Sonargaon University (SU)



Research Monograph

On

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

A Thesis Submitted in Partial Fulfillment of the Requirements for the Degree of LL.M Department of Law, Sonargaon University (SU)

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Letter of Transmittal

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To

Md. Deedarul Islam Bhuiyan
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Subject: Submission of research monograph.

Dear Sir,

It is a great pleasure to submit my Research Monograph Paper on "**Amendability of the Constitution of Bangladesh :Reflections on the Scope of Judicial Review Power**". I have given best efforts to finish the research monograph with relevant information that I have collected from various sources. I have concentrated my efforts to achieve the objectives of the work and hope that my endeavor will serve the purpose.

I shall be grateful and obliged if you kindly accept my research and evaluate it.

Sincerely yours,

.....
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Acknowledgement

All praise to the creator of the universe, who has given me all the strength, patience and grace required to complete this Research monograph successfully.

I am pleased to acknowledge the tremendous guidance, assistance, encouragement and help which I received from certain sectors during the writing of this research monograph. I would like to express my deepest gratitude to my honorable supervisor **Md. Deedarul Islam Bhuiyan,** Assistant Professor and Head of the Department of Law in Sonargaon University (SU) for his sincere guidance and assistance for the accomplishment of this paper. His informative comments and suggestions have assisted me untiringly in my endeavor to complete this paper. This research is dedicated to my beloved mother who is still waiting for my success and wants nothing else.

I hope that my work shall be satisfactory. If I have done any mistake, it might be unknowingly and in that I beg pardon.

.....
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Declaration

I, Jannatul Ferdous Kader Tumpa, would like to hereby do solemnly declare that this submission of research on **"Amendability of the Constitution of Bangladesh :Reflections on the scope of Judicial Review Power"** is my original and own work to the best of my knowledge and belief as a part of LL.M under the supervision of Md. Deedarul Islam Bhiyan, Assistant Professor and Head of Department of Law, Faculty of Arts and Humanities, Sonargaon University (SU)

I also declare that it contains no writings which were previously published or invented earlier, except where I have made due acknowledgement with proper references.

.....

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Certificate of the thesis supervisor

This is to certify that the Research Monograph entitled **"Amendability of the Constitution of Bangladesh :Reflections on the scope of Judicial Review Power''** is done by **Jannatul Ferdous Kader Tumpa** in partial fulfillment of the requirement for the degree of LL.M from the Department of Law, Faculty of Arts and Humanities, Sonargaon University (SU). The Research Monograph has been carried out under my guidance is a record of the bona fide work.

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Chapter 1
Introduction

1.1 Abstract

This research monograph examines the Amenability of the Constitution of Bangladesh: Reflections on the scope of judicial Review Power. 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 personnel 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 protests the Bangladesh Supreme Court eventually agreed that the famous judgment of the High Court would be upheld. Throughout this whole paper I will try to explain all the amendments of the constitution with their timely significance while giving appropriate weight to all of the 17 amendments. Here i will also try to draw a blueprint of its basic structure.

1.2 Introduction:

The Provisional Government of Bangladesh issued the Proclamation of Independence on 10 April 1971, which served as the interim first Constitution of Bangladesh. It declared "equality, human dignity and social justice" as the fundamental principles of the republic. East Pakistani members of Pakistan's federal and provincial assemblies were transformed into members of the Constituent Assembly of Bangladesh. The constituent assembly had 404 members. After the war, the Constitution Drafting Committee was formed in 1972. The committee included 34 members with Dr. Kamal Hossain as its chairman. The Constitution Bill was introduced in the Assembly on 12 October. Its first reading began on 19 October and continued till 30 October. The second reading took place from 31 October to 3 November. Manabendra Narayan Larma made an impassioned appeal to declare the term of citizenship as "Bangladeshi" instead of "Bengali". Larma argued that labeling all citizens as Bengali discriminated against non-Bengali communities, including his own Chakma ethnic group.

The third reading began on 4 November and it approved 65 amendments to the Constitution Bill and adopted and enacted the Constitution on 4 November. The Constitution came into effect on 16 December 1972. A Westminster style political system was established. It declared nationalism, socialism, democracy and secularism as the fundamental principles of the republic. It proclaimed fundamental human rights, including freedom of speech, freedom of religion, freedom of movement, freedom of assembly, the right to education and public healthcare among others. A two thirds vote of parliament was required to amend the Constitution. After winning the 1973 general election, the Awami League government often flouted Constitutional rules and principles. The government received strong criticism from the Bangladeshi press, including both Bengali and English newspapers. The Committee for Civil Liberties and Legal Aid was formed to defend the Constitution. The Awami League enacted three Constitutional amendments between 1973 and 1975. The most drastic amendment was in January 1975. It introduced a one party state and a presidential government, while the judiciary's independence was greatly curtailed. Constitutional rule was suspended on 15 August 1975 with the assassination of President Sheikh Mujibur Rahman and the declaration of martial law. The Chief Martial Law Administrator issued a series of Proclamation Orders between 1975 and 1979 which amended the Constitution. Lieutenant General Ziaur Rahman is credited for many of these Proclamation Orders. The most significant of these orders was defining citizenship as Bangladeshi; other orders included the insertion of religious references and the controversial Indemnity Ordinance. In 1979, martial

law was lifted, multiparty politics was restored and Constitutional rule was revived. The Fifth Amendment in 1979 validated all Proclamation Orders of the martial law authorities. An executive presidency continued until 1982. Martial law was again imposed in the 1982 Bangladesh coup d'état. When Constitutional rule was restored in 1986, the Sixth Amendment validated previous Proclamation Orders issued by the Chief Martial Law Administrator. The Eighth Amendment in 1988 declared Islam as the state religion and initiated limited devolution of the judiciary. In 1990, a pro-democracy uprising ousted President Ershad. The uprising was followed by parliamentary elections in 1991. The Twelfth Amendment passed by the fifth parliament is the most influential Constitutional amendment in Bangladesh. It re-established a parliamentary government. It amended Articles 48, 55, 56, 57, 58, 59, 60, 70, 72, 109, 119, 124, 141A and 142.[8] The Prime Minister became the executive head of government, and along with the cabinet, was responsible to parliament. Local government was made more democratic. However, the amendment restricted the voting freedom of MPs. According to Article 70, MPs would lose their seat if they voted against their party. This made it impossible for parliament to have a free vote, including no-confidence motions to remove a prime minister. Experts have described the amendment as instituting prime ministerial dictatorship. The Thirteenth Amendment in 1996 introduced the Caretaker government of Bangladesh. In 2010, the Supreme Court of Bangladesh ruled that the Fifth Amendment of 1979 went against the Constitutional spirit of the country and hence invalidated its removal of clauses related to secularism. The Supreme Court gave the verdict in the case of Bangladesh Italian Marble Works Ltd. v. Government of Bangladesh. While implementing the supreme court's verdict in the Fifteenth Amendment in 2011, the Awami League-led parliament abolished the caretaker government system, which the party itself had advocated in 1996. In 2017, the Supreme Court declared the Sixteenth Amendment Act of 2014 illegal and void. The amendment had introduced the provision of impeaching judges in parliament. The Supreme Court held that parliament cannot have conscience votes due to Article 70.

1.3 Objectives of the Research:

General Objective: A constitution establishes a government based on the rule of law and which is limited by law. It thus provides a legal basis for Governmental operations and makes constitutional government possible. It therefore prevents an anarch or dictatorial government which knows no legal bounds. A constitution acts like a peace treaty.

Specific Objective: Constitutional amendment is the most important way to make any change in constitutions because it involves making amendments to the constitution without resorting to abolishing or disrupting the constitution, which has the effect of filling the gap between the political reality and constitutional reality.

1.4 Research Methodology:

In any research data collection is very important. Every research involves methods by which desired results can be achieved in this regard. I have the following analytical method to complete this research & the data from secondary sources which include books, e-books, journals both printed and online, research reports, newspapers etc. Relevant literature has also been collected through internet browsing.

1.5 Limitations of Research:

Every matter has got some limitations. So, this is also not an exception. The limitations of this thesis are been stated below:

- The first limitation of the study is limited time. This is really such a short time for learning and making experience of practical life.
- The major limitation I have faced during my research is the availability of the information in an organized way.

Chapter Two

Concept On The Amenability Of The Constitution.

2.1 Meaning of Amendment: 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. b : an alteration proposed or effected by this process a constitutional 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. An amendment is a section that is added to a law or rule in order to change it.

2.2 Origin of the Amendment of constitution of Bangladesh: The Constitution of the People's Republic of Bangladesh was adopted and enacted on 4 November 1972, after the victory of the independent country on 16 December 1971.[1][2] As of 2018 the Constitution has been amended 17 times.[3]Amending the Constitution of Bangladesh is the process of making changes to the nation's fundamental law or supreme law.

2.3 Purpose of Amendment: Amendments allow laws and policies to be refined over time rather than replaced outright. Local, state, and federal laws can be changed through the ratification of amendments. Legislative bodies in the U.S. operate on the premise that laws and policies may be refined over time. As of 2018 the Constitution has been amended 17 times. Amending the Constitution of Bangladesh is the process of making changes to the nation's fundamental law or supreme law.[1]

2.4 Importance of the Amendment : If amendment rules are the most important part of the constitution, the frequency of constitutional amendments should be inversely related to the stringency of these rules (constitutional rigidity). However, empirical research so far finds a low, negative correlation between constitutional rigidity and the frequency of amendments.

I believe this weak relationship between constitutional rigidity and amendment frequency stems from two primary factors: The first is that prior research on the topic has included both democratic countries and authoritarian countries in the universe of cases studied. However, if a dictator decides to modify the constitution one can not make any inference about the role of constitutional constraints. Therefore, investigations of the relationship between constitutional

1 http://bdlaws.minlaw.gov.bd/act-367/section-24706.html#:~:text=The%20Constitution%20of%20the%20People%E2%80%8C%E2%80%8C%E2%80%8D's%20Republic%20of%20Bangladesh,-(%20ACT%20NO.&text=his%20assent%20he%20shall%2C%20within,the%20expiration%20of%20that%20period.%5D

rigidity and amendment frequency ought to be limited to democratic countries. It is straightforward to restrict the dataset to democratic countries, and I have done so. The Polity dataset scores different countries every year from 1 to 10, and those scoring above 6 are normally considered "democratic". From the Constitute dataset, I consider amendments in countries that were democratic in 2013, the last date covered by the Constitute dataset, and ONLY for those periods in which they score above 6. This leads to the selection of 92 countries across various time periods, out of which 77 have actually amended their constitutions. The second is the varying significance of amendments. This information does not exist, and my goal is to create it.

Chapter Three
Overview

3.1 Constitutional provisions regarding amendment : Power to amend any provision of the Constitution. 142.[2] 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 : Provided that-

(i) no Bill for such amendment shall be allowed to proceed unless the long title thereof expressly states that it will amend a provision of the Constitution;

(ii) no such Bill shall be presented to the President for assent unless it is passed by the votes of not less than two thirds of the total number of members of Parliament ;

(b) when a Bill passed as aforesaid is presented to the President for his assent he shall, within the period of seven days after the Bill is presented to him assent to the Bill, and if he fails so to do he shall be deemed to have assented to it on the expiration of that period.

3.2 preamble of Bangladesh constitution which cannot be amended:

The preamble of Bangladesh constitution which cannot be amended is shown below:

1 Bismillah-Ar-Rahman-Ar-Rahim

(In the name of Allah, the Beneficent, the Merciful)/

In the name of the Creator, the Merciful.]

Preamble

We, the people of Bangladesh, having proclaimed our independence on the 26th day of March, 1971 and through a historic struggle for national liberation], established the independent, sovereign People's Republic of Bangladesh; Pledging that the high ideals of nationalism, socialism, democracy and secularism, which inspired our heroic people to dedicate themselves to, and our brave martyrs to sacrifice their lives in, the national liberation struggle, shall be the fundamental principles of the Constitution; Further pledging that it shall be a fundamental aim of the State to realise through the democratic process a socialist

[2] Article 142, Constitution of People's Republic of Bangladesh.

society, free from exploitation a society in which the rule of law,[3] fundamental human rights and freedom, equality and justice, political, economic and social, will be secured for all citizens; Affirming that it is our sacred duty to safeguard, protect and defend this Constitution and to maintain its supremacy as the embodiment of the will of the people of Bangladesh so that we may prosper in freedom and may make our full contribution towards international peace and co operation in keeping with the progressive aspirations of mankind; In our Constituent Assembly, this eighteenth day of Kartick, 1379 B.S., corresponding to the fourth day of November, 1972 A.D., do hereby adopt, enact and give to ourselves this Constitution.

3.3 Article 7b, Or The Death Of Basic Structure Doctrine: Notwithstanding anything contained in article 142 of the Constitution, the preamble, all articles of Part I, all articles of Part II, subject to the provisions of Part IXA all articles of Part III, and the provisions of articles relating to the basic structures of the Constitution including article 150 of Part XI shall not be amenable by way of insertion, modification, substitution, repeal or by any other means. The provisions which could be identified with the basic features of the Constitution. At first glance, Article 7B makes as if to endorse legislative recognition of the basic feature doctrine as spelt out in Anwar Hossain Chowdhury & Others v Bangladesh, 1989 (hereinafter 'the 8th Amendment Case').This essay, however, argues that Article 7B in fact makes a significant departure from the way the basic feature doctrine was understood and formalised in the 8th Amendment Case. As may be recalled, the majority of judges in the 8th Amendment Case did not rule against amendment to the constitutional provisions in an unconditional manner. They rather maintained that amendments to the constitutional provisions are permissible so long as they do not impinge on the basic features of the Constitution. In contrast to the ratio of the 8th Amendment Case, Article 7B absolutely prohibited any amendment to the constitutional provisions which are identified as basic features in any manner whatsoever.[4] In the 8th Amendment Case, the majority of judges viewed basic features as the core ideological notions of the Constitution (Ibid).Quite the contrary, Article 7B has transposed the basic features from the sphere of core ideological notions to the text of the Constitution. In effect, Article 7B's envisioned approach, if termed 'the basic provision doctrine', would perhaps make more sense. It is worth mentioning that

[3]Constitution of the People's Republic of Bangladesh (Preamble)". Government of Bangladesh. 4 November 1972.

[4] Article 7B, Constitution of People's Republic of Bangladesh.

while Article 7B has taken away from the parliament much of its power to amend the Constitution; it has left plenty of latitude for the judiciary to say what the basic features are or which provisions the basic features are to be identified with. The reason is Article 7B neither by name declares what the basic features are, nor does it provide a list of constitutional provisions that relate to these basic features (Save Part nos. I, II & III and article 150 of the Constitution).Not only that, Article 7B has introduced significant changes in the method of scrutiny to determine validity of a constitutional amendment. The basic feature doctrine laid down a substantive compatibility test for amendments to be incorporated into the Constitution. Now in view of Article 7B, any amendments to Part nos. I, II & III, Article 150 as well as provisions relating to basic features of the Constitution will be void simply for the reason that the parliament will exceed its power if it passes such amendments. Hence, the court's task has come down to finding out whether an amendment in question has amended any of those constitutional provisions placed under the protection of Article 7B. As a result, Article 7B, unlike the basic feature doctrine, relieves of the need for any substantive compatibility test of a constitutional amendment coming within its purview. (Of course, article 7B does not take away the power of the court to review constitutional amendments anterior to it on the basis of the basic feature doctrine).Ironically, Article 7B (could now be termed 'the clogger clause') itself being a constitutional amendment seeks to shut the door to subsequent amendments despite the fact that it fails to make any ostensible claim to superiority over other amendments in any respect.It has modified the operation of Article 26(3) in a noticeably interesting way. Article 26(3) accepted constitutional amendments from judicial review even if they are inconsistent with Part-III of the Constitution. Since Part nos. I, II and III cannot be amended anymore in virtue of Article 7B, the application of Article 26(3), so far as it relates to these Parts has reduced to redundancy. Moreover, since Article 26(3) itself is also included in Part-III, the same cannot also be deleted or modified by way of amendment. From a political point of view, Article 7B constitutes a clog on the Awami League government's agenda to return to the 1972 version of the Constitution. Article 7B has added new perspectives to judicial review of constitutional amendment in Bangladesh. As a result, judicial review of any constitutional amendments enacted in post-Article 7B period will require a fresh jurisprudential approach.

3.4 Limitations of the Amending power of the legislature: The Parliament of Bangladesh is given both plenary legislative power and the power of constitutional amendment. The original constitution of 1972 contained no limitation whatsoever 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. The military regimes of 1975-79 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 not 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: Addition of clause (1A) was craftily made. In the one hand the President and the Chief Martial Law Administrator was not only merely 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 representatives of the people cannot further amend it. We are simply charmed by the sheer theocracy of the whole process. It seems that the High Court Division was questioning the hierocratic manner in which the referendum clause was inserted and entrenched in the constitution, i.e., through a military chief's orders and proclamations etc.[5] 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

[5] Constitutional_Amendments". Banglapedia. 19 March 2015. Retrieved 30 December 2018.

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 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.The doctrine claims that certain provisions and principles constitute the basic structures of the constitution.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. Article 7B is titled as "Basic provisions of the Constitution are not amendable". It has made the Preamble, all articles of Part I, II and III (subject to the emergency provisions), Article 150 and "all the provisions of articles relating to the basic structures of the Constitution" unamendable by way of insertion, modification, substitution, , repeal or by any other means. The vague reference to "all provisions of articles relating to basic structure of the constitution" in article 7B seems problematic. While entrenchment of core constitutional values through eternity clauses like this one is not totally unknown in global constitutional literature, there is an obvious danger in unnecessarily widening the breadth of unamendability. Common understanding of eternity clause jurisprudence suggests that only the higher values of constitutional order – the "constitutional cores"– should be entrenched. Extensive listing of unamendable articles is likely to constraint the peoples' primary constituent power. Seen in this light, the Fifteenth Amendment of 2011 is "extremely wide" and susceptible to future disregard. As will be argued subsequently in this paper, the discarded system of referendum, though having a problematic origin, if retained through necessary modification, could have solved most of the problems associated with the eternity clause and basic structure doctrines.

3.5 Problems of the Basic Structure Of Doctrine : The doctrine of basic structure drags the judiciary into the constitution amendment process. The judiciaries in South Asia claimed a responsibility to protect the constitutional edifice from the peril of an invincible parliamentary super-majority. The argument is that certain structural pillars of the constitution cannot be dislodged by parliament while amending it. Though Keshavananda Bharati is identified as the progenitor of the doctrine, it started shaping up in an earlier case

named Golak Nath v.[6] State of Punjab. In Golok Nath the Indian Supreme Court held that fundamental rights occupy a transcendental position in the Indian constitution and are therefore unamendable. Keshavananda elaborated the argument towards all other provisions forming 'basic structure' of the constitution. Justice Khanna held:

If the Basic Structure is retained, the old Constitution would be considered to be continuing even though other provisions have undergone change.

On the contrary if the Basic Structure is changed, mere retention of some articles of the existing Constitution would not warrant a conclusion that the existing Constitution continues or survive Golak Nath and Keshavananda Baharati were decided at a time when Indira Gandhi, then Prime Minister of India, was "using emergency powers, jailing opposition leaders, curtailing property rights of the elites and moving the country in a sharply socialist direction." Hence the public complacency with the activist zeal of the Indian Supreme Court was understandable. The parliament however reacted sharply and appointed a parliamentary committee to study the new doctrine. It came out with a proposal for an amendment in the constitution that would confirm that parliament's amendment power was unrestrained. Though the 42nd amendment to that effect was passed, it was later held unconstitutional by the Supreme Court using the same basic structure doctrine. The Supreme Court of Bangladesh adopted the doctrine in 1989 in Anwar Hossain Chowdhury. It invalidated the Eighth Amendment of 1988 to the constitution which sought to create some out-of-capital circuit benches of the High Court Division of the Supreme Court. The Court was of the opinion that unitary character of the republic was a basic structure of the constitution.

Therefore, there could be only one Supreme Court with its sole site in the capital. Popular reaction to the decision was massively favorable. The validation of a constitutional amendment passed by a military led government, was seen by all as a victory for judicial independence and activism. Problematic aspects of the doctrine, however, did not get much attention. Unlike the Indian legislature, the parliament of Bangladesh did not question the limitedness of its amendment power. The government reprinted the constitution by omitting the invalidated eighth amendment. Though the opportune moments of political adversity helped both Keshavananda Bharati and Anwar Hossain become a "cause celebre" in the constitutional jurisprudence of both the countries, confusions started appearing soon.

[6] Golak Nath v. State of Punjab.AIR 1967 SC1643

First and foremost, the judiciary got an apparently unlimited authority in defining basic structure which makes the concept unpredictable and consequently bad. It further provided judges with leeway to introduce their own ideological leanings into constitutional discourse.

The fluidity of basic structures allowed the judges to pick and choose provisions that appeared 'basic' and strike down whatever did not. The Indian Supreme Court in a 1988 case held that the secular character of the Union of India was a basic structure. The case, S.R. Bommai v. Union of India66 concerned the dismissal by the central government of four state governments led by the Hinduism based Bharatiya Janata Party(BJP). The action was taken in the context of a communal riot following the destruction of a fourteenth century mosque by the Hindu extremists. The Supreme Court upheld the action of the central government on the ground of the BJP led state governments' failure to uphold the 'secular' character of the Republic. Now, if someone in India approaches the Court today for dismissal of a particular government on account of its capitalist policies that contradicts 'socialism' which happens to be another fundamental principle of the Indian constitution, the Court might end up in something completely inconsumable.Capitalism and market economy being firmly rooted in Indian economy, a socialism-oriented verdict may be doctrinally right but politically futile.

The Pakistani Supreme Court also made a mess with the doctrine in two of its early 'Pervez Musharraf' cases: Zafar Ali Shah v. General Parvez Musharraf and Wasim Sajjad v. Pakistan. These related to challenges to the unconstitutional usurpation of power and whimsical changes in the constitution by the then military chief General Parvez Musharraf. Pakistan has a checkered history of military forces capturing the state power and the court succumbing to the dictators. However, the judiciary has been known to reverse this position once the military rulers are toppled and political government is established.Through the Pakistani Supreme Court did not endorse the basic structure doctrine as such till then, Zafar Ali Shah case upheld the usurpation of power by General Parvez Musharraf and his martial law proclamation order, subject to a condition that Pervez Musharraf could not change the 'salient features' of Pakistan constitution.It appears as if democratic governance was not a salient feature of Pakistani constitution in 1999. Could anything more 'basic' remain while an unconstitutional usurper made the constitution itself subservient to his sweet will?

Later, the Pakistani Supreme Court bypassed an invitation to endorse basic structure doctrine in Nadeem Ahmed v. Federation of Pakistan.In the 2015 decision of District Bar Association, Rawalpindi v Federation of Pakistan,it acknowledged some implied limits on amendment power, noting that "certain features mentioned in the Preamble of the Constitution cannot be abrogated". However, it ended up in cherry picking its judicial review power vis-a-vis

parliamentary amendment of the constitution and shredding other basics like the peoples' fundamental right to fair trial vis-a-vis the martial law courts.Examples of cherry picking 'basic structures' are also recorded in Bangladesh. The fifth and sixteenth amendment judgments of the Supreme Court of Bangladesh, so far as they relate to appointment and removal of supreme court judges, are criticized for aggrandizing the independence of judiciary over the principle of separation of power and judicial accountability.

Similarly, the thirteenth amendment judgement is criticized for pitching the 'non-representative' character of caretaker government irreconcilably against the people's right to free fair and election in the first place. Secondly, the constitution being a document of fundamental importance, it appears extremely difficult, if not impossible, to classify several provisions of the constitution as basic and some others as peripheral. Hence the list of 'basic structures' is an ever-expanding one. In Anwar Hossain Chowdhury itself, Justice Shahabuddin Ahmed gave a list of seven basic features.

Justice Mohammad Habibur Rahman added another one to the list. Justice Badrul Haider Chowdhury[7] felt that there were twenty-one 'unique features' in the constitution out of which 'some' were basic. Thirdly, the judicially imported immutability in the constitution was apparently against the intention of the framers of Indian, Bangladeshi and Pakistani constitutions. The framers intended an amendable constitution by all means. Nothing more than a qualified majority in the floor was required by the 1950 constitution of India,1972 constitution of Bangladesh and 1973 constitution of Pakistan.No substantive limits whatever was placed on the amendment power of parliament. Moreover, it was never explained how the court could assume for itself a constituent power which was not vested in it. In District Bar Association, Rawalpindi v Federation of Pakistan The Pakistani supreme court quite extra-ordinarily held that the judicial review of constitutional amendment is an inherent privilege of the judiciary but at the same time simply overlooked the fact that the Pakistani constitution clearly bars such judicial review on "on any ground whatsoever".

Fourthly, the institutional consideration is even more problematic. The doctrine of 'basic structure' arguably enables the judiciary to have a final say over the parliamentary amendment power. In one sense, the Bangladeshi version of the doctrine was more extreme than the Indian one. While the Indian constitution could be amended by the parliament alone, the Bangladeshi constitution, on the other hand, could be amended either by parliament acting in itself or by parliament acting in conjunction with popular referendum. The Supreme

[7] Chowdhury, Badrul Haider (2 September 1989). "Anwar Hossain Chowdhury vs. Bangladesh (Eighth Amendment Judgment)". Lex Intell. Archived from the original on 2021-08-28. Retrieved 28 August 2021.

Court of Bangladesh in 1989 did not note this distinctive process of amendment. It simply held that basic structure could not be destroyed. Had the Eighth Amendment been passed through a popular referendum, could the Supreme Court have placed itself above the people – the ultimate sovereign in the Republic and declare the amendment invalid? Fifthly, it is questionable as to whether a mere likelihood of parliamentary abuse of amendment power may serve as an excuse for introducing judicial review.The Sixteenth Amendment judgement in Bangladesh shows that the Supreme Court may, in fact, venture this path and invalidate an amendment on a suspicion that judges may be harassed by the parliamentarians sitting over their appointment and removal.What happens, if the judiciary, as an institution, transgresses its limit and starts abusing the power?How could the legislature and populace check counter-majoritarian body acting in unison? Vulnerabilities of democracies like Bangladesh to their own representatives does not seem to offer a strong justification of 'basic structure' in the way it is preached by their judiciaries. These and other considerations have led even some pro-basic structure scholars to concede the 'minimal legitimacy of the doctrine and argue for scarce and limited application of the doctrine.

Chapter For

Amendments in Bangladesh

4.1 Amendments of Bangladesh constitution

First amendment: Passed on 15 July 1973, the first amendment was made to Article 47 of the constitution. The amendment inserted an additional clause, Article 47(3) that allowed punishment and prosecution of war criminals under international law. A new Article 47A was also added, which specified that certain fundamental rights will be inapplicable in those cases.

Second amendment: Second amendment of the constitution was passed on 22 September 1973 that suspended some of the fundamental rights of the citizens during a state of emergency.[5] The act made following changes to the constitution: Amended articles 26, 63, 72 and 142. Substituted Article 33. Inserted a new Part IXA to the constitution.

Third amendment: The Third Amendment was passed on 28 November 1974 that brought changes in Article 2 of the constitution. An agreement was made between Bangladesh and India in respect of exchange of certain enclaves and fixation of boundary lines between the countries.[8]

Fourth amendment: The amendment was passed on 25 January 1975. 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 Substituted Articles 44, 70, 102, 115 and 124 of the constitution. Amended part III of the constitution out of existence. Altered the Third and Fourth Schedule. Extended the term of the first Jatiya Sangsad. Inserted a new part, VIA in the constitution and Inserted new articles 73A and 116A in the constitution. Significant changes included: The presidential form of government was introduced replacing the parliamentary system. A one-party system in place of a multi-party system was introduced; the powers of the Jatiya Sangsad were curtailed; the Judiciary lost much of its independence; The Supreme Court was deprived of its jurisdiction over the protection and enforcement of fundamental rights.

[8] The Constitution (Third Amendment) Act". 1974.

Fifth Amendment: The Fifth Amendment Act was passed by the Jatiya Sangsad on 6 April 1979. This Act amended the Fourth Schedule to the constitution by adding a new paragraph 18 thereto, which provided that all amendments, additions, modifications, substitutions and omissions made in the constitution during the period between 15 August 1975 and 9 April 1979 (both days inclusive) by any Proclamation or Proclamation Order of the Martial Law Authorities had been validly made and would not be called in question in or before any court or tribunal or authority on any ground whatsoever.

Sixth Amendment: This Amendment Act was passed 10 July 1981. The Sixth Amendment Act was enacted by the Jatiya Sangsad with a view to amending Articles 51 and 66 of the 1981 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 thereto, providing among others 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 during the period between 24 March 1982 and 11 November 1986 (both days inclusive) had been validly made, and would not be called in question in or before any court or tribunal or authority on any ground whatsoever. In summary, the amendment protected Hussain Muhammad Ershad and his regime from prosecution for actions taken under the years of military rule, following the 1982 coup d'état until the 1986 presidential election.

Eighth Amendment: This Amendment Act was passed 9 June 1988. The Constitution (Eighth Amendment) Act, 1988 declared, among others, that Islam shall be state religion (Article 2A) and also decentralised the judiciary by setting up six permanent benches of the High Court Division outside Dhaka (Article 100). Anwar Hussain . Vs.[9] Bangladesh[9] widely known as the 8th Amendment case is a famous judgment in the constitutional record of independence of Bangladesh. This is the earliest judgment whereby the Supreme Court of Bangladesh has saluted an amendment to the constitution ready by the parliament.

[9] Chowdhury, Badrul Haider (2 September 1989). "Anwar Hossain Chowdhury vs. Bangladesh (Eighth Amendment Judgment)". Lex Intell. Archived from the original on 2021-08-28. Retrieved 28 August 2021

Ninth Amendment: This Amendment Act was passed on 11 July 1989. The Constitution Act 1989 was approved in July 1989. This amendment presented for the direct voting of the Vice-President; it limited a person in holding the office of the President for two successive terms of five years each; it also provided that a Vice-President might be chosen in case of a vacancy, but the selection must be permitted by the Jatiya Sangsad.

Tenth Amendment: The Constitution Act 1990 revised, among others, Article 65 of the Constitution, stated for reservation of thirty places for the next 10 years in the Jatiya Sangsad entirely for women members, who will be elected by the members of the Sangsad.

Eleventh Amendment: The Constitution Act 1991 approves all actions taken by the caretaker government headed by Justice Shahabiuddin Ahmed. It also approves the appointment of Chief Justice Shahabuddin Ahmed as the Vice President who afterward becomes Acting President upon Ershad's resignation. In addition, the Act also established and made possible the return of Acting President Shahabuddin Ahmed to his preceding place as the Chief Justice of Bangladesh.

Twelfth Amendment: The Twelfth Amendment Act was passed on 18 September 1991, following a constitutional referendum. It amended Articles 48, 55, 56, 57, 58, 59, 60, 70, 72, 109, 119, 124, 141A and 142, restoring executive powers to the Prime Minister's Office, as per the original 1972 constitution, but which had been held by the President's Office since 1974. Instead, the President became the constitutional head of the state; the Prime Minister became the executive head; the cabinet headed by the Prime Minister became responsible to the Jatiya Sangsad; the post of the Vice President was abolished and the President was required to be elected by the members of the Jatiya Sangsad. Moreover, through Article 59 of the Constitution, this Act ensured the participation of the people's representatives in local government bodies.

Thirteenth Amendment: The Constitution (Thirteenth Amendment) Act, 1996 (28 March) introduced a non-party Caretaker Government (CtG) system which, acting as an interim government, would give all possible aid and assistance to the Election Commission for holding the general election. It was declared illegal on 10 May 2011 by the Appellate Division of the Supreme Court. The High Court declared it legal previously on 4 August 2004.

Fourteenth Amendment: The Fourteenth Amendment was passed on 17 May 2004.The main provision for this amendment is concerned about women in parliament.

Fifteenth amendment: The Fifteenth Amendment was passed on 30 June 2011 made some significant changes to the constitution. The amendment made following changes to the constitution.After article 7 it inserted articles 7(a) and 7(b) in a bid to end take over of power through extra-constitutional means. Restored[10] secularism and freedom of religion nationalism, socialism, democracy and secularism as the fundamental principles of the state policy.

Acknowledged Sheikh Mujibur Rahman as the Father of the Nation.

Sixteenth amendment: 16th amendment of the constitution was passed by the parliament on 22th September 2014,which gave power to the Jatiyo Sangshad to remove judges if allegations of incapability or misconduct against them are proved.[11][11] On 5 May 2016, the Supreme Court of Bangladesh declared the 16th Amendment illegal and contradictory to the Constitution.

Seventeenth Amendment: The 17th amendment of the constitution was passed by the parliament on 29th July 2018 increasing the tenure of 50 women parliamentarians who are elected in the women reserved seat to 25 years..

4.2 Amendment cases

: The Constituent Assembly adopted the Constitution of Bangladesh in 1972. As of now, a total of sixteen amendments has been made to the Constitution. At the same time, the Supreme Court of Bangladesh has declared five amendments out of the sixteen (5th, 7th, 8th, 13th and 16th) unconstitutional.

3rd amendment case: The Berubari case is formally called the Kazi Mokhlesur Rahmen v. Bangladesh which resolved the dispute regarding Berubari union.For this reason, this case is called Berubari case. After getting directions from the supreme court of Bangladesh though this case the constitution (3rdamendment) act1974, wa enacted on 28 November,1974 which

[10] Fifteenth Amendment introduces fusion of ideologies". The Opinion Pages. 2011-07-07. Retrieved 2016-05-07

[11] 16th amendment illegal: HC". Prothom Alo. Archived from the original on 2017-11-25. Retrieved 2016-05-07

bought a change on article 2 of tact constitution with a view to giving effect to an agreement between Bangladesh and India in respect of exchange of certain enclaves and fixation of boundary lines between India and Bangladesh.

5th amendment case: The Constitution (Fifth Amendment) Act, 1979 validated all amendments, additions, modifications, substitutions and omissions made in the constitution during the period between 15 August 1975 and 9 April 1979 by the Martial Law Authorities.

This amendment was declared unconstitutional in 2005 by the High Court Division in Bangladesh Italian Marble Works Ltd v Bangladesh (2006) BLT (Special) (HCD) 1. Subsequently, the Appellate Division upheld the decision of the HCD in Khondhker Delwar Hossain v[12] Bangladesh Italian Marble Works Ltd and Others (2010) 62 DLR (AD) 298.

7th amendment case: The Constitution (Seventh Amendment) Act, 1986 provided, among others, 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 during the period between 24 March 1982 and 11 November 1986 had been validly made.

This amendment was declared unconstitutional in Siddique Ahmed v Bangladesh (2011) 33 BLD (HCD) 84 by the High Court Division.

8th amendment case: The Constitution (Eighth Amendment) Act, 1988 declared, among others, that Islam shall be state religion (Article 2A) and also decentralised the judiciary by setting up six permanent benches of the High Court Division outside Dhaka (Article 100).

Change in original Article 100 regarding the seat of the HCD was challenged and the Appellate Division in Anwar Hossain Chowdhury v.[13] Bangladesh (1989) BLD (AD) (Special) declared the amendment of Article 100 unconstitutional.

13th amendment case: The Constitution (Thirteenth Amendment) Act, 1996 introduced a non-party Caretaker Government (CtG) system which, acting as an interim government, would give all possible aid and assistance to the Election Commission for holding the general election. The vires of this amendment was questioned in Saleem Ullah v[14] Bangladesh (2005) 57 DLR (HCD) 171, in which the HCD validated the CtG system. Subsequently, the decision was challenged in the Appellate Division which, in Abdul Mannan Khan v Bangladesh (2012) 64 DLR (AD) 1, decided against the HCD and by a four-to-three decision prospectively declared the Thirteenth Amendment unconstitutional.

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[12] Khandkar Delware Hossaiun v. Bangladesh Italian Marble Works Ltd. Civil leave Appeal Petition.

[13] Anwar Hossain Chowdhury vs. Bangladesh (Eighth Amendment Judgment)". Lex Intell. Archived from the original on 2021-08-28. Retrieved 28 August 2021.

[14] Abdul Mannan Khan v Bangladesh (2012) 64 DLR (AD)2012 Appellate Division.

16th amendment case: The Constitution (Sixteenth Amendment) Act, 2014 gave power to the parliament to remove superior court judges if allegations of incapability or misconduct against them are proved. The HCD declared this amendment unconstitutional in Asaduzzaman Siddiqui and Others v Bangladesh (Writ Petition No. 9989 of 2014; decision of 5 May 2016).[15] The Appellate Division upheld the HCD's decision in Government of Bangladesh and others v Advocate Asaduzzaman Siddiqui and others (Civil Appeal No. 6 of 2017; decision of 3 July 2017).

[15] 16th amendment illegal: HC". Prothom Alo. Archived from the original on 2017-11-25. Retrieved 2016-05-07.

CHAPTER FIVE

Constitutional Basis for Judicial Review in Bangladesh

5.1 Constitutional Basis for Judicial Review in Bangladesh- With Special Reference to Marbury V. Madison Case:

Years ago in 1610, Sir Edward Coke, Chief Justice of the Common Pleas declared in Dr. Bonham's case that "in many cases, the common law will control Acts of Parliament".

This historic declaration gave rise to an everlasting debate regarding the extent of power between the Parliament and the Judicial organ and also played an important role in developing a check and balance concept which is known today as the "Judicial Review" system. Judicial Review is a type of court proceeding in which a judge reviews the lawfulness of a decision or an action made by a public body based on consistency with the Constitution.

It includes that jurisdiction of the court by which it can declare a law made by the legislature inconsistent with the Constitution or with the provisions of fundamental rights and therefore unconstitutional & void. The procedure and scope of Judicial Review differs from country to country and State to State, still its aim remains the same, that is to protect the sanctity of the Constitution of the land Again, the term, "Judicial Review" may be included impliedly within a Constitution. The typical example of such a 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. 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 highlights of Appellate Division's Judgment on 16th Amendment)

In Kudrat-e-Elahi v. Bangladesh, 44 DLR (AD) 319 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 has 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 be bound to be followed in all the spheres of administration. The Marbury Vs. Madison, 5 U.S. 137 (1803) [read full judgment case was a landmark decision in the implementation of Judicial Review which laid the foundation of this concept in the United States. It dates back to November 1800 when Thomas Jefferson was voted as the 3rd president of the USA. But he would not assume office until March, 1801. This enabled president Adams to appoint a new govt. officials before the new president takes office. Jefferson was a Democrat-Republican but Adams was a Federalist. So the 'Lame Duck' congress took the opportunity to pass the Judiciary Act of 1801. These ensured additional federalists would be in powerful positions in the new govt. According to the plan Adams appointed 16 Federalist Circuit Judges & 42 Federalist Judges who were all called as 'Midnight Judges' (i.e., the last minute appointment). One of them was Willium Marbury who was named as Justice of Peace for the district of Columbia. When Thomas Jefferson started office, his Secretary of State, James Madison, did not deliver the official paper works to the 'Midnight Judges'. Thus, they, including Marbury, were denied their new jobs. As a result, Marbury petitioned for a writ of mandamus to force Madison to deliver the commission. Meanwhile, Chief Justice, John Marshall, denied the petition and refused to issue the writ of mandamus, even though section 13 of the Judiciary Act of 1789 gave the Supreme Court authority for such writs to be issued, as the Article 3 of the US Constitution does not recognize the power to force actions of the govt. officials. Therefore, the following questions arose. (1) whether or not the petitioner has a right to the commission he demands, (2) if he has a right, which is violated, do the laws of the country afford him a remedy and (3) whether or not Section 13 of the Judiciary Act was in violation of the Constitution. The Chief Justice found that the petitioners were entitled to their commissions but the Constitution did not give power to the Supreme Court to issue writs of mandamus even though section 13 did. Thus, it was inconsistent with the Constitution, therefore invalid. As the Constitution is superior to any ordinary Act of the legislature, a Court may declare an Act of Congress void if it is inconsistent with it. The

Constitution placed the entire confidence upon the supreme executive regarding delivering and withholding a commission as a political act for any misconduct, respecting which, the injured individual (Marbury) has no remedy. The decision increased the Court's power by encouraging the judicial department to say what the law actually is. So from this, a court may now declare an Act of the Congress/Parliament void if it found prove that the Act was inconsistent with the Constitution. Bangladesh has also obtained this view and, as stated before, the articles 7(2), 26, 44(1) & 102 of the Bangladesh Constitution indirectly support it. Article 7(2) established supremacy of the Constitution by saying if any other law is inconsistent with this Constitution that law shall, to the extent of the inconsistency, be void.
Article 26 and 44 denotes that laws inconsistent with fundamental rights will be void. However, this does not apply to any amendment of the Constitution made under article 142. While judicial review power is vested in the High Court Division under article 102(1) which is one of the basic structures of the constitution and it cannot be taken away. Whereas judicial review power under article 102(2) is not fundamental or guaranteed, it is only available if no other equally efficacious remedy is available. Again, there exists article 47 according to which no law shall be deemed to be void on the ground of inconsistency with the Constitution if Parliament expressly declares that such provisions have been made to give effect to any of the fundamental principles of state policy. This article is a clear contradiction to the above articles. Hence, this is a hindrance to the Judicial Review[16] system of Bangladesh as many inconsistent and harmful Acts can be passed through it. The present legal system is very rigid and complicated. There remains the hunger of gaining more and more powers which will surely disrupt the structure of the Government if left untreated and unchecked. The Judicial Review system tries to maintain and develop the structure by implementing some checks and balances which can surely protect a nation from imminent disruption.

5.2 Judicial review in Bangladesh:

Boundaries of Judicial Review

Institutional issues with judicial reviews are more complex. While judicial review of laws passed by parliament is marked as a precursor of constitutional supremacy, judicial review of the constitutional amendments are seen with both "reverence and suspicion".[17]

[16] Determining the province of judicial review: A.Re Evalution of Basic structure of the constitution of Bangladesh.
[17] Halim. Abdul Md. (2019). `Constitution, Constituional Law and Politics: Bangladesh perspective 11th edition, Dhaka: CCB Foundation.

The typical arguments disputing the judicial review of constitutional amendment are twofold. First, judiciary should protect the Constitution as it is and check that ordinary laws do not violate the Constitution as it is. It should not define how the Constitution should or should not be If the court ventures this path, it would amount to a judicial supremacy or government by the court. Secondly, constitutional amendments being matters of political choice, the judiciary should remain disinterested in them. The Supreme Court, however, has rejected these arguments. In the context of the volatility of Bangladesh politics, it is argued that the notion of constitutional supremacy requires its extra-ordinary entrenchment. The requirement of two thirds majority is just one of the many other ways to ensure this. The judiciary as a "guardian of the constitution" should have a say in this process of constitutional amendment.

Some believe that this argument is extremely relevant in the intensely politicized environment of Bangladesh. Once elected, it has been argued that the parliamentarians do not acquire a blanket power, to do everything they wish until they are de-elected in the next election. Just as Ely seeks judicial intervention to rescue the "discreet and insular minority" that is often systematically sidelined by the political process, the Supreme Court of Bangladesh here seems to have a role in rescuing the constitution from viciousness of politics. Absent judicial involvement in the process, the constitution runs the risk of being a plaything in the hands of the party ridden parliament leading towards an unguarded parliamentary supremacy. The next argument for judicial review of constitutional amendments seeks to refute the political question argument. Amendments do have political motives. However, is this also not the case with almost every law passed by the parliament? Does law-making by a particular ruling party not reflect its political ideology and convenience? So, if political question is not evoked to refute judicial review of ordinary laws, why should it be preached for the constitutional amendments?

With a concept of limited government in place, none can transgress this limit by hiding under a cloak of political question. The Appellate Division of the Bangladesh Supreme Court had earlier rejected the political question doctrine straightforwardly when it remarked:

There is no magic in the phrase 'political question'. While maintaining judicial restraint the Court is the ultimate arbiter in deciding whether it is appropriate in a particular case to take upon itself the task of undertaking a pronouncement on an issue which may be dubbed as a political question. In fact, judicial review of constitutional amendments has already become an accepted norm in Bangladesh. The Supreme Court has adjudged the validity of the Fifth Amendment in Bangladesh Italian Marble Works Ltd,Seventh Amendment in Siddik Ahmed Chowdhury v. Bangladesh, part of the Eighth Amendment in Anwar Hossain Chowdhury v.

Bangladesh, and Thirteenth Amendment in Abdul Mannan Khan v Bangladesh,...Tenth Amendment in Dr. Ahmed Hossain v. Bangladeshand Fazle Rabbi v. Election Commission, part of the Fourteenth Amendment in Farida Akter v. Bangladesh and lastly, the Sixteenth Amendment in Bangladesh and Others v Advocate Asaduzzaman Sidddiqui.

Though most of these judicial review decisions have been hailed, the courts in Fifth, Seventh, Thirteenth and Sixteenth amendment cases, involving fundamental and policy changes in the constitution, have been accused of adventurously meddling into the political process.

While a constitutional supremacy-based argument is offered and taken for granted in all of the above exercises, the charges of democratic deficit and counter-majoritarian usurpation by the the court never received serious attention from the Court. Judicial non-consideration of an issue, however, should not mean that it is dead. The democratic deficit in judicial decision-making is bound to be an issue of constant relevance and an initiative towards perpetual entrenchment of constitutional provisions cannot ignore the phenomenon.

While advocates of Basic Structure like Krishnaswamy invite us to consider the 'overall moral, political and sociological legitimacy' of basic structure doctrine - which he claims the doctrine has attained over the years of Indian legal history, he concedes that 'sociological legitimacy' of the doctrine would flow from its potential to enhance "the degree of political participation in radical expansive constitutional change by requiring a higher level of deliberative decision-making to support such constitutional amendment". It appears that, in a clientelist political system like Bangladesh,a brute parliamentary majority is less likely to deliberate an amendment more rigorously in anticipation of possible judicial nullification of such amendment. Instead, the Triple Floor Model proposed in. This paper would be more within the socio-political reality here. Amendments made by referendum, being the exercise of original constituent power, stay above judicial review. On the other hand, amendments made by parliament being the exercise of derivative constituent power, the courts must see whether or not the principal-agent trusteeship has been respected. This formulation would explain and justify the previous judgments of Bangladesh Supreme Court except the ones on the Fifth, Seventh and Thirteenth amendments.

Delimiting the breadth of 'basic structures'

While there is no denying of the existence of certain fundamental and basic principles in the constitution, a certainty about the list of such basics will solve the problem of ambiguity. The legislature and judiciary may also be relieved of the duty of second guessing the basics. The textual entrenchment of specific basic structures through referendum would possess "more

institutional legitimacy than would be the case for implicit substantive constraints announced by the judiciary." As mentioned in Part II of this paper, the Fifteenth Amendment of 2011 provides a textually settled list of basic structures but keeps it open by inserting a vague reference to other basic structures at the end. Revival of the referendum clause in Article 142 and omission of the a broad eternity clause in article 7B would solve the dilemma significantly.

Elimination of the 'Dead Hand'

Installation of the system of referendum would serve another important purpose. Both the entrenched unamendable rule and a judicially articulated doctrine of basic structure have a common problem of dead hand and perpetual fixation. Constitutions then become a "stale and hollow"instrument. Now, if the task of enlisting the basic structures is left to the political opinion of the people expressed through referendum and not to the legislators and judges, it can probably offer a better and practical solution to the dead hand problem.

The initial entrenchment list shall not foreclose the list of basics. If any new basic structure emerges in future, a legislative amendment along with a popular referendum shall add that new provision in the entrenchment list. Any basic structure provision becoming redundant later on will likewise be deleted from the list. While politics remain the most influential arbiter of public opinion, the characteristic. The restlessness of Bangladeshi politics remains a concern here as well. The public opinion may be tailored through populist regimes to propose and successfully pass frequent referendums. The common-sense trend of politics, however, does not lend much support for the proposition that fundamental changes in the constitution through popular amendment will be as frequent as the regular changes effected through parliamentary two-thirds majority-based amendment process. 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. When the court exercises the law of the Government not his work then the question arises of judicial review. The principle 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.

Natural justice

Right to reason

Rule against bias

Fairness.

Jurisdiction.

(8) Justifiability.

(E) Interpretation.

Primary and strict view: Judicial review of law made by the legislature, the judiciary has the power to examine the constitutionality of laws made by the legislature.

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 goes under the provisions of constitution and also the judicial review of administrative action are goes under the provision of statutory law.

(4) Judicial review also delegated legislation.

In the sense of constitutional supremacy: Pertinent cannot make any law to avoid the constitution. If the legislature passed such law then the Supreme Court may void these types of law. The concept of judicial review first comes from the U.S.A. and the case was Marbiry VS. Medison. The US Constitution does not say that it is the supreme law of land and neither does this constitution confer on the Supreme Court power to declare a law ultra vires.

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 whether the law is consistent with present law or not. But in this kind of constitutional Supremacy every action of law can be challenged. Farzand Ali vs. West Pakistan; 22 DLR (1970) 203.

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) 1

Judicial Review is a basic feature of the Constitution and as such cannot be taken away from control by the government of the constitution." for Filing Public Interest Litigation.

5.3 On what grounds a constitutional amendment could be held repugnant

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 the 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 many 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 the 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. Besides, the Supreme Court, in the 8th Amendment Case, explained the legal basis of its jurisdiction to review the 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. 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 constitutional amendment in Bangladesh context must take account of article 26 Bangladesh. constitution . if it wants to claim itself as complete.

CHAPTER SIX
Recommendations & Conclusion

6.1 Recommendations

The recommendations of the study are as follows:

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'. 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" 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. Yet this would not solve the problem altogether. The 'legal' and 'political' highest, are not norms in isolation. They constantly interact, influence and saturate each other. Instability in one destabilizes the other. Therefore, possible instability in the highest 'law' needs to be checked by taming instability in the peoples' highest 'will'. Constitutions try to do this by defining the amendment process with the best possible precision. Amendment clauses give constitutions the height necessary to remain above the nitty-gritty of 'presentist tendencies of the peoples' will. They also provide necessary leeway for intra and inter-generational adaptability of the constitutional texts and principles. 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 from 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

legislative entrenchments through perpetual or eternity clauses – which Richard Albert calls "codified unamendability" is an addition to the judicially articulated "interpretative unamendability" under the so-called doctrine of basic structure. Both the eternity clause and the basic structure doctrine involve controversies. With the court, a facially "counter-majoritarian" institution, pressing for perpetuity of an unidentified set of basics, democracy's basic arrangement of representation, institution, power and principles face a new challenge.
Basic structure denies political forces and the people the scope to anticipate and react to in the judicial interpretation of constitutional text and principles. Inconsistent interpretation leads to an ever-fluctuating list of unamendable basic structures. Codified eternity clauses, on the other hand, create a highly problematic dead hand rule – ideals of the foregone generation binding the present generation - within the constitutional landscape.

6.2 Concluding remarks

It is seen from the above abstract, that a few Amendments ended at one time under certain forceful situations were consequently detached by another Amendment, and also that numerous of these had a nationwide harmony. But only some of the Amendments were endorsed without appropriate arguments and thorough discussions concerning all the pledge holders including people adhering to diverse, sometimes 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. The three molds used to examine the doctrine are Basic Structure and the theory of Originals, Basic Structure acts as a 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. Articles. The constitutional supremacy clause of the Constitution of Bangladesh is, in essence, a popular sovereignty clause. It makes the Constitution a "solemn expression of the will of the people" and "the supreme law of the Republic." It is therefore quite logical that all the sovereign organs - Parliamentary, Judicial or Executive – must give

way to the supremacy of the people. The Referendum-based entrenchment suggested in this paper is better served to give expression to the will of the people. There is a need to guard constitutional coherence from both the day to day scratches of political rivalry, hence judicial review of constitutional amendments cannot be rejected outright. Again, the need for inter-generational adaptability of the foundational pillars of constitution requires that both codified and interpretative unamend ability be discouraged. The system of referendum has the potential of achieving all these together. While the referendum has some problems of its own, it is suggested that it might be accompanied by other devices, such as within a broader 'escalating structure' of amendment process. Interestingly, support for the referendum-based amendment process can be found in Anwar Hossain Chowdhury itself. Mohmmad Habibur Rahman J, one of the judges in the case, stood in marked contrast to the other judges. He agreed that the result offered a unique reasoning. He did not claim a permanent immutability for the so-called basic structures but rather asserted that the Parliament cannot 'by itself impair or destroy the fundamental aim of our society.'This impliedly leads us to the system of referendum. After all, 'fixation' of constitutional norms will not guarantee its ultimate survival unless it accommodates a breathing space for public opinion and sentiment and intergenerational adaptability. Quite opposite to the popular truism, a constitution's survival has been empirically linked more to its flexibility than to its rigidity.

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