Sonargaon University (SU)

Research Monograph

On

"Amendability of the Constitution of Bangladesh: Reflections on the Scope of Judicial Review Power"

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Department of Law, Sonargaon University (SU)

Submitted By:

Parveen Fatema

ID-LL.M 2102023011

LL.M (1 Year)

Department of Law

Faculty of Arts and Humanities

Sonargaon University (SU)

Supervised By:

Md. Deedarul Islam Bhuiyan

Assistant Professor and Head of the Department

(Department of Law)

Faculty of Arts and Humanities

Sonargaon University (SU)

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Date -19th April'2022

To,

Md. Deedarul Islam Bhuiya

Course Supervisor

Research Monograph

Sonargaon University (SU)

Green Road , Dhaka

Subject – Letter of Transmittal

Sir,

I respectfully said that, It is great pleasure for me to submit this research on "Amendability of The Constitution of Bangladesh Reflections on the Scope of Judicial Review Power". I have tried my level best to make this thesis paper to the latest standard. I think that research paper will fulfill your requirement and pleased you.

I therefore, hope that you would be kind enough to go through research paper for evaluation. I am always being ready for clearance of any part of my research, thank you Sir.

Parveen Fatema

LL.M(1 Year)

ID-LL.M 2102023011

Department of Law

Preface

This research is the result of my many days painstaking study. In this research the study has dealt with the Amendability of the Constitution of Bangladesh, the scope of judicial review power and comparison with other countries.

This research has explained the procedure of amendment of Bangladesh Constitution, different amendment of Bangladesh Constitution, power of amendability of Bangladesh Constitution. Amending the Constitution of Bangladesh is the process of making changes to the nations fundamental law or supreme law.

This research has dealt the power of Judicial review. It investigates the origin of judicial review which portrays the heroic performance of American Chief Justice Jhon Marshall in 1803 in Marbury case. Judicial review in different in various countries in the World. The power of Judicial review is vested upon the High Court Division of the Supreme Court. This research paper provides and empirical study of the available number cases decided by the HCD of the Supreme Court of Bangladesh.

ACKNOWLEDGMENT

It is gratification for me to submit the Thesis " Amendability of The Constitution of Bangladesh Reflections on the Scope of Judicial Review Power". I hope that this research paper will fulfill your expectation. I therefore, that you would be kind enough to thought this paper this paper for evaluation.

At first, I thanks to almighty ALLAH for gave ability to make this research. The contribution and encouragement of my teacher who assisted me for this research are gratefully acknowledged. Especially I would like to thanks to my respected course Supervisor **Md. Deedarul Islam Bhuiyan** for this encouragement.

Declaration

I am Parveen Fatema, LL.M(1 Year) ID-LLM2102023011 student of Law department, Sonargaon University . hereby declare that, this research Monograph is the outcome of the investigation done my me and also prepared by myself under the supervision of **Md. Deedarul Islam Bhuiyan**, Head of Law department, Sonargaon University (SU). I also declared that this research paper or any part thereof has not been or is not been submitted elsewhere for the award of any Degree or Diploma.

Countersigned

……..

Md. Deedarul Islam Bhuiyan

Assistant Professor & Head

Department of Law

Signature

……

Parveen Fatema

(Candidate)

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Chapter 1 (Introductory Part)

1.1 Abstract

The Constitution is the guide which leads a nation to the prosperity. A modern state cannot be thought of without it. So, after nine months long blood-shedding battle in 1971, Bangladesh achieved her long-awaited independence and therefore, took an instant effort to formulate a constitution rapidly, based on the ideological spirit of the war of independence. However, to accommodate the demands and will of the people and even sometimes to fulfill the narrow interests of the rulers, Bangladesh Constitution has been amended several times. Except a few cases almost every amendment has a great political impact in the constitution. The very first amendment of the constitution about war-crimes was filled-up the hope and aspiration of the people. Indeed, the fourth, fifth, seventh and eighth amendments were enacted only achieving personal and political gain of the ruler. Moreover, reintroducing the parliament system by twelfth amendments got hail from the masses. Though the caretaker government system, is one of the finest inventions by our parties for holding general election which adopted through thirteenth amendment after long chaotic process, did not last long for mistrust and distrust. The fourteenth amendment again created suspicion in the mind of the oppositions so it became worthwhile. The most aspired and comprehensive fifteenth amendment alsoinduce d a great debate among the political parties, intellectual part, constitution experts and masses. In view of all the circumstances, it is found that almost every adopted amendment in Bangladesh Constitution failed to meet the dream and the quest of the citizens for the narrow and mean interest of the rulers at different regime. Analyzing all these amendments of Bangladesh constitution it is said that for flourishing of democracy each government must undertake such rules in the constitution through amendment which are accepted by all.

1.2 Introduction

The constitution is the supreme law of the republic. The entire legislative, executive and judicial activities of the state are guided and regulated by the constitution. In all countries here where constitutionalism prevails, ordinary men and women are more or less knowledgeable about their country's constitution and are vigilant and vocal to a man to assert and preserve the constitution and their constitutional rights. They do not leave their constitution in the hands of constitutional lawyers' judge and academicians. Each citizen is a defender of the constitution. So that it becomes almost impossible to make an open breach of it.

Article 21 of the Bangladesh constitution says that "it is the duty of every citizen to observe the constitution and the laws, to maintain discipline, to perform public duties and to protect public property."[1]

Constitutional development is no doubt an evolution of the constitution through judicial decisions, but judicial decisions on the constitution are the outcome of dedicated lawyering backed by intensive academic studies.

1

1.3 Objective of this Study

Main objective of this Thesis Paper is to observe and discuss Amendability of Constitution and the scope of judicial review power. Report focusses on various comparison with other countries Amendments. An easy procedure of amendment of the constitution is necessary for a new, idealistic and developing country like Bangladesh. Such amendments to a national Constitution can fundamentally change a country's political system or governing institutions. Such amendments are usually submitted to an exactly prescribed procedure.

1.4 Research Methodology

This study has followed an extensive of qualitative method. Qualitative research focuses on specific situations and emphasizes on words rather than number. Basically it is the research based on documentary analysis. Documentary research is almost qualitative in nature however it can be utilized both qualitative or quantitative analysis.

[1] Article 21, Constitution of People's Republic of Bangladesh

As the study demands analysis of mostly secondary data, information has been collected from various books, journals, articles, newspaper and government records etc. It has provided with comprehensive and historical information of different time which helped to get insight into what people think (especially, Constitution analyst and people of intellectual class). Moreover, this analysis is useful for corroboration of information

1.5 Hypothesis of the Study

The people of Bangladesh believe in constitutional politics, the political elites are resorting to controversy regarding the Constitution and the amendments to the Constitution with an adverse resultant impact upon the working of democracy in the country. However, in the midst of political controversies and crises Bangladesh's constitutional evolution is surviving despite a few interruptions.

1.6 Limitations of the Research

Although this research was carefully prepared, researcher is still aware of its limitations and shortcomings. In this study it is tried to analyze various books, journals, documents etc. But the materials are not sufficient and very few pertinent research works are found in this regard. Moreover, web documents on the research area are limited; even their downloading or reading subscription is too high to have. So, the non-availability of relevant materials was a limitation to this work.

Chapter 2 (Conceptual Analysis)

A typical constitutional supremacy clause characterizes the constitution as the 'highest law' of a country. Again, pitched against the concept of popular sovereignty, constitutions often occupy a lower designation, as 'higher law'[2]. Constitutional supremacy clauses however accommodate a slippery concept of the peoples' sovereignty. A claim of supremacy here rests on constitution's embodiment of the will of the people. Seen this way, a constitution's supremacy remains subject to the 'highest' will of the people. The biggest problem with this approach is that 'will of the people' is a theoretical concept not capable of perfect subtraction into a legal concept. It is hard to pinpoint exactly when the 'will of the people' changes and a "constitutional moment[3] knocks on the door. Added to this is the near impossibility to discern what exactly the 'will' itself is. Hence, a more accommodating alternative might be to take the constitution as the 'legal highest' and leave the will of the people – the 'political highest' - aside.

Amendment power and process is laced with complexity. Constitutional provisions may be 'comparatively hard', 'particularly hard', or even 'impossible' to amend. Many constitutions choose comparatively hard amendment processes and require a qualified majority of two-thirds or three-fourths in the legislature for a constitutional amendment. Some constitutions, the United States' being the most prominent, chose a particularly hard process of amendment and require some additional steps like ratification and concurrent action by institutions apart the legislature. Though no constitution so far has claimed strict unamendability for all of its contents, some jurisdictions have attempted such strategy for parts of their constitutions by introducing eternity or perpetuity clauses and, as Roznai shows, the trend is growing in this direction [4].[2]

2.1 Definition of Constitution:

A Constitution is a body of Fundamental rules, written or unwritten, which determines the organization or structure of the government, distributes powers and determines the rotations among the organs of the government. It also determines the scope and way of the exercise of essential governmental functions, regulation the sphere of the rights and liberties of the people, controls governmental organization and distribution of powers of a State; lastly it determines the provisions for amendments of the Constitution itself.

2. J. M, Balkin, Living Originalism, 59 (1st ed., 2011).

3. B. Ackerman, We the People, Volume 2: Transformations, 17-26 (1st ed., 1998).

4. Y. Roznai, Unconstitutional Constitutional Amendments: A Study of the Nature and Limits of Constitutional Amendment Powers, Thesis submitted to the Department of Law of the London School of Economics for the degree of Doctor of Philosophy, 27 (2014), available at: http://etheses.lse.ac.uk/915/, last seen on 08/06/2020. (As Roznai's groundbreaking dissertation notes, "between 1789 and 1944, only 17% of world constitutions enacted in this period included unamendable provisions .

A constitution is a set of fundamental principles or established precedents according to which a state or other organization is governed [5] These rules together make up, i.e. constitute, what the entity is. 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.

According to Rousseau, the most important of all laws "which is not graven on tablets of marble or brass but on the hearts of the citizens" is embodied in what he calls "the real constitution." It "takes on everyday new powers, when other laws decay or die out, restores and takes their place, keeps a whole people in the ways in which it was meant to go, and insensibly replaces authority by the force of habits."[6]

2.2 Historical Background [7]

In order to understand the constitutional law of a country we must not only refer to the laws and principles that exist outside the constitution, we must also acquaint ourselves with its historical background. There are usually many provisions in a constitution which can be properly understood and applied only if we know the historical facts which led to the adoption of the scheme and the formation of those provisions of the constitution.

2.3 Partition of India [8]

India was being governed by the government of India Act 1935 when it was partitioned in 1947. This Act provided for a federal parliamentary form of government, though the Governor General was the repository of power as the representative of the British sovereign. While partitioning the country, the British parliament amended this Act and passed the Indian

Independence Act, 1947 creating two dominions- India and Pakistan and two constituents Assemble for the two Dominions.

3

2.4 Delay in framing constitution in Pakistan [9]

The constituent assembly of India promptly enacted a constitution which came into operation in January 1950. The constituent assembly of Pakistan could not complete its work for quite a long time. In 1950 the Prime Minister, Liaquat Ali, was murdered. Khawaja Nazimuddin, who became the Governor General on the death of M.A. Jinnah, became the Prime Minister and Ghulam Mohammad, an ex-civil servant holding the office of Finance Minister, became the Governor General. In April, 1953 Ghulam Mohammad

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5. TheNew Oxford AmericanDictionary, ,Second Edition., Oxford University Press,2005, p-279

6. Quoted in Carl J. Friedrich, Constitutional Government and Democracy, , Oxford & IBH publishing Co. NewDelhi,1974, p-155

7. https://assignmentpoint.com/thesis-on-amendments-of-bangladesh-constitution

8. ibid

9.ibid

dismissed Khawaja Nazimuddin and his cabinet. He appointed Mohammad Ali of Bogra as the Prime Minister. Under the circumstances, Ghulam Mohammad, only a titular head, had no constitutional authority to dismiss the Prime Minister and to assume the role of a sovereign.

2.5 Dissolution of Constituent Assembly [10]

Ultimately the making of the constitution reached the final stage. The draft constitution based on the objectives Resolutions adopted by the constituent Assembly had been prepared with the assent of the leaders of various political parties in the constituent Assembly. The Prime Minister announced that the constitution for Pakistan would be pat into operation in December 1954.

2.6 S.19 of the Government of India Act, 1935 [11]

S.19 of the Government of India Act, 1935 as originally enacted, confessed power on the Governor General to dissolve the federal legislature, while amending the Act to bring it in line with the Indian Independence Act, this power of dissolution was omitted from S.19. Tamizuddin Khan, the president of the constituent Assembly, filed a writ petition under S/223-A of the Government of India Act in the Sind Chief Court Challenging the dissolution of the Constituent Assembly Mainly on the ground that the Governor General had no power of dissolution.

2.7 Constitution of 1956 [12]

East Pakistan had a population larger than the population of the four provinces off West Pakistan taken together. East Pakistan was entitled to a larger representation in the federal legislature. In order to avoid the situation, the four provinces of West Pakistan were merged into one province of West Pakistan and the principle of parity between the two units of Pakistan was introduced. The new Constituent assembly adopted a constitution based on the[4]

principle of parity. In the meanwhile, Iskander Mirza succeeded Ghulam Mohamrnad as the Governor General He refused to assent to the constitution unless. the members of the [5]Constituent Assembly agreed to make him the President and he became the first President of Pakistan using the threat.

2.8 Martial Law of 1958 and demise of the constitution [13]

Though the constitution came into operation in March, 1956, no election was held under it to compose the federal legislature with the representatives directly elected by the people.

10.ibid

11. ibid

12. ibid

13. ibid

When it was decided that an election would be held in 1959, Iskander Mirza had little chance of being elected as the President by the newly elected federal legislature. He with Ayub Khan abrogated the constitution, dissolved the National and Provincial Assemblies and imposed Martial Law throughout the country by a Proclamation on 7 October 1958. Ayub Khan was appointed the Chief Martial Law Administrator. On 1.0 October 1958 Iskander Mirza issued the Laws (Continuance in Force) Order which provided that notwithstanding the abrogation of the constitution and subject to any order of the President or Regulation made by the Chief Martial Law Administrator, the country would be governed as nearly as may be in accordance with the abrogated constitution. On 13 October 1958 the now famous case of State v. Dosso"1 came up for hearing before the Supreme Court

2.9 Constitution of 1962, its demise and birth of Bangladesh [14]

Ayub ban set up a Constitution Commission to make recommendations for the future constitution of the country. Even though no election was held under the constitution of 1956 to give the parliamentary form of government prescribed by that constitution a fair trial, the Commission was asked to find out the causes of failure of parliamentary form of government. The constitution framed by him came into operation on 7 June 1962. This constitution of 1962 introduced a system which was euphemistically called a presidential form of government even though the normal checks and balances of such a form of government to prevent one-man rule were not incorporated in the constitution. It, in fact, prescribed an authoritarian rule by one who occupied the position of the President. The President and the members of the National and Provincial Assemblies were to be elected by the members of the Electoral College who were to be elected by the people.

Towards the end of 1968, an agitation was started ail over Pakistan by the main political parties-against the despotic rule of Ayub Khan and-the undemocratic constitution imposed by him. The agitation gathered momentum day by day and was accompanied by wide-spread disturbances- throughout the country. On 31 March 1969 Yahya Khan promulgated the Provisional Constitution Order which substantially followed the pattern of the Laws

(Continuance in Force) Order, 1958. On 30 March 1970 Yahya Khan promulgated the Legal Framework Order and under its provision's elections were held in December, 1970 to the National and Provincial Assemblies on the basis of adult franchise. After a good deal of political manoeuvring, a session of the National Assembly was summoned by Yahya Khan on 3 March 1971 at Dhaka. But the Peoples Party led by Z.A. Bhutto which emerged with majority seats in West Pakistan refused to attend the session at Dhaka and Yahya Khan postponed the session indefinitely. The Awami League led by Sk. Mujibur Rahman which won almost all the seats in East Pakistan and held a clear majority in the National Assembly reacted sharply and in protest of the action taken by Yahya Khan virtually took over the administration in East Pakistan. To meet the situation, Yahya Khan had talks with

[6]the important political leaders in Dhaka which subsequent events clearly indicated was a ruse. The ruling junta really intended to take serious military action in East Pakistan to suppress all dissidents for all times. Yahya. Khan started his military action with unprecedented brutality, gunning down hundreds of innocent people in Dhaka and other places in East Pakistan in the night of 25 March 1971. The people of East Pakistan took this as an act of betrayal. Sk. Mujibur Rahman "made a declaration of independence at Dacca on March 26 1971,and urged the people of. Bangladesh to defend the honour and integrity of Bangladesh".1 Thousands took up arms to fight against the Pakistani Armed Forces to liberate the country, Bangladesh. The members' of the National and Provincial Assemblies elected in the 1970 election from East Pakistan proclaimed independence of Bangladesh on 10 April 1971 and formed the Government .of Bangladesh with Sk. Mujibur Rahman then in custody in Pakistan, as the President and Syed Nazrul Islam as the Acting President till the release of Sk. Mujibur Rahman. [14]

2.10 Independence of Bangladesh [15]

The war of liberation continued for about nine months, at the end of which war broke out between the Pakistan Armed Forces on the one side and the Indian Armed Forces and the Bangladesh Freedom Fighters on the other. On 16 December; 1971 the Pakistan Armed Forces surrendered and Bangladesh became fully liberated.[7]

2.11 Constitution of Bangladesh, 1972 [16]

Sk. Mujibur Ranman was released by the Government of Pakistan in January, 1972 and he returned to Dhaka on 10 January 1972. The next day he, in his capacity as the President of Bangladesh, issued the Provisional Constitution of Bangladesh Order, 1972[2] providing for a parliamentary form of government in the interim period2 and constituting the Constituent Assembly with the members of National Assembly and East Pakistan Provincial Assembly [8]who were elected by the people of East Pakistan in December 1970 for giving, the country a democratic constitution. The Constituent Assembly adopted a constitution which came into operation on 16 December 1972, exactly one year after the liberation of Bangladesh.

14. ibid

15 ibid

16.ibid

2.12 Features of the constitution of 1972 [17]

- **Origin and character:**

The Constitution of Bangladesh is hot the outcome of a negotiated settlement with a former colonial power, nor drawn. up with the concurrence or approval of any external sovereign power. It is the fruit of a historic war of independence making it a class apart from other constitutions of comparable description. In the Constitution the people feature as the dominant actors and it is a manifestation of what is called 'the people's power'.

- **Sovereign Republic:**

The Constitution established Bangladesh as a sovereign unitary Republic. It created one government composed of representatives chosen by the people in contrast to the rule of one man, as in kingship, or one class of men, as in aristocracy. The term 'sovereign' indicates that Bangladesh is subject to no external authority and the term 'Republic' denotes that the Head of the State is not a monarch, but an elected functionary. The Constitution declares that the sovereignty lies with the people and the Constitution is the embodiment and solemn expression of the will of the people.

- **Preamble and Fundamental Principles of state Policy:**

Having regard to the constitutional misadventures of the past and usurpation of power by unauthorised persons, the framers of the Constitution thought it necessary to spell out the objectives of the Constitution in the preamble in some detail. Declaring the people to be the source of power and the Constitution, the preamble referred to the national liberation struggle and pledged that the high ideals of nationalism, socialism, democracy and secularism shall be the fundamental principles of the Constitution, The Constitution sought to establish a welfare State and the preamble declared the fundamental aim of the State to be the realization through democratic process of a socialist society, free from exploitation– a society in which the rule of law, fundamental human rights and freedom, equality and justice would be ensured.

- **Territory:**

The Constitution defined the territory of the; Republic be the territories which immediately before the proclamation of independence constituted the territory of East Pakistan and such other territories as may become included in the Republic. When Bangladesh entered into an agreement with India giving up its claim to Berubari and retaining Dahagram, the Appellate Division held that the agreement involved cession of territory which could not be

done except by constitutional amendment. As a result, the Constitution (Third Amendment) Act, 1974 was passed to give effect to the agreement.[9]

- **Supremacy of the Constitution:**

The Constitution declared the "supremacy or the Constitution and sought to establish a limited government in the sense that every authority in the Republic had power prescribed and limited by the Constitution.

- **Separation of powers:**

The Constitution provided for separation of powers between the three organs of the State – executive, legislature and judiciary. It was not a separation of powers of the type practised in the American jurisdiction. What the Constitution did can be said to be an assignment or distribution of different powers of the Republic to the three organs and it provided for separation of powers in the sense that no one organ could transgress the limits set by the Constitution.[10]

- **Fundamental rights:**

The Constitution enumerated a number of rights as fundamental rights and no law could be made which was inconsistent with these rights and no action could be taken by the government in derogation of such rights. To that extent, the power of Parliament and the [11]executive was limited. However, certain laws were set apart which could not be challenged on the ground of violation of fundamental rights.

- **Parliamentary form of government:**

The Constitution introduced a parliamentary form of government with the President of the Republic as the constitutional head elected by the members of Parliament. The members of Parliament were to be directly elected by the-people on the basis of adult franchise. The President would appoint a member of Parliament who commanded the support of the frivolity of the members of Parliament as the Prime Minister and would appoint ministers on the recommendation of the Prime Minister. The executive authority of. the Republic vested in the Prime Minister who, and also the Cabinet, were responsible to Parliament and through Parliament to the ultimate sovereign, the people.

- **Local government:**

17. ibid

The Constitution stipulated that the State encourage local government institutions composed of the representatives of the area concerned and that the Republic shall be a democracy in which effective participation by the people through their elected representatives in administration at all levels shall be ensured.

- **Judicial review:**

The guardianship of the Constitution was given the Supreme Court. The Supreme Court. The Supreme Court was given the power of judicial review. Save in some specified situation, the Supreme Court, in exercise of that power, could not only review the State actions to ensure that it did not contravene any provision of the constitution or the laws of the land, but also could strike down any law for inconsistency with any provision of the Constitution including the provisions guaranteeing fundamental rights.

- **Independence of judiciary:**

For guardianship of the Constitution and for the establishment of rule of Saw independence of judiciary is necessary. Provisions were made to ensure the independence of the Judges of the Supreme Court, subordinate judicial officers and the magistrates exercising judicial functions.

- **Election:**

To ensure free and fair election which is an indispensable pre-requisite for the success of democracy, the Constitution- provide for an independent Election Commission upon which the duty of holding election of the President and the members of Parliament was cast.

- **Civil Service:**

The civil service maintains the continuity of the government and the success of the government to a great extent depends on the efficiency of the civil service. So, to ensure recruitment of efficient persons in the services of the Republic, the Constitution provided for public service commissions. To obtain the best service it is necessary to have secure and satisfied civil servants and the Constitution guaranteed equality of treatment and security of tenure to them.[12]

17. ibid

Chapter 3
Nature and scope of amendment of Bangladesh constitution.

3.1 Amendment

Amendment, in government and law, an addition or alteration made to a constitution, statute, or legislative bill or resolution. Amendments can be made to existing constitutions and statutes and are also commonly made to bills in the course of their passage through a legislature[18] Since amendments to a national constitution can fundamentally change a country's political system or governing institutions, such amendments are usually submitted to an exactly prescribed procedure.

3.2 Constitutional Amendment:

A **constitutional amendment** is a modification of the constitution of a polity, organization or other type of entity. Amendments are often interwoven into the relevant sections of an existing constitution, directly altering the text. Conversely, they can be appended to the constitution as supplemental additions (codicils), thus changing the frame of government without altering the existing text of the document [19]

3.3 Amendments to the Constitution of Bangladesh:

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.

The Constitution of Bangladesh was written by international personals and other experienced people. However, amendments during socialist one party and military rule in Bangladesh drastically changed the material and moderate democratic character of the constitution. In August, 2005, the Bangladesh High Court approved a pointer finding that states constitutional amendments in military ruling as unlawful and also unconstitutional, so completely invalid. In January 2010, after several protest the Bangladesh Supreme Court eventually agreed that the famous judgment of the High Court will be upheld. [13]

Parliament was given the power to amend the constitution. Art.142 provided for a special procedure for such amendment and prescribed that no Bill for amendment should be presented to the President unless it was passed by the votes of not less than two-thirds of the total number of members of Parliament.[14]

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18. https://www.britannica.com

19.https://en.m.wikipedia.org>wiki

3.4 Amendment of the Constitution of Bangladesh, 1972

According to the article 142(1) Notwithstanding anything contained in this constitution:

a) Any provision thereof may be amended by way of addition, alteration, substitution or repeal by Act of parliament [20]

So, to adopt with the changing situation or to make contemporary the provision of amendment is inserted. Because, the law maker of the constitution does not know or assume what will happen in future. So, to improve existing law/arrangement this provision is inserted.

3.5 Procedure of Amendment:

- According to our main constitution article 142. If we want to change any provision, we have to bring a bill writing what articles are changed.
- According to main constitution it is needed the support of 2/3 majority of the total number of parliaments to amend any article. In 1978, The president Ziaur Rahman said to change some articles, it is not enough the support of 2/3 but it is also needed referendum. Those are preamble, article, 142a (ii) [21]

15

20. Article 142(1), Constitution of People's Republic of Bangladesh

21 Article 142a (ii) Constitution of People's Republic of Bangladesh

3.6 Amendment Power in Bangladesh: Trichotomy of Basic Structure, Unamendability and Referendum:

The Parliament of Bangladesh is given both plenary legislative power [22] and the power of constitutional amendment [23]. The original constitution of 1972 contained no limitation whatever on the parliament's power of amendment. Amendment could be made through a Bill passed by two thirds majority of the members of Parliament. Article 142 being the sole repository of amendment power, there could be no extra-constitutional route to amendment [24] The military regimes of 197579 and 1982-1986 however, frequently took the extra-constitutional routes.

A series of martial law orders, regulations and proclamations amended the constitution as per the sweet will of the martial law administrators. Thereafter all those 'amendments' were placed as two packages before second and third parliaments which approved the packages though the Fifth and Seventh Amendments respectively In the Fifth Amendment, a system of referendum was installed within the amendment process As per the new formula, amendments in the Preamble or some other articles consolidating the presidential system vis-a-vis the Prime Minister and cabinet and the parliament would require referendum in addition to a two-thirds majority in parliament. Though it was told expressly, the newly installed referendum system treated some articles, some of which were controversial as more 'fundamental' than the other articles of the constitution.

Later, the Fifth Amendment was invalidated by the Supreme Court of Bangladesh. The High Court Division judgement in the Fifth Amendment case specifically dealt with the referendum clause:

[16] Addition of clause (1A) was craftily made. In the one hand the President and the Chief Martial Law Administrator was not only merrily making all the amendments in the Constitution of the People's Republic of Bangladesh according to his own whims and caprices by his order…but at the same time, made provision in Article 142 itself in such a manner so that the amended provisions cannot be changed even by the two thirds majority members of the parliament short of a referendum. In short, by executive order of one person, amendment of the Constitution can be made at any time and in any manner but even the two thirds majority of the representative of the people cannot further amend it. We are simply charmed by the sheer hierocracy of the whole process [25]. (Emphasis supplied)

It seems that the High Court Division was questioning the hierocratic manner in which the

22. Art. 142, the Constitution of Bangladesh (Parliament is empowered to amend the constitution by of addition, alteration, substitution or repeal subject to the procedure and conditions laid down in this Article).
23. The original constitution of 1972 contained no limitation whatever on the parliament's power of amendment. Amendment could be made through a Bill passed by two-thirds majority of the members of Parliament. Article 142 being the sole repository of amendment
24. See R. Albert, Constitutional Amendment by Stealth, 60 McGill Law Journal 673, 678 (2015).
25. Bangladesh Italian Marble Works Ltd v. Bangladesh, 14 (2006) BLT (Spl) (HCD) 1, 199 (High Court Division of Bangladesh Supreme Court). See M. J. A. Chowdhury, Negotiating article 142(1)(A) for Basic Structure, The Daily Star 12 (Dhaka, 06/03/2010).

referendum clause was inserted and entrenched in the constitution, i.e., through a military chief's orders and proclamations etc. While the High Court Division did not test the substantive concept of referendum as such, the Appellate Division judgment on the Fifth Amendment also did not deal with the referendum clause specifically. It did however approve the High Court Division's nullification of the referendum clause. The Fifteenth Amendment Act of 2011, which followed the Supreme Court verdict in the Fifth Amendment case, deleted the referendum clause and revived the original format of Article 142 i.e., amendment through two-thirds majority [26] only.

The Fifteenth Amendment, however created another problem of its own. By inserting a new Article 7B in the constitution, it made a large part of the constitution totally unamendable. Prior to that, the doctrine of basic structure was explicitly embraced by the Supreme Court of Bangladesh in its 1989 Anwar Hossain Chowdhury decision [27]. The doctrine claims that certain provisions and principles constitute the basic structures of the constitution and are therefore unamendable. Now, the Fifteenth Amendment has added a large number of specific articles in the unamendability list. It also included other unspecified 'basic structures' to list of unamendability. [17]

26. Like the question over the High Court Division's invalidation of the referendum clause, it may also be asked whether the parliament could remove the referendum clause in 2011 by a mere two-thirds majority while the twelfth amendment of 1991 required a further referendum to amend the referendum clause. While these fundamental issues require elaborate theoretical and doctrinal exposition, scope of the present article confines us to the effect of the fifth amendment judgement and the fifteenth amendment act rather than process and rationality of those.

27. Anwar Hossain Chowdhury v. Bangladesh, (1989) 18 CLC (AD) 1.

3.7 Understanding Amendment Power vis-à-vis the Unamendable Clauses –

There are debates as to whether amendment power is a 'constituent' power or a 'constituted' one [28] . Constituent power is the highest political sovereignty that works as an extralegal grandmom whose legitimacy is taken for granted [29] Constituted power on the other hand is secondary and derivative. It draws its authority from the constituent power and must conform to it. Amendment power has been inconsistently described as 'constituent power' and/or 'constituted power'. Holmes and Sunstein write that amendment power:

….inhabits a twilight zone between authorizing and authorized powers. The amending power is simultaneously framing and framed, licensing and licensed, original and derived, superior and inferior to the constitution [30] . [18]

28. Carl Schmitt's Constitutional Theory, 71-75, 141-46 (Jeffrey Seitzer, 2008); M. Loughlin, On Constituent Power, 151, in The Political Construction of the State (Michael W. Dowdle and Michael A. Wilkinson, 2017); Sieyes, What is the Third Estate?, 124 (1963); C. Pfenninger, Reclaiming Sovereignty: Constituted and Constituent Power in Political Theory, E-International Relations, available at https://www.e-ir.info/2015/01/12/reclaiming-sovereignty-constituted-and-constituent-power-in-political-theory/CHRISTIAN PFENNINGER, last seen on 09/06/2020

29. J. Raz, Kelsen's Theory of the Basic Norm, 19(1) The American Journal of Jurisprudence 94, 95 (1974)

30. S. Holmes, and C.R. Sunstein, The Politics of Constitutional Revision in Eastern Europe, 275, 276 in Responding to Imperfection: The Theory and Practice of Constitutional Amendment (Sanford Levinson, 1995).

Sieyes claimed that constituent power is unlimited, unrestricted and free from all prior bondages and is always subject to reclamation [31]. Doyle argues that constituent power should be seen as a capacity (power) rather than an entity (bearer of power) [32] Entity based understanding of constituent power insists that only one entity - the people, can exercise it [33] Capacity based understanding, on the other hand, would look for whether an entity (revolutionary force, legislature or military for example) can successfully create a new constitution by breaching the existing one. If the new constitution so brought forth is perceived by the people as serving their interest, there should be no reason to deny that the concerned entity has exercised its constituent power. On this count, exercise of amendment power may qualify as a constituent power in suitable cases e.g., where the legislature drastically alters its own sphere of competence [34].[19]

A contrary view of the amendment power, however, describes it as a constituted power. According to this view, the constituent power is laid to rest once its job of constituting the original constitution is over. Thereafter, every entity works under the constituted system [35] Since the legislature's amendment power is part of the system as constituted, it cannot claim an authority beyond its boundary. On this basis, Schmitt argues that an amendment cannot eliminate the constitution nor can it annihilate the constitution by stripping off its essential identities. Tribe also echoes the tune that amendments may not alter fundamental values of the constitution to such an extent that may tantamount to regime change or revolution or create inconsistency within the regime. Amar also recognizes 'a seemingly paradoxical exception' to amendability and claims that the 'inner logic' of the constitution calls for entrenchment of certain [U.S. first amendment, for example] values. Entrenchments of constitutional norms through eternity clauses (explicit limits on amendment power) or basic structure doctrines (implicit limits on amendment power) or transnational norms (supra-constitutional limits on amendment power) are therefore not devoid of reasoning.

31. Y. Roznai, Towards a Theory of Unamendability, New York University Public Law and Legal Theory Working Paper Series, 8, Working Paper Number 515, New York University School of Law (2015).

32. O. Doyel, Populist Constitutionalism and constituent power, 20(2) German Law Journal 161, 166-71 (2019).

33. Ibid, at 169.

34. Ibid, at 170

35. U. K. Preuss, The Exercise of Constituent Power in Central and Eastern Europe, 220 in The Paradox Of Constitutionalism: Constituent Power and Constitutional Form (M. Loughlin and N. Walker., 1st ed., 2007).

All the four Appellate Division judges, including the dissenting judge, sitting in Anwar Hossain Chowdhury v Bangladesh have agreed that amendment power is a limited power, though they varied on the question whether amendment power is a constituent power or not. Justice Badrul Haider Chowdhury apparently refused the constitutional amendment any higher status in terms of its 'constituent' character. Relying on the constitutional supremacy clause in Article 7(1) of Bangladesh constitution, Justice Chowdhury would see the constituent power, if there be any, belonging only to the 'people'

All powers in the republic belong to the people. This is a concept of Sovereignty of the people. Sovereignty lies with the people not with executive legislature or judiciary - all these three are creations of the Constitution itself [36] (Emphasis supplied)

While finding that amendment power was not a constituent power, Justice Chowdhury did not specifically say whether it is a constituted power instead. Amendment power is elevated from the ordinary law-making power in so far as article 142 of the constitution 'enables' it to bring changes in, short of swallowing up, the constitution:

[Article 142] merely confers enabling power for amendment but by interpretative decision that clause cannot be given the status for swallowing up the constitutional fabric [37]

Similarly, Justice M H Rahman would not articulate the amendment power as either constituent or constituted one. He would rather see the amendment power as one limited by the constitutional fabric e.g., the rule of law.

I am, however, striking down the amendment not on the ground of uncertainties or irreconcilability of the existing provisions with the amended provisions as such, but on the ground of the amendment's irreconcilability with the rule of law, as envisaged in the preamble, and, in furtherance of which, Articles 27, 31,32,44,94 to 116A were particularly incorporated in the Constitution [38] .

Compared to Justice Chowdhury and Justice Rahman, Justice Shahabuddin Ahmed's view on amendment power is more explicit. Justice Shahabuddin was reluctant to accept the amendment power as a constituent power in its primary or original sense. He would rather accept it as derivative constituent power at best:

As to the 'constituent power', that is power to make a constitution, it belongs to the people alone. It is the original power. It is doubtful whether it can be vested in the Parliament, though opinions differ. People after making a constitution give the Parliament power to amend it in exercising its legislative power strictly following certain special procedures. … Even if the 'constituent power' is vested in the Parliament the power is a derivative one and the mere fact that an amendment has been made in exercise of the derivative constituent power will not automatically make the amendment immune from challenge. (Emphasis supplied) [39] [20]

36, Supra 19, at ¶ 166 (Justice Badrul Haider Chowdhury).
37. Ibid at ¶ 184 (Justice Badrul Haider Chowdhury).
38. Ibid, at ¶ 523 (Justice M. H. Rahman).
39. Ibid, at ¶ 381 (Justice Shahabuddin Ahmed).

Justice Badrul Haider Chowdhury's endorsement of amendment power as derivative constituent power was picked up by the dissenting judge Justice ATM Afzal. Justice Afzal rejected the argument of one of the lawyers who asked the court to see the parliament's amendment power at par with its constituted power of law making:

It becomes difficult to agree with him having regard to the views expressed by judges and Jurists as to the position and quality of a law which is enacted under the constituent power of a Parliament even though it is a derivative power and [also] the position of Constitutional law, in relation to ordinary law made under ordinary legislative process [40] (Emphasis supplied)

Concluding the discussion of this part, it appears reasonable to say that the basic structure judgments of both the Indian and Bangladeshi Supreme Courts see amendment powers as secondary or derivative constituent power which is higher than the legislature's constituted power of ordinary law making but lower than the peoples' original constituent power of repealing or replacing the constitution or altering its essential basic characteristics.

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40. Ibid, at ¶ 594 (Justice A.T.M. Afzal).

3.8 Constitutional Amendment:

So far there has been 17amendments to the constitution of Bangladesh. Detail discussion will follow here a summary of all the amendments.

3.9 Summary of 14 Amendments: [41]

Amendments	Date	Summary of substance
1st Amendment	15th July 1973	To make way for prosecution of genetic crime against humanity and war crimes committed in the liberation war of 1971.
2nd Amendment	22nd September, 1973	Inclusion emergency provision suspension of fundamental rights and preventive detention.
3rd Amendment	28th November 1974	To give effect to the boundary line treaty between Bangladesh and India.
4th Amendment	25th January, 1975	One party dictatorial system was subsisted for a responsible parliamentary system.
5th Amendment	6th April, 1979	Legalising all acts done by the first Military Authority
6th Amendment	10th July, 1981	To make way for the Vice President to be a candidate in president election.
7th Amendment	10th November, 1986	Legalising all acts done by the 2nd Military Authority.
8th Amendment	9th June, 1988	Setting up six permanent Benches of the High Court Division and making 'Islam' the state religion.
9th Amendment	11th July, 1989	Direct election of the president and the Vice-President simultaneously.
10th Amendment	23rd June, 1990	Period for reservation of 30 women members seats in the parliament was extended for 10

		years.
11th Amendment	10th August 1991	Legalising the appointment of Shahabuddin Ahmed, Chief Justice of Bangladesh as Vice President of Bangladesh and his all activities as the Acting President and then the return to his previous position of the Chief Justice of Bangladesh.
12th Amendment	18th September, 1991	Reintroducing the parliamentary system.
13th Amendment	28th March, 1996	Provision for Caretaker Government.
14th Amendment	16th May 2004	Provision regarding women in the parliament
15th Amendment	30th June 2011	• Increased number of women reserve seats to 50 from existing 45. • After article 7 it inserted articles 7(a) and 7(b) in a bid to end takeover of power through extra-constitutional means. • Restored secularism and freedom of religion. • Incorporated nationalism, socialism, democracy and secularism as the fundamental principles of the state policy. • Acknowledged Sheikh Mujibur Rahman as the Father of the Nation.
16th Amendment	22nd September 2014	Empowering the Parliament to remove Judges or establishing the Government control over the Judiciary.
17th Amendment	8th July 2018	According to 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 2014.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.



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41, https://assignmentpoint.com/thesis-on-amendments-of-bangladesh-constitution/

Chapter – 4 (Judicial Review and Scope of Judicial Review)

4.1 Judicial Review:

Judicial review is a process under which executive, legislative and administrative actions are subject to review by the judiciary. A court with authority for judicial review, may invalidate laws, acts and governmental actions that are incompatible with a higher authority: an executive decision may be invalidated for being unlawful or a statute may be invalidated for violating the terms of a constitution. Judicial review is one of the checks and balances in the separation of powers: the power of the judiciary to supervise the legislative and executive branches when the latter exceed their authority [42] 23

Again, the term, "Judicial Review" may be included impliedly within a constitution. The typical example of such Constitution is the Constitution of the People's Republic of Bangladesh. Here this term has not been mentioned even for once. But the articles 7(2), 26, 44(1) & 102 of the Bangladesh Constitution indirectly support the Judicial Review system [43] A recent example of the exercise of this review power would be the High Court's decision to scrap the 16th amendment of the Constitution that empowered the Parliament [by articles 96(2) & 96(3)] to impeach Supreme Court judges for incapacity or misconduct [44] The Court declared the amendment illegal & unconstitutional and against the principle of separation of powers & the independence of the judiciary. This decision was also upheld by the Appellate Divisio.

42, https://en.wikipedia.org/wiki/Judicial_review
43. Article 7(2), 26, 44(1) & 102Constitution of People's Republic of Bangladesh

44. Article [by articles 96(2) & 96(3)]Constitution of People's Republic of Bangladesh

4.2 JUDICIAL REVIEW IN BANGLADESH:

Judicial review is the power of the court to review laws and determine whether or not they are unconstitutional. The Judiciary Act of 1789 stated that all citizens of the United States are "separate but equal", referring to segregation.

A Uniform system is exercised by the High Court of its supervisory jurisdiction over inferior courts, Tribunals and public bodies and persons. Upon application to the High Court for judicial review the remedies available are orders of mandamus, prohibition or certiorari a declaration or injunction an injunction restraining a person acting in a public office when not entitled to do so.

The remedy of judicial review is concerned not with the decision of parliament but review is sought with the decision-making process by the Supreme Court.

Bangladesh is unitary independent sovereign, Republic to be known as the people's Republic of Bangladesh and by nature, man is rational as well as animal being and they live together in the society depending upon each other to fulfil their needs for survival. As Social beings, men express their nature by creating and recreating an organization which guides and control their behaviors in many ways.

Judicial review of administrative action is perhaps the most important development in the field of public law in the second half of this century. This is the most potent weapon in the hands of the judiciary for the maintenance of the rule of law.

Generally Judicial Review means the power of the courts to review the legislative and executive action and determine their validity. Courts exercise such power on the basis that powers can be validly exercised only within their true limits and a public functionary is not to be allowed to transgress the limits of his authority conferred by the constitution or the law.

Article 105 of the Constitution of the People's Republic of Bangladesh provides that subject to the provisions of an Act of Parliament and any rules made by it, the Appellate Division may review its own judgment or order [45] When the court exercise the law of the Government not his work then the question arises of judicial review. The principal ground when and by what the judicial review may exercise —by following points.

(1) Ultra vires

(2) Abuse of discretionary power

(3) Proportionality.

(4) Legitimate expectation.

(5) Unreasonable exercise of power.

(6) Estoppels

(7) Illegality.

1. Natural justice
2. Right to reason
3. Rule against bias
4. Fairness.
5. Jurisdiction.

(8) Justifiability.

(E) Interpretation.

Primary and strict view: Judicial review of law made by the legislature; the judiciary has to power to examine the constitutionally of laws made by the legislative. [24]

Broader and liberal view:

(1) Judicial review of made by the legislature,

(2) Judicial enforcement of fundamental right.

(3) The judicial reviews of administrative action are goes under the provisions of constitution and also the judicial review of administrative action are goes under the provision of stationary law.

(4) Judicial review also delegated legislation.

In the sense of constitutional supremacy: Pertinent cannot make any law to avoid the constitution. It the legislative passed such law than the Supreme Court may void these types of law. The concept of judicial review is first coming from U.S.A. and the case was Marbiry VS. Medison. The US Constitution does not say that it the supreme law of land and not does this constitution confers on the Supreme Court power to declare a law ultra vires.

45. Article [105] Constitution of People's Republic of Bangladesh

Judicial Review in the sense of parliamentary supremacy:

(1) Judicial review of administrative actions under provision of statutory bus.

(2) Judicial review of delegated legislation.

In the sense of parliamentary supremacy only the court observed that weather the law is in consist with present law or not.

But in the kind of constitutional Supremacy every action of law can be challenge.

Case Law : A. Farzand Ali vs. West Pakistan; 22 DLR (1970) 203. [46]

> The power of judicial review of superior courts is a matter of constitutional conformant in our country and it cannot be taken away or abridged by ordinary legislation.

Anwar Hossain Chowdhury vs. the State; 1989 BLD (Special Issue) [47]

Judicial Review is a basic feature of the Constitution and as such cannot be taken away of control over by government of the constitution."

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Again, the term, "Judicial Review" may be included impliedly within a constitution. The typical example of such Constitution is the Constitution of the People's Republic of Bangladesh. Here this term has not been mentioned even for once. But the articles **7(2), 26, 44(1) & 102** of the Bangladesh Constitution indirectly support the Judicial Review system [48] A recent example of the exercise of this review power would be the High Court's decision to scrap the 16th amendment of the Constitution that empowered the Parliament [by articles **96(2) & 96(3)**] to impeach Supreme Court judges for incapacity or misconduct. The Court declared the amendment illegal & unconstitutional and against the principle of separation of powers & the independence of the judiciary. This decision was also upheld by the Appellate Division. (**Read Highlights of Appellate Division's Judgment on 16th Amendment**)

46. Case Law : A. Farzand Ali vs. West Pakistan; 22 DLR (1970) 203.

47. Anwar Hossain Chowdhury vs. the State; 1989 BLD (Special Issue)

48. articles 7(2), 26, 44(1) & 102

B. **In *Kudrat-e-Elahi v. Bangladesh*, 44 DLR (AD) 319** [49] Mustafa Kamal J held that even Constitutional Amendments fall within the definition of 'any other law' referred to in Art. 7(2) of the Constitution (Para 84) thus is subject to judicial review. Although, according to the law minister the High Court did not have the jurisdiction to deliver this verdict and for that the Government have decided to challenge the HC decision at the Appellate Division of Supreme Court. As the object of Judicial Review is to ensure that the authority does not abuse its powers and being the guardian of the Constitution of the land, it is now up to the Appellate Division to decide this case and declare its final judgement which will bound to be followed in all the spheres of administration.[26]

According to Chief Justice John Marshall:

"Judicial Review is the power given to Supreme Court justices in which a judge has the power to reason whether a law is unconstitutional or not. Chief Justice John Marshall initiated the Supreme Court's right to translate the Constitution in 1803 following the case of Marbury vs. Madison, in which he declared the Supreme Court as the sole interpreters of Constitutional law. This is one of the sole purposes of the Supreme Court of the United States. Many Historical thinkers would find some difficulty in imagining a government set up to limit the power of itself, but others would argue that this form of government best works for the people, and not against them. The treatment of the Constitution by the Supreme Court as a "living" document that is able to be translated differently over time for the good of the people has as many sceptics as it does supporters."

4.3 Judicial review in other countries:

The Supreme Court's principal power is judicial review the right of the Court to declare laws unconstitutional. This authority is not expressly stated in the Constitution. The Supreme Court has exercised judicial review since 1803, when Chief Justice John Marshall first announced it in Marbury v. Madison. Marshall deduced the necessity of such a power from the purpose and existence of the Constitution. He reasoned that judicial review was necessary to implement the Constitution's substantive and procedural limits on the government. Judicial review is both a powerful and controversial tool because it allows the Supreme Court to have the ultimate word on what the Constitution means. These permits the Court justices are appointed rather than elected—to overrule decisions already made by Congress and legislatures throughout the country.

Case Law - Marbury v. Madison:

The Marbury vs. Madison case resulted in the most important Supreme Court decision in history. The court's ruling established the power of judicial review, solidified the Constitutional system of checks and balances, strengthened the power of the federal government, and made the Judiciary an equal partner with the Legislative and Executive branches of government. Supra 49, at 14-18. Minerva Mills Ltd. and Ors. v. Union of India and Ors, AIR 1980 SC 1789. In the Election, Thomas Jefferson and his anti-federalist Republican Party defeated the incumbent John Adams and the Federalist Party. The Republicans also in Congress In an effort to keep at least one branch of the government under Federalist control Congress passed the Judiciary Act

49. In Kudrat-e-Elahi v. Bangladesh, 44 DLR (AD) 319

of 1801 in a lame- duck session. The bill reformed a 1789 statute and created many new judgeships. Adams nominated judges and the Senate confirmed them. Adams then stayed up until long after midnight on March3, 1801 his last full day in office, signing commissions that put fifty-nine loyal Federalists in office. These were the so-called "midnight judges." In the final weeks before Jefferson took office, John Marshall was Secretary of State and Chief Justice simultaneously.

Even with Marshall's suppression of this states' right of review. Even at the time that the case was decided, it was insignificant because Marbury's term as justice would have the time the Court was ready to consider it. Four of the uncommissioned justices of the peace, including William Marbury, sought a writ of mandamus, or order directing Madison to deliver the commissions. The idea came up as the nullification controversy of Calhoun and ultimately was a cause of the Civil War. Next, Congress, using its authority under the Constitution to make "regulations" for the federal court, shut down the Supreme Court for a year. If he denied the request, the Supreme Court would be left a "helpless victim of presidential or congressional whim". As these facts demonstrate, Marbury had incalculable effects on the Constitution and government. Marshall had forever changed the task of the Supreme Court. The system of separation of powers implied that each branch, "as Madison remarked, had' the necessary constitutional means, and personal motives, to resist the encroachments of the others. Outraged by Adams' appointments, Jefferson ordered Madison not to deliver the commissions. [50] [27]

4.4 Judicial review in English Law:

Judicial review is a procedure in English Administrative Law by which English courts supervise public authorities in the exercise of their powers. A person who feels that a decision of a public authority, such as a government minister, the local council or a statutory tribunal has violated his or her rights, may apply to the High Court for judicial review of the decision and have it set aside (quashed) and possibly obtain damages. A court may also make mandatory orders or injunctions to compel the authority to do its duty or to stop it from acting illegally.

4.5 Constitutional position:

The constitutional theory of judicial review has long been dominated by the doctrine of ultra vires, under which a decision of a public authority can only be set aside if it exceeds the powers granted to it by Parliament. The role of the courts was seen as enforcing the "will of Parliament" in accordance with the doctrine of Parliamentary sovereignty. However, the doctrine has been widely interpreted to include errors of law and of fact and the courts have also declared the decisions taken under the Royal Prerogative to be amenable to judicial review. Therefore, it seems that today the constitutional position of judicial review is dictated by the need to prevent the abuse of power by the executive as well as to protect individual rights.

50.43 DLR 131

4.6 The importance of Judicial review of Bangladesh

- **Opportunity for the public to participate:**

Judicial review creates a right for individuals to approach the court for relief over a breach of an Act. It makes it possible to challenge a determination of the consent authority. Judicial review of environmental matters therefore allows the public an opportunity to participate in the environmental planning and development process.

- **Opportunities available for relief:**

  In Bangladesh there is currently no environmental legislation, which gives the opportunity to a person to bring proceedings for remedy or restrain the breach of an Act. Notwithstanding, a person may seek judicial review under the Civil Procedure Code 1908 or Criminal Procedure Code 1898, though there has been little reference made to the opportunities available for relief under these Codes. 9.8.3 Procedural requirements: Under the Civil Procedure Rules a claim (application) for judicial review will only be admissible if permission (leave) for judicial review is obtained from the High Court, which has supervisory jurisdiction over public authorities and tribunals. Permission may be refused if one of the following conditions is not satisfied: The application must be made promptly and in any event within three months from the date when the grievance arose. Note that legislation can impose shorter time limits while a court may hold that an application made in less than three months may still be not prompt enough. The applicant must have sufficient interest in a matter to which the application relates. This requirement is known as the requirement of standing. The application must be concerned with a public law matter, i.e., the action must be based on some rule of public law, not purely tort or contract [51]
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- **Amenability to judicial review:**
  The decision complained of must have been taken by a public body, i.e. a body established by statute or otherwise exercising a public function. In R v Panel for Takeovers and Mergers Ex p Data fin [1987] 1 QB 815, the Court of Appeal held that a privately established panel was amenable to judicial review because it in fact operated as an integral part of a governmental framework for regulating Mergers and Takeover, while those affected had no choice but to submit to its jurisdiction.

- **Ouster clauses:**
  Sometimes the legislator may want to exclude the powers of the court to review administrative decision, making them ‘final’, ‘binding’ and not appealable. However, the courts have consistently held that none but the clearest words can exclude judicial review. When the Government wanted to introduce a new Asylum and Immigration Act containing such clear words, members of the judiciary protested to the extent of

51. The daily Star, page -9 June

saying that they will not accept even such an exclusion) The Government withdrew the proposal.

- **Error of law or error of fact:**
  An example of this can be seen in **Wheeler v Leicester City Council,** where the City Council banned a rugby club from using its ground because three of the club's members went on a tour in South Africa at the time of apartheid. In R v Somerset County Council v Fewings the local authority decided that discretion hunting on the grounds of it being immoral. In Padfield v Ministry of Agriculture, Fisheries and Food, the Minister refused to mount an inquiry into a certain matter because he was afraid of bad publicity.[29]

4.7 Scope of judicial review:

Broadly speaking, judicial review in India comprises of three aspects: judicial review of legislative action, judicial review of judicial decisions and judicial review of administrative action. The judges of the superior courts have been entrusted with the task of upholding the Constitution and to this end, have been conferred the power to interpret it. It is they who have to ensure that the balance of power envisaged by the Constitution is maintained and that the legislature and the executive do not, in the discharge of functions, transgress constitutional limitations. Thus, judicial review is a highly complex and developing subject. It has its roots long back and its scope and extent varies from case to case. It is considered to be the basic feature of the Constitution. The court in its exercise of its power of judicial review would zealously guard the human rights, fundamental rights and the citizens' rights of life and liberty as also many non-statutory powers of governmental bodies as regards their control over property and assets of various kinds, which could be expended on building, hospitals, roads and the like, or overseas aid, or compensating victims of crime.

4.8 Limits of Judicial Review:

Judicial review has certain inherent limitations. It is suited more for adjudication of disputes than for performing administrative functions. It is for the executive to administer the law and the function of the judiciary is to ensure that the Government carries out its duty in accordance with the provisions of the Constitution. It is true that the courts have wide powers of judicial review of Constitutional and statutory provisions. These powers, however, must be exercised with great caution and self-control. The courts should not step out of the limits of their legitimate powers of judicial review. The parameters of judicial review of Constitutional provisions and statutory provisions are totally different. In J.P.Bansal v State of Rajasthan the Supreme Court observed: "It is true that this court in interpreting the Constitution enjoys a freedom which is not available in interpreting a statute. It endangers continued public interest in the impartiality of the judiciary, which is essential to the continuance of rule of law, if judges, under guise of interpretation, provide their own preferred amendments to statutes which experience of their operation has shown to have had consequences that members of the court before whom the matters come consider to be injurious to public interest. Where the words are clear, there is no obscurity, there is no ambiguity and the intention of the

legislature is clearly conveyed, there is no scope for the court to innovate or to take upon itself the task of amending or altering the statutory provisions. In that situation the judge should not proclaim that they are playing the role of lawmaker merely for an exhibition of judicial valour. They have to remember that there is a line, though thin, which separates adjudication from legislation. That line should not be crossed or erased. This can be vouchsafed by an alert recognition of the necessity not to cross it and instinctive, as well as trained reluctance to do so".[30]

If case the court forgets to appreciate this judicial wisdom, it would undermine the constitutional mandate and will disturb the equilibrium between the three sovereign organs of the Constitution. In State (Govt of NCT of Delhi) v Prem Raj the Supreme Court took a serious note of this disturbing exercise when the High Court commuted the sentence by transgressing its limits. The court observed:[31]

"The power of commutation exclusively vests with the appropriate government. The appropriate government means the Central government in cases where the sentence or order relates to a matter to which the executive power of the Union extends, and the state government in other cases. Thus, the order of the high Court is set aside".Similarly, in Syed LA. Haqshbandi v State of J&K the Supreme Court observes:

"Judicial review is permissible only to the extent of finding whether the process in reaching the decision has been observed correctly and not the decision itself, as such. Critical or independent analysis or appraisal of the materials by the court exercising powers of judicial review unlike the case of an appellate court would neither be permissible nor conducive to the interests of either the officer concerned or the system and institutions. Grievances must be sufficiently substantiated to have firm or concrete basis on properly established facts and further proved to be well justified in law, for being countenanced by the court in exercise of its powers of judicial review. Unless the exercise of power is shown to violate any other provision of the Constitution of India or any of the statutory rules, the same cannot be challenged by making it a justifiable issue before the court".

The courts are further required not to interfere in policy matters and political questions unless it is absolutely essential to do so. Even then also the courts can interfere on selective grounds only. In P.U.C.L v U.O.I the Supreme Court observed: "This court cannot go into and examine the need of Prevention of Terrorism Act. It is a matter of policy. Once legislation is passed, the government has an obligation to exercise all available options to prevent terrorism within the bounds of the Constitution. Moreover, mere possibility of abuse cannot be counted as a ground for denying the vesting of powers or for declaring a statute unconstitutional".

source: https://www.lawyersnjurists.com/article/judicial-review-in-bangladesh/

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Chapter 5

5.1 Review of a Constitutional Amendment

5.2 Conclusion

5.1 Review of a Constitutional Amendment

This research seeks to discuss briefly two fundamental issues concerned with judicial review of constitutional amendment in Bangladesh, such as – on what grounds a constitutional amendment could be held repugnant and how the court would justify exercise of its judicial power to hold a constitutional amendment repugnant. In other words, what legal criteria the court should rely on for deciding validity of a constitutional amendment, and how the court would account for its jurisdiction in deciding validity of a constitutional amendment.

In view of the background legacy of Bangladesh legal system, it appears that a constitutional amendment could be adjudged repugnant at least on three grounds namely, lack of legislative competence, lack of procedural compliance and lack of substantive compatibility. Invariably, lack of legislative competence refers to a situation when any legislative body or authority brings in a constitutional amendment despite having no power to do so. Examples will include promulgation of ordinance by the president seeking to amend the Constitution. Similarly, passing an amendment bill by a simple majority of its members of parliament will typify lack of procedural compliance. And lack of substantive compatibility will occur if any constitutional amendment stands at so much odds with the existing constitutional provisions or introduces so much changes that even harmonious interpretation cannot rub down their mutual incongruences.

As a matter of fact, the aforementioned grounds came into discussion before the court in a number of cases concerning validity of constitutional amendments. For example, the grounds on which the Supreme Court has annulled the 5th constitutional amendment [Italian Marble Works Ltd v Bangladesh (2010) 62 DLR 70] and the 7th constitutional amendment [Siddique Ahmed v Bangladesh (2011) 63 DLR 565] include lack of legislative competence and lack of procedural compliance. Again, the matter in issue in the cases concerning validity of the 8th constitutional amendment [Anwar Hossain Chowdhury & Others v Bangladesh (1989) BLD (SPL) 1] or the 13th constitutional amendment [Abdul Mannan Khan v Bangladesh (2012) 64 DLR (AD) 169] was mainly substantive compatibility.

Undeniably, among the above-mentioned grounds, determining substantive compatibility of a constitutional amendment vis-à-vis the Constitution is the most difficult task because in the last resort a constitutional amendment is also a part of the Constitution. Therefore, determining validity of a constitutional amendment vis-à-vis the Constitution necessitates a special and convincing tool. The Supreme Court resolved this issue in the 8th Amendment Case by laying down a test for determining substantive compatibility of a constitutional amendment vis-à-vis the Constitution – which is famously known as 'the basic feature doctrine' or 'the basic structure doctrine'. In many respects, the 8th Amendment Case could be designated as the most important case in the history of the legal system of

Bangladesh. One such reason is that it marked the beginning of judicial review of constitutional amendment in Bangladesh.[32]

Besides, the Supreme Court, in the 8th Amendment Case, explained the legal basis of its jurisdiction to review validity of a constitutional amendment. In particular, Justice Badrul Haider Chowdhury argued that the authority to decide constitutionality of any laws including a constitutional amendment was vested in the Supreme Court in virtue of article 7 of the Constitution. The aforesaid argument was later followed in the cases in which the Supreme Court declared a number of constitutional amendments repugnant (see Kawser Ahmed, 'Misreading or Leapfrogging? SC's Power to Review Constitutional Amendment', The Daily Star, 22 August 2017, p. 12).

Evidently, the majority of judges in the 8th Amendment Case heavily drew on jurisprudence from Indian jurisdiction in shaping their ideation of the basic feature doctrine. Unfortunately, the judges seemed to have overlooked the fact that the Constitution of Bangladesh did contain tangible hints on the basis of which an indigenous doctrine could have been viably developed so as to accommodate judicial review of constitutional amendment on the grounds of lack of substantive compatibility.

For instance, the original article 26 of the Constitution unqualifiedly provided that laws which were inconsistent with the fundamental rights would become void and no laws would be made inconsistent with the fundamental rights. By the second constitutional amendment, a new clause was inserted into article 26 providing that the earlier two clauses [26(1) and 26(2)] of the same provision would not apply to any constitutional amendment. The aforesaid amendment endorses the fact that the legislators viewed constitutional amendments as more on a par with 'other laws', and for the same reason, excepted them from judicial review if they were inconsistent with the fundamental rights. To put it differently, article 26(3) implies that constitutional amendments are susceptible to judicial review and could be held repugnant for being inconsistent with any provisions of the Constitution other than the fundamental rights. Hence, it appears that any theory of judicial review of constitutional amendment in Bangladesh context must take account of article 26 of the Constitution if it wants to claim itself as complete.[33]

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5.2 Conclusion

We can conclude that, an easy procedure of amendment of the constitution is necessary for a new, idealistic and developing country like Bangladesh. But it may make the constitution the play thing at the hands of a brute majority of a party in power. There is no check or brake on it, no provisions for reconsideration, or revision, no scope for "an appeal to Philip drunk to Philip sober". At least the president should have been given right to return it back to parliament for reconsideration.