of President, but that such an appointment must be approved by the Jatiya Sangsad.

Tenth Amendment

The Tenth Amendment Act was enacted on 12 June 1990. Amongst other things, it amended Article 65 of the Constitution, providing for the reservation of thirty seats in the Jatiya Sangsad exclusively for women members. The reservation was to last for 10 years, with the members holding the reserved seats to be elected by the members of the Sangsad.

Eleventh Amendment

The Eleventh Amendment Act was passed on 6 August 1991. It amended the Fourth Schedule to the Constitution by adding a new paragraph 21, validating the appointment and oath as Vice President of Shahabuddin Ahmed (Chief Justice of Bangladesh), and the resignation tendered to him on 6 December 1990 by the then President Hussain M Ershad. This Act ratified, confirmed and validated all powers exercised, all laws and ordinances promulgated, all orders made and acts and things done, and actions and proceedings taken

by the Vice President as acting President from 6 December 1990 to 9 October 1991 (when Abdur Rahman Biswas became President following his election). The Act also confirmed and made possible the return of Vice President Shahabuddin Ahmed to his previous office as Chief Justice of Bangladesh.

Twelfth Amendment

The Twelfth Amendment Act, passed on 6 August 1991 and approved by referendum in September, brought about a fundamental change to Bangladesh's constitutional arrangements. It amended Articles 48, 55, 56, 57, 58, 59, 60, 70, 72, 109, 119, 124, 141A, and 142 of the Constitution with the following results:

- (a) The parliamentary form of government was re-introduced;
- (b) The President became the constitutional head of the state;
- (c) The Prime Minister became the head of the executive;
- (d) The Cabinet headed by the Prime Minister became responsible to the Jatiya Sangsad;
- (e) The position of Vice President was abolished;
- (f) The office of President now became elected by the members of the Jatiya Sangsad.

Through the amendment of Article 59 this amendment also ensured the participation of the people's representatives in local government bodies, thus stabilising the base of democracy in the country.

Thirteenth Amendment

The Constitution (Thirteenth Amendment) Act 1996 was passed on 26 March 1996. It provided for a non-party caretaker government which, acting as an interim government, would give all possible aid and assistance to the Election Commission for holding the general election of members of the Jatiya Sangsad peacefully, fairly and impartially. The non-party caretaker government, comprising the Chief Adviser and not more than 10 other advisers, would be collectively responsible to the president and would stand dissolved on the date on which the Prime Minister entered upon his office after the constitution of the new Sangsad.³¹

On May 10, 2011 the Supreme Court of Bangladesh repealed the 13th amendment to the Constitution declaring the Non-party caretaker government of three months duration

³¹ *The Constitution (Thirteenth Amendment) Act 1996.*

for holding national elections void and ultra vires to the constitution.³²The Constitution (Thirteenth Amendment) Act, 1996 (Act 1 of 1996), is ultra vires the Constitution and hereby declared void prospectively.³³ The contention in essence is that because the head of the Care-Taker Government would be chosen from the last retired Chief Justice, or the retired Chief Justice previous to him, this leaves open the possibility that the Hon'ble Chief Justice who would be in line to become the last or penultimate retired Chief Justice might be tempted to be influenced in his decisions in favour of the party in power, keeping his eyes upon the future appointment.³⁴

However, Supreme Court allowed holding two more parliamentary elections under the caretaker government excluding the provision of appointing the former Chief Justices and Appellate Division Judges as the Chief Adviser. It is now for current Parliament to decide on it which has been taken up by the Special Committee working to bring in amendments to the Constitution following verdicts of Supreme Court. As usual, AL and BNP taken up opposing stand, reported in national dailies, which have raised reasonable questions, how it would end, would it be repetition of 1996 when AL and its allies forced BNP enact 13th amendment by short lived 6th Parliament, or something else? What is the state of Election Commission now, as the main Opposition wants a new?

Fourteenth Amendment

The Constitution (Fourteenth Amendment) Act, 2004 was passed on 16 May 2004. This amendment amended several articles of the Constitution:

- (a) a new Article 4A was inserted, for the preservation and display of the portraits of the President and the Prime Minister;
- (b) clause (3) of Article 65 was amended regarding the seats reserved exclusively for women members in the Parliament;
- (c) Articles 96 (1), 129, and 139 were amended to raise the retirement age of the Judges of the Supreme Court, the Auditor General, and the Chairman and other members of the Public Service Commission (PSC); and
- (d) Article 148 was amended, to provide for the administration of the oath to newly elected members of Parliament by the Chief Election Commissioner.

³² [<http://studiesbangladesh.blogspot.com/2011/06/constitutional-amendments-constitution.html> (last access date on 15 November 2019).

³³ [www.supremecourt.gov.bd/resources/documents/526214_13thAmet.pdf].

³⁴ *Ibid*

Fifteenth Amendment

This amendment primarily served to repeal aspects of the Fifth Amendment. Secularism in Bangladesh as prescribed in the constitution was never allowed to be practised after Sheikh Mujibur Rahman's Awami League government. From November 1975 to 1977, when Bangladesh was under martial law, President and Chief Martial Law Administrator Lieutenant General Ziaur Rahman passed a presidential decree that removed the principle of secularism from the preamble of the constitution and set in "*absolute trust and faith in the Almighty Allah*". The decree was later legitimized by the second parliament of Bangladesh.

In February, 2010, the Bangladesh Supreme Court observed that parliament does not possess any authority to suspend the constitution and proclaim martial law and, hence, it cannot legitimize actions of martial law regimes. The judgment paved the way for restoring the original four fundamental principles declared in the preamble of the constitution, including secularism.

Sixteenth Amendment

Bangladesh Act No XIII of 2014 amended the Constitution of Bangladesh, empowering Parliament to impeach Supreme Court judges.^{[10][11]} Part VI, chapter one, article 96, of the Bangladesh Constitution, which includes provisions on the tenure of office of the Supreme Court judges, now states:

1. Subject to the other provisions of this article, a Judge shall hold office until he attains the age of sixty-seven years.
2. A Judge shall not be removed from his office except by an order of the President passed pursuant to a resolution of Parliament supported by a majority of not less than two-thirds of the total number of members of Parliament, on the ground of proved misbehavior or incapacity.
3. Parliament may by law regulate the procedure in relation to a resolution under clause (2) and for investigation and proof of the misbehavior or incapacity of a Judge.
4. A Judge may resign his office by writing under his hand addressed to the President. (The Constitution of the People's Republic of Bangladesh (2014), Legislative and Parliamentary Affairs Division website.)

Before the adoption of the Sixteenth Amendment, articles 96 (2) and (3) of the Bangladesh Constitution under Part VI included a provision on impeachment carried out by the Supreme Judicial Council instead of the Parliament. It stated:

1. A judge shall not be removed from office except in accordance with the following provisions of this article.
2. There shall be a Supreme Judicial Council, in this article referred to as the Council, which shall consist of the Chief Justice of Bangladesh, and two next senior judges. (The Constitution of the People's Republic of Bangladesh (2013), Legislative and Parliamentary Affairs Division website.)

The Parliamentary Standing Committee on the Ministry of Law, Justice and Parliamentary Affairs had proposed the legislation, now adopted as law, that suggested replacement of sections 2 through 8 of article 96 with the sections 2, 3, and 4. The draft amendment was passed with a 327-0 vote, based on the recommendation of the Parliamentary Standing Committee.

16th amendment of the constitution was passed by the parliament on September 17, 2014 which gave power to the Jatiyo Shangshad to remove judges if allegations of incapability or misconduct against them are proved. On 5 May 2016, the Supreme Court of Bangladesh declared the 16th Amendment illegal and contradictory to the Constitution.³⁵

Provision of 16th Amendment

Bangladesh Act No XIII of 2014 amended the Constitution of Bangladesh, empowering Parliament to impeach Supreme Court judges.³⁶ (Parliament and Judiciary: Striking a Balance). Part VI, chapter one, article 96, of the Bangladesh Constitution, which includes provisions on the tenure of office of the Supreme Court judges, now states:

- (1) Subject to the other provisions of this article, a Judge shall hold office until he attains the age of sixty-seven years.
- (2) A Judge shall not be removed from his office except by an order of the President passed pursuant to a resolution of Parliament supported by a majority of not less than two-thirds of the total number of members of Parliament, on the ground of proved misbehavior or incapacity.
- (3) Parliament may by law regulate the procedure in relation to a resolution under clause (4) and for investigation and proof of the misbehavior or incapacity of a Judge.

³⁵ "16th Amendment illegal: HC". Prothom Alo. Retrieved 2016-05-07.

³⁶<http://en.wikipedia.org/wiki/Bangladesh> (last access date on 15 November 2019).

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(1) A judge shall not be removed from office except in accordance with the following provisions of this article.

(2) There shall be a Supreme Judicial Council, in this article referred to as the Council, which shall consist of the Chief Justice of Bangladesh, and two next senior judges.

Seventeenth Amendment

The parliament (8 July 2018) unanimously passed the 17th amendment to the constitution which increases the tenure of 50 lawmakers who are elected in the women reserved seat to 25 years. The Bill was passed in the House by 298-0 vote as the speaker put it in the division vote. Law Minister Anisul Huq placed the bill to keep the provision for securing the reserve seats for the women in the parliament with Speaker Shirin Sharmin Chaudhury in the chair. If the amendment was not brought, the next parliament would have no women in reserved seats. The bill was placed in the parliament on April 10 and it was sent to the respective Parliamentary Standing Committee for further scrutiny. Nine lawmakers belonging to the main opposition Jatiya Party and Independent camp placed motions for inclusion of some provisions in the bill which were rejected in voice vote (295-0). The JP and independent MPs who termed some provisions of the bill unconstitutional and argued for increasing the time for 10 years instead of 25 years voted against their proposals during division vote. According to the Article 65 (3) of the constitution, 50 seats would be reserved exclusively for women in the parliament for 10 years from the first meeting of parliament after the one that passed the 14th constitutional amendment in 2004. As per the constitution, the parliament shall consist of 300 members to be elected directly and 50 reserved seats for women to be allotted to parties based on their proportional representation in the House. The incumbent 10th parliament has 350 members -- 300 elected in general elections and 50 lawmakers from reserved seat for women.

But the exiting 10-year tenure of the reserved seats is going to end on January 24, 2019. According to the draft bill, the 25-year period of the reserved seats will be counted from the first day of the 11th parliament. In 2004, the 8th parliament extended the tenure of the reserved seats by another 10 years through a constitutional amendment and it became effective in the 9th parliament, which sat on January 25, 2009. The 8th parliament

increased the number of reserved seats from 30 to 45 while the 9th parliament enhanced it to 50. But the amendment did not extend the term of the quota.³⁷

³⁷ *The Daily Star*, (July 08, 2018), p. 8

Chapter -5

Judicial Power and Basic Structure Doctrine Appraisal of Bangladesh Constitution

5.1 Judicial Power Doctrine of Basic Structure of Bangladesh Constitution

Basic structures of the constitution mean structural pillars on which the constitution rests and that if these structural pillars are demolished the entire constitutional edifice will crumble. The basic structure doctrine applies only to the constitutionality of amendments and not to ordinary Acts of Parliament, which must conform to the entirety of the constitution and not just to its basic structure. Sovereignty of the people, supremacy of the constitution as the solemn expression of People's will, unitary character of the state, as an independent sovereign Republic, Democratic form of Government, separation of powers between the three organs of the state, Executive, Legislature and Judiciary along with the rule of law and judicial review. Independence of judiciary and Fundamental Human Rights are the basis Features of the Constitution. Mr. Justice B.H. Chowdhury J,(as he then was) enumerated as many as 21 (twenty one) unique features of Bangladesh Constitution.

It is said that "the doctrine of basic structure as applied by the Indian Supreme Court had originated from a decision of "Chief Justice Coke's famous fourth agreement in Bonham's case, 8 C.O. Rep 114(1610), arguments of counsels made on the 18th amendment cases. In U.S.A. and particularly to Chief Justice Kennedy's dissent in *Royan v. Lennon* 1933 IRIT70.⁶² this principle was possibly followed by the then Dhaka High Court which was upheld in appeal by the Pakistan Supreme Court.

Now what is meant by the doctrine of basic structure of the Constitution ? This doctrine is not a well-settled principle of constitutional law ; it is rather a recent trend in and a growing principle of constitutional jurisprudence. As M.H. Rahman, J says in the 8th Amendment case that the doctrine has developed in a climate where the executive, commanding on overwhelming majority in the legislature, gets snap amendments of the Constitution passed without a green paper or white paper. Without eliciting any public opinion, without sending the Bill to any select committee and without giving sufficient time to the members of the Parliament for deliberation on the Bill for amendment.

According to some jurists in Bangladesh the following are said to be the basis structures or features of our constitution :

1. Supremacy of the Constitution.

2. Republican and Democratic form of Government and Sovereignty of the Peoples and the country.
3. Unitary and Republican character of the State and Government.
4. Separation of Powers between the Legislature, Executive and the Judiciary.
5. Independence of the judiciary.
6. Rule of law.
7. Judicial Review.
8. The Unity and Integrity of the Nation.
9. Supremacy of the Constitution.
10. The dignity of the individual secured by the various freedom and fundamental rights in part III and the directions to build a welfare state contained in part of the Constitution.

The above structures are built on the foundation i.e. the dignity and the freedom of individual. This is of supreme importance. In exercise of the power under Art. 142 the Constitution cannot be destroyed or abrogated. The concept of basic structure is very wide, and varied in nature. The Supreme Court of India declared, “The principle of free and fair election” being the essential postulate of democracy is a part of the basic feature of the constitution.⁶⁵ Some of the following have been churned from the judgments of the Supreme Court of India as the basic feature which are not amendable.

5.2 Delimitation of Basic Structures:

Accepting the Judicial Review of Parliamentary amendment does not relieve us of another important attack on Anwar Hossain. It is the issue of there being innumerable and controversial basic structures. In Anwar Hossain Shahabuddin Ahmed J gave a list of eight basic features of the Constitution. Mohammad Habibur Rahman J added another one to the list Badrul Haider Chowdhury J found twenty one unique features out of which some were basic which he did not identify.

5.3 Independence of judiciary is a part of the basic structure :

In the case of Secretary, Ministry of Finance Vs. Masdar Hossain 52 DLR(AD) 82, Mustafa Kamal, C.J while interpreting Articles 94(4) and 116A clearly spelt out that the independence of Judiciary is one of the basic pillars of our constitution and held in paragraph 59 as follows :-

The independence of the Judiciary, as affirmed and declared by Article 94(4) and 116A is one of the basic pillars of the Constitution and be demolished, whettled down curtailed or diminished in any manner whatsoever except under the existing provision of the Constitution true that this independence as emphasized by the learned Attorney General is subject to the provision of the constitution but the provision in the constitution which curtails, diminishes or otherwise abridges this independence. Article 115, Article 133 and Article 136 not give either the Parliament or the President the authority to the curtail diminish the independence of the Subordinate Judiciary by recourse subordinate legislation or rules what cannot be done directly cannot be done indirectly.

5.4 Philosophy Underlying the Doctrine of Basic Structure :

Someone might argue that this doctrine is vague and should be rejected. But S. Ahmed J. in 8th Amendment Case says that the doctrine of basic structure cannot be rejected if consequence of it, rejection is taken into consideration.⁸⁴ Seervai in his Constitutional Law of India,⁸⁵ rightly observed that the consequence of rejecting the doctrine of basic structure would be so grave and so opposed to the objectives of the constitution that the consequence of uncertainty would be insignificant by comparison. Actually, there are some sound philosophical rationales, which work behind this doctrine.

1. A constitution like a sacred document is made written with a formal declaration by a democratic assembly especially constituted on behalf of the people for this purpose necessary with a view to keeping its supremacy as a lofty idealism for a nation. Every written constitution, therefore, has certain fundamental principles and objectives which are its structural pillars and on which the whole edifice of the constitution is erected and if these principles are taken away or destroyed, the Constitution will lose its original and inherent identity and character.

2. The parliament being a creature of the Constitution must exercise its powers within the constitutional bounds and limits. It, therefore, cannot enlarge its limited power into an absolute power to destroy its basic elements. If parliament had the power to destroy the basic feature of the Constitution, it would cease to be a creature of the Constitution and became its master. Moreover, a Constitution which is formally declared as a sacred document and as the guide for the nation can, in no way, be considered as an object of rapine and plunder at the hand of the parliament. As S. Ahmed, J says in 8th Amendment case, the doctrine of bar to change the basic structure is an effective guarantee against

frequent amendments of the Constitution in secretarial or party interest in countries where democracy is not given any chance to develop.

3. The declaration of constitutional supremacy as opposed to the Parliamentary supremacy in the Constitution implicitly presupposed the existence of an independent court or authority to examine the constitutionality of actions done by the executive and legislative. Though the judiciary like parliament is also the creature of the Constitution, it is the Constitution which at the same time gives, somewhere directly and somewhere indirectly, this judiciary the power to play the role of an umpire – to see that the executive and legislative are not transgressing their constitutional limits. This is why the judiciary under a written Constitution is called the guardian of the Constitution.⁸⁶

Most of the judges so far have treated this doctrine from numerative point of view. Someone says that there are 21 basic structures, someone says for 6, someone 3 and so on. This is why no unanimity can be found among the judges as to the substance of this doctrine. If this doctrine is meant from this general or numerable sense then there creates danger.

Likewise in 8th Amendment case of Bangladesh the Judges could not come into a unanimity as to what constitute basis structure of the constitution. According to B.H. Chowdhury, J, 21 features are basic feature of our constitution. Justice Sahabuddin Ahmed has mentioned six features as basic which have been mentioned earlier.

Now we can say, there is no hard and fast rule for basic feature of the Constitution. Different judge keep different views regarding to theory of basic structure. But at one point they have similar view that parliament has no power to destroy, alter, or emasculate the ‘basic structure’ or framework of the constitution. If the historical background, the preamble, the entire scheme of the constitution and the relevant provisions thereof including article 142 are kept in mind then there can be no difficulty, in determining what are the basic elements of the basic structure of the constitution. These words apply with greater force to doctrine of the basic structure because, the federal and democratic structure of the constitution, the separation of powers, the secular character of our state are very much more definite than either negligence or natural justice. So for the protection of welfare state, fundamental rights, Unity and integrity of the Nation, Sovereign democratic republic and for liberty of thought, expression, belief, faith and worship, interpretation of judiciary is mandatory. We can say none is above constitution even parliament and judiciary.

Chapter-6

Recommendations and Conclusion

6.1 Recommendations

- i. If the amendment of the constitution is necessary must be reflect the will of the people of the Bangladesh. Because amendments to Constitutions sometimes have taken place to suit the interests of a particular person or to meet the interests of the party in power.
- ii. The referendum is essential in the case of amendment of the important article of the Bangladesh Constitution. But basic feature of the constitution cannot be amended or destroyed.
- iii. The amendment of the constitution cannot have the effect of destroying abrogating of the basic structure framework of the constitution. That means the basic structure or the essential feature of the Constitution cannot destroyed.
- iv. Every provision of the constitution can be amended provided in the result the foundation and the structure of the constitution remains the same. In the other words the basic structure of the constitution cannot be amended.
- v. If the amendment of the constitution is necessary must be maintain all the procedure which is mention in article142 of the Constitution of the People's Republic of Bangladesh.
- vi. If the constitution is amended to be followed such other procedure as the constitution prescribes.
- vii. Provision of amendment of constitution must be needed in any country because the society changes day by day.

6.2 Conclusion

It is seen from the above abstract, that a few Amendments ended at one time under certain forceful situation were consequently detached by another Amendment, and also that numerous of these had a nationwide harmony. But a only some of the Amendments were endorsed without appropriate arguments and thorough discussions concerning all the pledge holders including people adhering to diverse, sometime differing, ideological or opinionated views. Amendments that were the consequence of unsophisticated thought, lack of esteem for democratic practices or suitability have clearly come under severe disapprovals, sometimes for suitable motives and sometimes for sectarian political ideas. In conclusion, we have no hostility in enacting a new Amendment by the present or upcoming governments, but if and when this is complete, there must be occupied debates and contribution by all the political parties, intelligentsia and apprehensive citizens. Reading the doctrine of basic structure for this research proposes various models by which the doctrine may be identified and evaluated came up. The three molds used to examine the doctrine are Basic Structure and the theory of Originalism, Basic Structure acts as balancing tool, and Basic Structure as a tool of growth. The tool is used to examine some of the limitations of the basic structure doctrine in the background of weak societies and proposes a deviating and progressive approach in judicial appliances of constitutional main beliefs.

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