Chapter 1
Introduction

1.1 Introduction

The record gives the construction that separates the Bangladeshi republic with a unitary, parliamentary vote based framework, that values pivotal normal freedoms and potential open doors, a free lawful chief, larger part rule neighborhood government and a public association. The four critical guidelines of the Constitution are enthusiasm, socialism, a larger part leads framework and secularism. The Constitution attempts to make a socialist society in which the rule of law, key normal freedoms and opportunity, consistency and value, political, money related and social, is gotten for all of its occupants. It commits Bangladesh to "add to worldwide amicability and co-movement with respect to the powerful desires of mankind".

One of the important constitutional laws in Bangladesh is that its basic structure cannot be changed by the Parliament even it can not be done by referendum. The chief advantage of such a doctrine probably is to secure the Constitution, the solemn expression of the will of the people, from unwanted encroachment to be made by the legislatures exercising their arbitrary and capricious use of the strength of majority. But, though the Constitution of Bangladesh is an elaborate written Constitution which is also one of the largest constitutions in the world it does not contain any specific provision regarding its basic structure or does not say anything regarding unamendablity of its basic structure. It has been established only in 1989 in the famous milestone case of Anwar Hossain V. Bangladesh^ popularly known as the 8th Amendment case.[1] Thus, now the basic structure of our Constitution is set beyond the purview of the amending power and a new interpretation of Article 142 has also been given. The object of writing this article is to trace the history of basic structure and examining the concept of basic structure in the context of the constitutional law of Bangladesh. In doing so, obviously, much more emphasis has been given on the Constitution 8th Amendment case by frequently referring and quoting from it. Because, the 8th Amendment case is the only authority in Bangladesh

[1] http://journal.library.du.ac.bd/index.php?journal=DULJ&page=article&op=viewFile&path[]=1541&path[]=1450, accede date on12 August 2022.

that deals with the concept of basic structure and the judgment is so elaborate that includes so many references of cases, legal literatures and full with arguments.

Legal precedent is enshrined in Bangladesh's Constitution under Article 111,[2] which makes Bangladesh a necessary piece of the precedent-based regulation world. Legal audit is likewise upheld by the Constitution. It was taken on by the Constituent Assembly of Bangladesh on 4 November 1972 and became powerful on 16 December 1972. The Constitution supplanted the Proclamation of Independence as the country's key instrument of government. The Constitution became successful on Bangladesh's Victory Day, definitively one year after the marking of the Instrument of Surrender.[3]

The Constitution of Bangladesh is the most elevated administering of Bangladesh. It addresses Bangladesh as a majority rule republic country where all the power is in the possession of Bangladeshi individuals and portrays essential political standards of the state and represents the crucial privileges of residents. It was supported by the Assembly of Bangladesh on November 4, 1972; it was practiced from December 16, 1972. The constitution remains as the most remarkable proof to state Bangladesh as a unitary, free and Republic, established on a battle for public freedom, and that is the way we accomplish the People's Republic of Bangladesh. It establishes major areas of strength for an of patriotism, mainstream quality, a vote based system and communism as the fundamental morals that represents the Republic and pronounces the journey of a general public that provides its residents with law and order, crucial social liberties and freedom as well as decency and fairness, political, monetary and social.

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1.2 Objectives of the Study

The **main objective** of this research monograph is to **"Concept of Basic Structure of the Constitution: An Appraisal from the perspective of Bangladesh and India"**. In order to achieve main objective of this research there are some **specific objectives**, are as follows:

1. To find out the judicial power and basic structure of constitutionalism in Bangladesh.
2. To trace out the constitutionalism is Bangladesh.
3. To find out the procedure of Bangladesh constitutionalism.

[2] Article 111 of the Constitution of Bangladesh". Retrieved 18 June 2021.

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

4. To some recommendation ways for better constitutionalism is Bangladesh its start and problem.

1.3 Methodology of the Study

I have involved auxiliary hotspots for finishing the review. I, first and foremost, have gathered applicable books on constitutionalism and Law diaries connecting with Right to opportunity articulation Laws and its advantages, benefits and hindrances. Then, I gather fundamental data about Bangladesh constitution and its significant with this examination. Furthermore, I have examined with my kindred companions and seniors about the points and it assists me with enhancing my subject. In a few times I talk with my manual for get his recommendation to set up this exploration monograph and he assists me with setting up this examination work. I additionally find support from different site in the current setting of Bangladesh.

1.4 Limitations of the Study

The facts really confirm that each exploration has a few constraints. Thus, this exploration monograph isn't the exemption of this constraint and decreased the extent of the concentrate in certain progressions constitutionalism is Bangladesh.

1. In perspective on my examination subject designated time is sparse and short.
2. The fundamental limit of the review is the restricted works and distributions on the worry point and greatest are with political perspectives behind. These give me data as well as disarray.
3. My examination subject is legal power and essential construction regulation. In any case, I attempted.

Chapter- 2

General Conceptual Framework

2.1 Conceptual Framework

The Supreme Court's underlying situation on sacred changes had been that any piece of the Constitution was amendable and that the Parliament may, by passing a Constitution Amendment Act in consistence with the necessities of article 368, correct any arrangement of the Constitution, including the Fundamental Rights and article 368. That the Constitution has "fundamental elements" was first hypothesized in 1964, by Justice J. R. Mudholkar in his contradiction, on account of Sajjan Singh v. Province of Rajasthan. He contemplated whether the ambit of Article 368 incorporated the ability to modify an essential element or revise a piece of the Constitution. He composed,

It is likewise a matter for thought whether rolling out an improvement in a fundamental component of the Constitution can be viewed just as a correction or could it be, basically, reworking a piece of the Constitution; and if the last option, could it be inside the domain of Article 368?

In 1967, the Supreme Court switched its prior choices in Golaknath v. Province of Punjab. It held that Fundamental Rights remembered for Part III of the Constitution are given a "supernatural position" and are past the range of Parliament. It likewise proclaimed any revision that "removes or compresses" a Fundamental Right presented by Part III as illegal. In 1973, the essential design tenet was officially presented with thorough lawful thinking in Justice Hans Raj Khanna's unequivocal judgment in the milestone choice of Kesavananda Bharati v. Territory of Kerala.[4] Previously, the Supreme Court had held that the force of Parliament to correct the Constitution was unbound. Nonetheless, in this milestone controlling, the Court mediated that while Parliament has "wide" abilities, it didn't have the ability to obliterate or weaken the essential components or major elements of the constitution..[4]

Despite the fact that Kesavananda was chosen just barely of 7-6, the fundamental design principle, as propounded in Justice Khanna's judgment, has since acquired far and wide legitimate and academic acknowledgment because of various ensuing cases and decisions depending vigorously upon it to strike down Parliamentary alterations that were held to be

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

violative of the essential construction and in this way unlawful. Essential among these was the burden of a highly sensitive situation by Indira Gandhi in 1975, and her resulting endeavor to stifle her indictment through the 39th Amendment. At the point when the Kesavananda case was chosen, the basic misgiving of the greater part seat that chosen delegates couldn't be relied upon to act mindfully was seen as uncommon. Notwithstanding, the section of the 39th Amendment by the Indian National Congress' larger part in focal and state lawmaking bodies, demonstrated that as a matter of fact such worry was solid. In Indira Nehru Gandhi v. Raj Narain and Minerva Mills v. Association of India, Constitution Benches of the Supreme Court utilized the fundamental design regulation to strike down the 39th Amendment and portions of the 42nd Amendment individually, and prepared for rebuilding of Indian majority rules government. The Supreme Court's situation on established revisions spread out in its decisions is that Parliament can alter the Constitution yet can't obliterate its "essential construction". The fundamental design principle was dismissed by the High Court of Singapore. It was at first likewise dismissed by the Federal Court of Malaysia, yet was subsequently acknowledged by it. Alternately, the precept was at first supported in Belize by the Supreme Court..[5]

2.2 History

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.

The Supreme Court's underlying situation on sacred changes was that no piece of the Constitution was unamendable and that the Parliament may, by passing a Constitution Amendment Act in consistence with the prerequisites of article 368, revise any arrangement of the Constitution, including the Fundamental Rights and article 368. In Shankari Prasad Singh Deo v. Association of India (AIR. 1951 SC 458), the Supreme Court consistently held, "The terms of article 368 are completely broad and enable Parliament to alter the Constitution with practically no special case whatever. With regards to article 13, "regulation" should be interpreted as meaning principles or guidelines made in exercise of common authoritative power and not corrections to the Constitution made in

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

exercise of constituent power, with the outcome that article 13 (2) doesn't influence alterations made under article 368. In Sajjan Singh v. Province of Rajasthan (case reference: 1965 AIR 845, 1965 SCR (1) 933), by a larger part of 3-2, the Supreme Court held, "When article 368 gives on Parliament the option to change the Constitution, the power being referred to can be practiced over every one of the arrangements of the Constitution. Holding that "Regulation" in article 13 (2) takes in Constitution Amendment Acts passed under article 368." In the two cases, the ability to change the freedoms had been maintained based on Article 368 would be absurd."

Golaknath case

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

In 1967, the Supreme Court reversed its earlier decisions in *Golaknath v. State of Punjab*.[6] A bench of eleven judges (the largest ever at the time) of the Supreme Court deliberated as to whether any part of the Fundamental Rights provisions of the constitution could be revoked or limited by amendment of the constitution. The Supreme Court delivered its ruling, by a majority of 6-5 on 27 February 1967. The Court held that an amendment of the Constitution is a legislative process, and that an amendment under article 368 is "law" within the meaning of article 13 of the Constitution and therefore, if an amendment "takes away or abridges" a Fundamental Right conferred by Part III, it is void. Article 13(2) reads, "The State shall not make any law which takes away or abridges the right conferred by this Part and any law made in contravention of this clause shall, to the extent of contravention, be void." The Court also ruled that Fundamental Rights included in Part III of the Constitution are given a "transcendental position" under the Constitution and are kept beyond the reach of Parliament. The Court also held that the scheme of the Constitution and the nature of the freedoms it granted incapacitated Parliament from modifying, restricting or impairing Fundamental Freedoms in Part III. Parliament passed the 24th Amendment in 1971 to abrogate the Supreme Court ruling in the Golaknath case. It amended the Constitution to provide expressly that Parliament has the power to amend any part of the Constitution including the provisions relating to Fundamental Rights. This was done by amending articles 13 and 368 to exclude amendments made under article 368, from article 13's prohibition of any law abridging or taking away any of the Fundamental Rights.[7] Chief Justice Koka Subba Rao writing for the majority held that:

- A law to amend the constitution is a law for the purposes of Article 13.

[6] *Ibid.*

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

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

2.3 The concept of Basic Structures:

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

2.4 Types of Basic Structure:

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

a) Basic Structure principle in general sense or Numerable sense and

b) Basic Structure principle in real or substantive sense.

2.5 Basic Structure principle in general sense or Numerable sense:

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

value of the judiciary. It has been seen in the judgment of the case *of BADRUL HAIDER CHOWDHURY vs. BANGLADESH* in the eighth amendment case.

2.6 Basic Structure principle in real or substantive sense:

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

2.7 The Basic structure of the constitution of Bangladesh:

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

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

1) Supremacy of the constitution which states in article 7 of the constitution.

2) Democracy which states in the preamble.

3) Republican government which states in the article 1 of the constitution.

4) Independence of judiciary which states in article 22 of the constitution.

5) Unitary state which is mentioned in article 9 of the constitution.

[8] *Ibid.*

6) Separation of powers which is mentioned in article 22 of the constitution.

7) Fundamental rights which is mentioned in from article 26 to 47A of the constitution.

These structural pillars of the constitution stand beyond any change by amendatory process. If these principles are curtailed more than one permanent seat of the Supreme Court by exercising the amending power, then it destroying the unitary character of the judiciary. The amended article 100 is Ultra vires because it has destroyed the essential limb of the judiciary by setting up rival courts to the HCD in the name of permanent Benches conferring full jurisdiction, power and function of the HCD. The amended article 100 is inconsistent with article 44, 94, 101, and 102.It also reduced article108 to article 111 of the Bangladesh Constitution. It directly violated article 114, this amended is illegal because there is no provision of transfer which is essential requisite for dispensation of justice.

2. 8 Basic structures Elements of our constitution

The Constitution of Bangladesh officially the Constitution of the People's Republic of Bangladesh is the supreme law of Bangladesh. The document provides the framework that demarcates the Bangladeshi republic with a unitary, parliamentary democracy, that enshrines fundamental human rights and freedoms, an independent judiciary, democratic local government and a national bureaucracy.

The four fundamental principles of the Constitution are nationalism,[9] socialism,[10] democracy[11] and secularism.[12] The Constitution endeavors to create a socialist society in which the rule of law, fundamental human rights and freedom, equality and justice, political, economic and social, is secured for all its citizens. It commits Bangladesh to "contribute to international peace and co-operation in keeping with the progressive aspirations of mankind".[13]

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

[10] "Article 10 of the Constitution of Bangladesh". Legislative and Parliamentary Affairs Division, Ministry of Law, Justice and Parliamentary Affairs. Retrieved 29 June 2021.

[11] "Article 11 of the Constitution of Bangladesh". Legislative and Parliamentary Affairs Division, Ministry of Law, Justice and Parliamentary Affairs. Retrieved 29 June 2021.

[12] "Article 12 of the Constitution of Bangladesh". Legislative and Parliamentary Affairs Division, Ministry of Law, Justice and Parliamentary Affairs. Retrieved 29 June 2021.

[13] "Preamble of the Constitution of Bangladesh". Legislative and Parliamentary Affairs Division, Ministry of Law, Justice and Parliamentary Affairs. Retrieved 18 June 2021.

It invokes constitutional supremacy, as opposed to legislative supremacy since it was created by a constituent assembly not Parliament and was adopted by the people of Bangladesh in its preamble. Parliament cannot quash parts of the Constitution. Judicial precedent is enshrined in Bangladesh's Constitution under Article 111, which makes Bangladesh an integral part of the common law world. Judicial review is also supported by the Constitution. It was adopted by the Constituent Assembly of Bangladesh on 4 November 1972 and became effective on 16 December 1972. The Constitution replaced the Proclamation of Independence as the country's fundamental instrument of government. The Constitution became effective on Bangladesh's Victory Day, precisely one year after the signing of the Instrument of Surrender.

2.9 Unitary Parliament Bangladesh

The **Government of the People's Republic of Bangladesh** [14]is the central executive government of Bangladesh. The government was constituted by the Constitution of Bangladesh and represented by the president, the prime minister and the cabinet of Bangladesh. The legislature represented by the Jatiya Sangsad, and the judiciary, represented by the Supreme Court of Bangladesh. Bangladesh is a unitary state and the central government has the authority to govern over the entirety of the nation. The seat of the government is located in Dhaka, the capital of Bangladesh.

The executive government is led by the prime minister, who selects all the remaining ministers. The prime minister and the other most senior ministers belong to the supreme decision-making committee, known as the Cabinet. The current prime minister is Sheikh Hasina, leader of the Bangladesh Awami League, who was appointed by the president on 6 January 2009 following the general election on 29 December 2008. Bangladesh Awami League led by her, and its Grand Alliance (a total of 14 parties) won two-thirds majority in the elections. Numerically, the party controls 230 seats out of 299.

The legislature of Bangladesh is unicameral. Called the Jatiya Sangsad in Bengali, it is the parliament of Bangladesh. The Speaker presides over meetings of the Jatiya Sangsad and conducts its business in an orderly fashion. The current Jatiya Sangsad contains 350 seats, including 50 seats reserved exclusively for women and 300 seats for elected members,

[14] https://en.wikipedia.org/wiki/Government_of_Bangladesh

which are apportioned on elected party position in the parliament. The eleventh national parliamentary election was held on 30 December 2018.[15] The current speaker is Shirin Sharmin Chaudhury, who is presiding over the eleventh Parliament. She is the first woman to have held this office.

The judicial system contains an apex Supreme Court, which is composed of the Appellate Division and the High Court Division. There are various levels of the judiciary in Bangladesh – different types of courts form a strict hierarchy of importance – District Courts, City Criminal Courts, Specialized Courts and Tribunals are all inferior to the Supreme Court. The chief justice of Bangladesh is the head of the judiciary and the Supreme Court. The present and the 22nd chief justice of Bangladesh is Syed Mahmud Hossain. He succeeded acting chief Justice Md. Abdul Wahhab Miah on 2 February 2018.[16]

2.10 Provision of Fundamental Rights

Fundamental rights of the people of Bangladesh

The fundamental rights of the people of Bangladesh have been guaranteed in Part III (Article 26-47) of the constitution of Bangladesh. All past laws inconsistent with these rights are made void by the Constitution, and it directs the State not to make any law inconsistent with these rights.[17] Article 44 of the constitution guarantees the right of every citizen to move the High Court Division in accordance with clause (1) of Article 102 for the enforcement of any of the fundamental rights conferred by Part III of the Constitution. The jurisdiction of the High Court Division of the Supreme Court to enforce the fundamental rights is defined in Article 102 of Part Vl of the Constitution of 197218

The fundamental rights of the people[19]

Third part (article 26 to 47A) of the Constitution of Bangladesh mentions the fundamental rights of the citizens of Bangladesh.

27. Equality before law

28. Discrimination on grounds of religion, etc.

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[15] *The Daily Star*. 9 January 2014

[16] Staff Correspondent. "Acting CJ Wahhab Miah resigns". *Prothomalo*. Retrieved 5 December 2021.

[17] *Prothom Alo* (in Bengali). Retrieved 2019-02-20.

[18] "Fundamental Rights". *Banglapedia*. Retrieved 2019-02-20.

[19] https://en.wikipedia.org/wiki/Fundamental_rights_of_the_people_of_Bangladesh#:~:text=The%20 fundament al%20rights%20of%20the,law%20inconsistent%20with%20these%20rights.

29. Equality of opportunity in public employment
30. Prohibition of foreign titles, etc.
31. Right to protection of law
32. Protection of right to life and personal liberty
33. Safeguards as to arrest and detention
34. Prohibition of forced labour
35. Protection in respect of trial and punishment
36. Freedom of movement
37. Freedom of assembly
38. Freedom of association
39. Freedom of thought and conscience, and of speech
40. Freedom of profession or occupation
41. Freedom of religion
42. Rights to property
43. Protection of home and correspondence
44. Enforcement of fundamental rights
45. Modifications of rights in respect of disciplinary law
46. Power to provide indemnity
47. Saving for certain laws
47A. Inapplicability of certain articles

Chapter-3

Judicial Power and Basic Structure of Bangladesh Constitution

3.1 The Emergency (1975)

The Court reaffirmed and applied the fundamental construction precept in Indira Nehru Gandhi v. Raj Narain, famously known as Election case. The lawfulness of Article 329A, which had been embedded by the 39th Amendment in 1975 was tested for this situation. Soon after the inconvenience of the Emergency, a seat of thirteen appointed authorities was quickly collected to hear the case. Managed by Chief Justice Ajit Nath Ray, the court needed to decide how much alterations were limited by the essential construction hypothesis. Beam, who was among the protesters in the Kesavananda Bharati case, had been elevated to Chief Justice of India on 26 April 1973, supplanting three senior Judges, Shelat, Grover and Hegde (all in the larger part in a similar case), which was exceptional in Indian legitimate history. On November 10 and 11, the group of common freedom supporter counselors, drove by Nanabhoy Palkhivala, contended against the Union government's application for reevaluation of the Kesavananda choice. A portion of the adjudicators acknowledged his contention on the absolute first day, the others on the following; before the second's over day, the Chief Justice was decreased to a minority of one. On the morning of 12 November, Chief Justice Ray curtly articulated that the seat was broken down, and the appointed authorities rose.[20]

The 39th Amendment endeavored, among different arrangements, to legitimize the appointment of Indira Gandhi in 1971. Article 329A put the appointment of the Prime Minister and Lok Sabha Speaker outside the domain of the legal executive and given to assurance of questions concerning their decisions by a position to be set up by a Parliamentary regulation. The Supreme Court struck down conditions (4) and (5) of the article 329A, which made the current political decision regulation irrelevant to the Prime

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

Minister's and Speaker's political race, and pronounced the forthcoming procedures in regard of such races invalid and void.

3.2 Development

Protected legal counselor A. G. Noorani noticed that the principle has "presently spread all over past its wildernesses.", however that the possible attribution to Dietrich Conrad is missing, who propounded the contentions in a talk to the law staff in the Banaras Hindu University. The contention, Noorani describes cleared a path to M K Nambyar who read the selection out in Golaknath.

3.3 Indirect Confines of the Amending Power

"Maybe the place of the Supreme Court is affected by the way that it has not so far been faced with any outrageous kind of established revisions. It is the obligation of the law specialist, however, to expect outrageous instances of contention, and once in a while just outrageous tests uncover the real essence of a legitimate idea. Thus, if with the end goal of legitimate conversation, I might propose an imaginary correction regulations to you, might it at any point actually be viewed as a substantial activity of the revision power gave by Article 368 in the event that a 66% greater part changed Article 1 by separating India into two States of Tamilnad and Hindustan legitimate. "Might a protected correction at any point cancel Article 21, such that forthwith an individual could be denied of his life or individual freedom without authorisation by regulation? Could the decision party, assuming it sees its larger part contracting, revise Article 368 such that the changing power rests with the President following up on the guidance of the Prime Minister? Might the changing at any point control be utilized to cancel the Constitution and once again introduce, let us say, the standard of a moghul head or of the Crown of England? I don't need, by suggesting such conversation starters, to incite simple responses. In any case, I ought to get a kick out of the chance to familiarize you with the conversation which occurred on such inquiries among protected legal counselors in Germany in the Weimar period - conversation, appearing to be scholarly from the start, yet out of nowhere shown by history in an extraordinary and horrendous way."

3.4 Development of the Doctrine

The essential design convention was additionally explained in Minerva Mills v. Association of India. The 42nd Amendment had been authorized by the public authority of Indira Gandhi in light of the Kesavananda Bharati judgment with an end goal to decrease the force of the legal audit of established revisions by the Supreme Court. In the Minerva Mills case, Nanabhoy Palkhivala effectively moved the Supreme Court to pronounce areas 4 and 55 of the 42nd Amendment as unconstitutional.[13] The defendability of segments 4 and 55 of the 42nd Amendment were tested for this situation, when Charan Singh was overseer Prime Minister. Segment 4 of the 42nd Amendment, had changed Article 31C of the Constitution to accord priority to the Directive Principles of State Policy verbalized in Part IV of the Constitution over the Fundamental Rights of people enunciated in Part III. Area 55 kept any protected revision from being "brought being referred to in any Court on any ground". It likewise pronounced that there would be no constraint whatever on the constituent force of Parliament to alter via definition, variety or nullification the arrangements of the Constitution. On 31 July 1980, when Indira Gandhi was back in power, the Supreme Court announced segments 4 and 55 of the 42nd amendment as illegal. It further embraced and developed the essential construction precept of the Constitution. As had been recently held through the fundamental construction precept in the Kesavananda case, the Court decided that Parliament couldn't by changing the constitution convert restricted power into a limitless power (as it had suspected to do by the 42nd amendment).

In the judgment on segment 55, Chief Justice Yeshwant Vishnu Chandrachud composed,

Since the Constitution had presented a restricted changing power on the Parliament, the Parliament mightn't under the activity of that restricted power at any point broaden that very power into a flat out power. For sure, a restricted revising power is one of the essential elements of our Constitution and in this way, the limits on that power can not be obliterated. All in all, Parliament can not, under Article 368, grow its correcting power to secure for itself the option to nullify or repeal the Constitution or to annihilate its fundamental and fundamental elements. The donee of a restricted power mightn't by the activity of that power at any point convert the restricted power into a limitless one.[21]

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

The decision was broadly invited in India, and Gandhi didn't challenge the verdict.[16] In the judgment on Section 4, Chandrachud composed:

Three Articles of our Constitution, and just three, stand between the paradise of opportunity into which Tagore believed that his nation should alert and the pit of unreasonable power. They are Articles 14, 19 and 21. Article 31C has taken out different sides of that brilliant triangle which stands to individuals of this country an affirmation that the commitment held forward by the introduction will be performed by guiding a populist time through the discipline of central privileges, or at least, without weakening of the freedoms to freedom and balance which alone can assist with protecting the poise of the person.

This last option perspective on Article 31C was addressed, however not toppled, in Sanjeev Coke Manufacturing Co v Bharat Cooking Coal Ltd. (case reference: AIR 1983 SC 239). The idea of fundamental construction has since been created by the Supreme Court in ensuing cases, like Waman Rao v. Association of India (AIR 1981 SC 271), Bhim Singhji v. Association of India (AIR 1981 SC 234), S.P. Gupta v. Leader of India (AIR 1982 SC 149) (known as Transfer of Judges case), S.P. Sampath Kumar v. Association of India (AIR 1987 SC 386), P. Sambamurthy v. Province of Andhra Pradesh (AIR 1987 SC 663), Kihota Hollohon v. Zachilhu and others (1992 1 SCC 309), L. Chandra Kumar v. Association of India and others (AIR 1997 SC 1125), P. V. Narsimha Rao v. State (CBI/SPE) (AIR 1998 SC 2120), I.R. Coelho v. Province of Tamil Nadu and others (2007 2 SCC 1), and Raja Ram Pal v. The Hon'ble Speaker, Lok Sabha and others (JT 2007 (2) SC 1) (known as Cash for Query case). The Supreme Court's situation on protected revisions spread out in its decisions is that Parliament can alter the Constitution yet can't obliterate its "fundamental construction"..[22]

3.5 Recognition

Bangladesh

The basic structure doctrine was adopted by the Supreme Court of Bangladesh in 1989, by expressly relying on the reasoning in the Kesavananda case, in its ruling on *Anwar Hossain*

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

Chowdhary v. Bangladesh (41 DLR 1989 App. Div. 165, 1989 BLD (Spl.) 1).[23] However, Bangladesh is the only legal system to introduce this concept through constitutional provisions. Article 7B of the Constitution of Bangladesh Introduced some parts of it as basic provisions of the constitution and referred to some others (which are not properly defined) as basic structure of the constitution and declares all of these as not amendable.

Belize

The basic structure doctrine was invoked by the Supreme Court of Judicature of Belize in *Bowen v Attorney General BZ 2009 SC 2* in rejecting the Belize Constitution (Sixth Amendment) Bill 2008, which had sought to exclude certain deprivation of property rights from judicial review. The court recognised the fundamental rights granted by the constitution, respect for the rule of law and the right to the ownership of private property as basic features of the Belizean constitution, as well as the separation of powers, which Chief Justice Abdulai Conteh noted had been recognised by the Judicial Committee of the Privy Council in *Hinds v The Queen [1977] AC 195* which was not a constitutional amendment case as implicit in Westminster model constitutions in the Caribbean Commonwealth realm.[24]

The Supreme Court affirmed the doctrine in *British Caribbean Bank Ltd v AG Belize Claim No. 597 of 2011* [25]and struck down parts of the Belize Telecommunications (Amendment) Act 2011 and Belize Constitution (Eighth) Amendment Act 2011. The amendments had sought to preclude the court from deciding on whether deprivation of property by the government was for a public purpose, and to remove any limits on the National Assembly's power to alter the constitution. This was found to impinge on the separation of powers, which had earlier been identified as part of the basic structure of the Belizean constitution.

Malaysia

In Malaysia, the basic features doctrine was initially found to be inapplicable by the Federal Court in *Phang Chin Hock v. Public Prosecutor*. The Court remarked that the Indian constitution was drafted by a constituent assembly representative of the Indian

[23] Archived copy". Archived from the original on 2010-12-20. Retrieved 2013-12-02.

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

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

people in territorial, racial and community terms, and not "ordinary mortals", while the same could not be said for the Malaysian constitution, which was enacted by an ordinary legislature. The basic structure doctrine was first cited with approval by the Federal Court in *obiter dicta* in *Sivarasa Rasiah v. Badan Peguam Malaysia*, before ultimately being applied by the same court in *Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Daerah Hulu Langat & Ano'r Case*[26] and *Indira Gandhi a/p Mutho v. Pengarah Jabatan Agama Islam Perak & 2 O'rs & 2 Other Cases*. In those cases, the Federal Court held that the vesting of the judicial power of the Federation in the civil courts formed part of the basic structure of the Constitution, and could not be removed even by constitutional amendment.

Pakistan

The basic structure doctrine was recognised in *Constitution Petition No.12 of 2010, etc.* by the Supreme Court of Pakistan in 2015. The case was heard by the full 17-member bench, of which a plurality of 8 accepted the basic structure doctrine as a basis for limiting the ability of the Parliament of Pakistan to amend the Constitution, 4 rejected the premise of such limitations, describing the basic structure doctrine as a "vehicle for judicial aggrandisement of power", and 5 accepted that some limitations exist but did not endorse the basic structure doctrine. The judgement identified democracy, federalism and independence of the judiciary as among the characteristics protected by the doctrine. Before this decision, it was unclear whether the basic structure doctrine applied in Pakistan. The doctrine was considered and rejected shortly after the *Kesavananda* decision, revived in 1997, and rejected again in 1998.[The 2015 decision addressed the issue directly and accepted the doctrine.[27]

Singapore

The High Court of Singapore denied the application of the basic features doctrine in Singapore in *Teo Soh Lung v. Minister for Home Affairs*. Justice Frederick Arthur Chua held that the doctrine was not applicable to the Singapore Constitution: "Considering the differences in the making of the Indian and our Constitution, it cannot be said that our Parliament's power to amend our Constitution is limited in the same way as the Indian Parliament's power to amend the Indian Constitution."[28]

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[26] ibid

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

[28] *Teo Soh Lung* (H.C.), p. 479, para. 47.

Uganda

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

Chapter -4

The Constitution of Bangladesh

4.1 Constitution:

The Constitution of the People's Republic of Bangladesh is a composed record. It was officially embraced by the Constitution Assembly on fourth November 1972. It contains 153 articles, one preface and 7schedules.

4.2 Definition

The basic principles and laws of a nation, state, or social group that determine the powers and duties of the government and guarantee certain rights to the people in it.[29] A constitution is an aggregate of fundamental principles or established precedents that constitute the legal basis of a polity, organisation or other type of entity, and commonly determine how that entity is to be governe.[30] When these principles are written down into a single document or set of legal documents, those documents may be said to embody a written constitution; if they are written down in a single comprehensive document, it is said to embody a codified constitution. Some constitutions (such as that of the United Kingdom) are uncodified, but written in numerous fundamental Acts of a legislature, court cases or treaties.[31]

4.3 Inflexible Constitution:

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

4.4 Legal of Amendment:

A revision is basically a rectification. It comes in numerous assortments, up to and including the most common way of modifying something through either parliamentary or established system. In the Bangladesh Constitution, the word is frequently utilized explicitly of a change to the Bangladesh. An established revision might be proposed by Congress with a 66% larger part vote in both the Senate and the House of Representatives

[29] https://www.merriam-webster.com/dictionary/constitution(last access date on 10 November 2019).

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

[31] R (HS2 Action Alliance Ltd) v Secretary of State for Transport [2014] UKSC 3, [207]

or through a sacred show with larger part casts a ballot in 66% of state lawmaking bodies. Whenever it is confirmed by Congress, it should be endorsed by three-fourths of the states. Meaning of Amendments. The method involved with modifying or changing a regulation or record (like a constitution) by parliamentary or sacred system privileges that were conceded by revision of the Constitution.[32]

Definition of Amendments

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

4.5 Preamble:

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

4.6 Supremacy of the Constitution:

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

4.7 Unitary Government System:

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

4.8 Unicameral Legislature:

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

4.9 Fundamental Principle of State Policy:

Having regard to the constitutional misadventures of the past and usurpation of power by unauthorized persons, the framers of the Constitution thought it necessary to spell out the

[32] https://dictionary.cambridge.org/dictionary/english/amendment(last access date on 11 March 2022).

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.

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

4.10 Fundamental Rights:

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

4.11 Parliamentary form of Government:

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

4.12 Independence of Judiciary:

The constitution of1972 ensured the independence of Judiciary. The Chief Justice would be appointed by the President and other justice of the Supreme Court appointed after consultation with the Chief Justice, according to the constitution. Appointment of subordinate judges and magistrates was also to be exercised with consultation of the Supreme Court. Secondly, a judge could not be removed form his office expect by an order of the President passed to a resolution of parliament supported by a two-third members of the parliament.

4.13 Doctrine of Basic Structure of the Constitution:

Basic structures of the constitution mean structural pillars on which the constitution rests and that if these structural pillars are demolished the entire constitutional edifice will crumble.[33] The basic structure doctrine applies only to the constitutionality of amendments and not to ordinary Acts of Parliament, which must conform to the entirety of the constitution and not just to its basic structure.[34] Sovereignty of the people, supremacy of the constitution as the solemn expression of People's will, unitary character of the state, as an independent sovereign Republic, Democratic form of Government, separation of powers between the three organs of the state, Executive, legislature and judiciary along with the rule of law and judicial review, Independence of judiciary and Fundamental Human Rights are the basic Features of the constitution. Mr. Justice B.H. Chowdhury J, (as he then was) enumerated as many as 21 (twenty one) unique features of B Bangladesh constitution.[35]

4.14 Constitutional Amendments Legislative Versus Judicial:

As of 2012 the Constitution of the People's Republic of Bangladesh has been amended by the Parliament fifteen times by its fifteen Constitutional Amendment Acts. It is to be noted that of these fifteen Amendments, the first three amendments are still valid and exists in the Constitution without any substantial change. However, with regard to the rest of the ten amendments (4^{th} to 14^{th}) there have been two types of changes: Legislative changes (by way of constitutional amendments); and Judicial changes (by way of judicial declaration with judicial declaration with judicial review power).[36]

4.15 How Did It Amend?

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

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

[34] *Visit on http://en.wikipedia.org/ wiki/Basic_structure#Extending_the_doctrine_.281981.29*

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

[36] https://www.lawyersnjurists.com/article/amendment-of-the-constitution-of-bangladesh last access date on 11 March 2022

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

According to the constitution, the amendment to the constitution will come into effect with the president's assent to the bill.According to Article 142((b) of the constitution, however, the president would need to assent to the bill in seven days after it is presented to him and 'if he fails so to do he shall be deemed to have assented to it on the expiration of that period. The new amendment to the constitution stipulates that parliament 'may by law' regulate the procedure of 'investigation and proof of the misbehavior or incapacity of a judge. The law minister, Anisul Huq, placed the bill before the house for passage as parliamentary session resumed at 7:00pm with speaker Shirin Sharmin Chowdhury in the chair and the bill was passed at about 11:00pm. The law minister promised that his ministry would frame rules on appointment of judge's soon. Most of the lawmakers including the leader of the house, Sheikh Hasina, the leader of the opposition in parliament, Raushan Ershad, and the Jatiya Party chairman, HM Ershad, joined the sitting that passed the bill. The Jatiya Party (JP) chairman, Anwar Hossain Monju, also the environment minister, was absent. With the passage of the bill, parliament will also have the power to remove the chief election commissioner and other election commissioners, the Public Service Commission chairman and members, the comptroller and auditor general and the Anti-Corruption Commission chairman and commissioners on similar grounds.

According to the constitution and the Anti-Corruption Commission Act 2004, the holders of those offices 'shall not be removed from his office except in like manner and on like grounds as a judge of the Supreme Court. Anisul on September 7 tabled the bill saying that it would restore the original Article 96 of the constitution adopted in 1972. The house sent the bill to the standing committee on law ministry for scrutiny. The standing committee on September 14 submitted its report recommending some changes to the bill

and it was passed as amended by the committee. A total of 30 proposals for amendment to the bill were submitted by lawmakers of Jatiya Party, ruling Awami League's alliance partners Workers Party of Bangladesh and Jatiya Samajtantrik Dal and independent ones and 15 lawmakers submitted notice for soliciting public.

First Amendment

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

Second Amendment

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

Third Amendment

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

Fourth Amendment

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

a) A presidential form of government was introduced in place of the parliamentary system;
b) A one-party system was introduced in place of a multiparty system;
c) The powers of the Jatiya Sangsad were curtailed;
d) The term of the first Jatiya Sangsad was extended;
e) The judiciary lost much of its independence; and
f) The Supreme Court was deprived of its jurisdiction over the protection and enforcement of fundamental rights.

g) This Act:
h) Amended articles 11, 66, 67, 72, 74, 76, 80, 88, 95, 98, 109, 116, 117, 119, 122, 123, 141A, 147 and 148 of the Constitution;
i) Replaced Articles 44, 70, 102, 115 and 124;
j) Repealed Part III of the Constitution;
k) Altered the Third and Fourth Schedules;
l) Inserted a new part (Part VIA); and
m) Inserted new articles 73A and 116A.

Fifth Amendment

The Fifth Amendment Act was passed by the Jatiya Sangsad on 6th April 1979. This Act amended the Fourth Schedule to the Constitution by inserting a new paragraph 18. The effect of the amendment was that all amendments or repeals made in the Constitution from 15 August 1975 to 9 April 1979 (inclusive) by any proclamation or Proclamation Order of the Martial Law Authorities were deemed to have been validly made, and could not be called into question before any court or tribunal or other authority.

Sixth Amendment

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

Seventh Amendment

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

A.B.M. Khairul Haque, CJ.

This appeal is by way of a certificate under Article 103 (2) (a) of the Constitution of the People's Republic of Bangladesh. Accordingly, this appeal was filed directly in this Division as provided in Order XII of the Supreme Court of Bangladesh (Appellate

Division) Rules,1988. It involves determination of the legality of section 3 of the Constitution (Seventh Amendment) Act,1986 (Act 1 of 1986).

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

In due course, the case was forwarded to the Court of Sessions, Chittagong, vide Order dated 16.01.1986 and was numbered as S.T. Case No.10 of 1986 and vide Order dated 10.02.2006, was transferred to the Court of Additional Sessions Judge, Chittagong, for trial (Annexure-G to the writ petition). The writ-petitioner apparently did not appear in the trial and remained absconding. Meanwhile, on being asked, the records of the said Sessions Case was transferred to the Chairman, Special Martial Law Court No.3, Zone-C, Cantonment Bazar, Chittagong, for trial. There it was re-numbered as Martial Law Case No.12 of 1986 and charge was framed under sections 302/34 and the trial proceeded against the accused persons including the writ-petitioner in absentia. After conclusion of the trial, all the accused persons including the writpetitioner were convicted in absentia under sections 302/34 of the Penal Code and were sentenced to suffer imprisonment for life and also to pay a fine of Tk.1,000/- each, in default, to suffer rigorous imprisonment for a further period of 1 (one) year each (Annexure-L to the writ petition). The said conviction and sentence was confirmed in review by the Chief Martial Law Administrator by his Order dated 19.07.1986 (Annexure-M to the writ petition).

Eighth Amendment

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

(a) Declared Islam as the state religion;

(b) Decentralized the judiciary by setting up six permanent benches of the High Court Division outside Dhaka;

(c) Substituted the spelling 'Bengali' with 'Bangla', and 'Dacca' with 'Dhaka', in Article 5 of the Constitution;

(d) Amended Article 30 of the Constitution by prohibiting the acceptance of any title, honours, award, or decoration from any foreign state by any citizen of Bangladesh without the prior approval of the president.

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

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

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

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

Ninth Amendment

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

Tenth Amendment

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

Eleventh Amendment

The Eleventh Amendment Act was passed on 6 August 1991. It amended the Fourth Schedule to the Constitution by adding a new paragraph 21, validating the appointment and oath as Vice President of Shahabuddin Ahmed (Chief Justice of Bangladesh), and the resignation tendered to him on 6 December 1990 by the then President Hussain M Ershad. This Act ratified, confirmed and validated all powers exercised, all laws and ordinances promulgated, all orders made and acts and things done, and actions and proceedings taken by the Vice President as acting President from 6 December 1990 to 9 October 1991 (when Abdur Rahman Biswas became President following his election). The Act also confirmed and made possible the return of Vice President Shahabuddin Ahmed to his previous office as Chief Justice of Bangladesh.

Twelfth Amendment

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

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

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

Thirteenth Amendment

The Constitution (Thirteenth Amendment) Act 1996 was passed on 26 March 1996. It provided for a non-party caretaker government which, acting as an interim government, would give all possible aid and assistance to the Election Commission for holding the general election of members of the Jatiya Sangsad peacefully, fairly and impartially. The non-party caretaker government, comprising the Chief Adviser and not more than 10 other advisers, would be collectively responsible to the president and would stand dissolved on the date on which the Prime Minister entered upon his office after the constitution of the new Sangsad.[37]

On May 10, 2011 the Supreme Court of Bangladesh repealed the 13th amendment to the Constitution declaring the Non-party caretaker government of three months duration for holding national elections void and ultra vires to the constitution.[38]The Constitution (Thirteenth Amendment) Act,1996 (Act 1 of 1996), is ultra vires the Constitution and hereby declared void prospectively.[39] The contention in essence is that because the head f the Care-Taker Government would be chosen from the last retired Chief Justice, or the retired Chief Justice previous to him, this leaves open the possibility that the Hon'ble Chief Justice who would be in line to become the last or penultimate retired Chief Justice might be tempted to be influenced in his decisions in favour of the party in power, keeping his eyes upon the future appointment.[40]

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

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[37] *The Constitution (Thirteenth Amendment) Act 1996*.

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

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

[40] *Ibid*

Fourteenth Amendment

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

(a) a new Article 4A was inserted, for the preservation and display of the portraits of the President and the Prime Minister;

(b) clause (3) of Article 65 was amended regarding the seats reserved exclusively for women members in the Parliament;

(c) Articles 96 (1), 129, and 139 were amended to raise the retirement age of the Judges of the Supreme Court, the Auditor General, and the Chairman and other members of the Public Service Commission (PSC); and

(d) Article 148 was amended, to provide for the administration of the oath to newly elected members of Parliament by the Chief Election Commissioner.

Fifteenth Amendment

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

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

Sixteenth Amendment

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

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

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

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

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

16th amendment of the constitution was passed by the parliament on September 17, 2014 which gave power to the Jatiyo Shangshad to remove judges if allegations of incapability or misconduct against them are proved. On 5 May 2016, the Supreme Court of Bangladesh declared the 16th Amendment illegal and contradictory to the Constitution.[41]

Provision of 16th Amendment

[41] "16th Amendment illegal: HC". Prothom Alo. Retrieved 2016-05-07.

Bangladesh Act No XIII of 2014 amended the Constitution of Bangladesh, empowering Parliament to impeach Supreme Court judges.[42] (Parliament and Judiciary: Striking a Balance). Part VI, chapter one, article 96, of the Bangladesh Constitution, which includes provisions on the tenure of office of the Supreme Court judges, now states:

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(3) Parliament may by law regulate the procedure in relation to a resolution under clause (4) and for investigation and proof of the misbehavior or incapacity of a Judge.

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

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

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

Seventeenth Amendment

The parliament (8 July 2018) unanimously passed the 17th amendment to the constitution which increases the tenure of 50 lawmakers who are elected in the women reserved seat to 25 years. The Bill was passed in the House by 298-0 vote as the speaker put it in the division vote. Law Minister Anisul Huq placed the bill to keep the provision for securing the reserve seats for the women in the parliament with Speaker Shirin Sharmin Chaudhury in the chair. If the amendment was not brought, the next parliament would have no women in reserved seats. The bill was placed in the parliament on April 10 and it was sent to the respective Parliamentary Standing Committee for further scrutiny. Nine lawmakers belonging to the main opposition Jatiya Party and Independent camp placed motions for inclusion of some provisions in the bill which were rejected in voice vote (295-0). The JP and independent MPs who termed some provisions of the bill unconstitutional and argued

[42]http://en.wikipedia.org/wiki/Bangladesh (last access date on 15 November 2019).

for increasing the time for 10 years instead of 25 years voted against their proposals during division vote. According to the Article 65 (3) of the constitution, 50 seats would be reserved exclusively for women in the parliament for 10 years from the first meeting of parliament after the one that passed the 14th constitutional amendment in 2004. As per the constitution, the parliament shall consist of 300 members to be elected directly and 50 reserved seats for women to be allotted to parties based on their proportional representation in the House. The incumbent 10th parliament has 350 members -- 300 elected in general elections and 50 lawmakers from reserved seat for women.

But the exiting 10-year tenure of the reserved seats is going to end on January 24, 2019. According to the draft bill, the 25-year period of the reserved seats will be counted from the first day of the 11th parliament. In 2004, the 8th parliament extended the tenure of the reserved seats by another 10 years through a constitutional amendment and it became effective in the 9th parliament, which sat on January 25, 2009. The 8th parliament increased the number of reserved seats from 30 to 45 while the 9th parliament enhanced it to 50. But the amendment did not extend the term of the quota.[43]

[43] *The Daily Star*, (July 08, 2018), p. 8

Chapter -5

Basic Structure Doctrine and Judicial Power Appraisal of Bangladesh Constitution

5.1 Judicial Power Doctrine of Basic Structure of Bangladesh Constitution

The Constitution does not contain any direct provision regarding the basic structure. So, how can it be deduced from the Constitution? Since the theory of basic structure ultimately restricts the absolute amending power, so the issue of the amending power of the Constitution conferred by it is of great importance in making any discussion about basic structure. Obviously, if there would have been any clear provision in the Constitution identifying them as the basic sti-ucture and a special provision also wouldhavebeen there keeping thembeyond the reach of amendment, then no such requirement would arise. Thus, in the absence of any clear constitutional provision, in fact, the existence of basic structure is dependant on the nature of the amending power of the Constitution. If the amending power can be exercised absolutely irrespective of the basic structure then nothing remains there as basic structure beyond the reach of amendment. So, to determine the existence of certain provisions as basic structure keeping beyond the reach of amendment procedure is only possible if the nature of the amending power permits it.

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.[44]

Fundamental designs of the constitution mean primary points of support on which the constitution rests and that assuming these underlying support points are annihilated the

[44] https://www.academia.edu/41162433/Assignment_on_Basic_structure_Of_Bangladesh

whole established structure will disintegrate. The fundamental construction tenet applies just to the legality of revisions and not to conventional Acts of Parliament, which should adjust to the whole of the constitution and not simply to its essential design. Sovereignity of individuals, incomparability of the constitution as the grave articulation of People's will, unitary person of the state, as an autonomous sovereign Republic, Democratic type of Government, division of abilities between the three organs of the state, Executive, Legislature and Judiciary alongside law and order and legal audit. Freedom of legal executive and Fundamental Human Rights are the premise Features of the Constitution. Mr. Justic B.H. Chowdhury J,(as he then was) listed upwards of 21 (21) special elements of Bangladesh Constitution.

It is said that "the convention of fundamental construction as applied by the Indian Supreme Court had begun from a choice of "Boss Justice Coke's renowned fourth understanding for Bonham's situation, 8 C.O. Rep 114(1610), contentions of insight made on the eighteenth amendment cases. In U.S.A. also, especially to Chief Justice kennedy's contradiction in Royan v. Lennon 1933 IRIT70.62 this standard was perhaps trailed by the then Dhaka High Court which was maintained in request by the Pakistan Supreme Court.

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

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

1. Supremacy of the Constitution.
2. Republican and Democratic form of Government and Sovereignty of the Peoples and the country.
3. Unitary and Republican character of the State and Government.
4. Separation of Powers between the Legislature, Executive and the Judiciary.
5. Independence of the judiciary.
6. Rule of law.
7. Judicial Review.

8. The Unity and Integrity of the Nation.
9. Supremacy of the Constitution.
10. The dignity of the individual secured by the various freedom and fundamentalrights in part III and the directions to build a welfare state contained in part of the Constitution.

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

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

The concept of the basic structure of the constitution can be found in the sub-continent in the case of Pakistan Supreme Court in -FAZLIL QUDER CHOWDHURY Vs. ABDUL HAQUE. It was held that Franchise and form of government are fundamental features of a constitution. The power conferred upon the presidency by the constitution of Pakistan to remove difficulties does not extend to making an allegation in a fundamental feature of the constitution.

5.2 Delimitation of Basic Structures:

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

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

Independence of legal executive is a piece of the fundamental construction :

On account of Secretary, Ministry of Finance Vs. Masdar Hossain 52 DLR(AD) 82, Mustafa Kamal,C.J while deciphering Articles 94(4) and 116A obviously spelt out that the

freedom of Judiciary is one of the fundamental mainstays of our constitution and held in section 59 as follows :-

The freedom of the Judiciary, as avowed and pronounced by Article 94(4) and 116A is one of the essential mainstays of the Constitution and be destroyed, whettled down reduced or lessened in any way at all besides under the current arrangement of the Constitution genuine that this autonomy as stressed by the learned Attorney General is dependent upon the arrangement of the constitution yet the arrangement in the constitution which shortens, decreases or in any case compresses this freedom. Article 115, Article 133 and Article 136 not give either the Parliament or the President the power to the shorten lessen the autonomy of the Subordinate Judiciary by response subordinate regulation or rules what isn't possible straightforwardly isn't possible in a roundabout way.

5.4 Attitude Underlying the Doctrine of Basic Structure:

Somebody could contend that this regulation is ambiguous and ought to be dismissed. Yet, S. Ahmed J. in eighth Amendment Case says that the regulation of essential design can't be dismissed assuming outcome of it, dismissal is thought about. 84 Seervai in his Constitutional Law of India, 85 properly seen that the outcome of dismissing the principle of fundamental design would be so grave thus gone against to the goals of the constitution that the result of vulnerability would be immaterial by correlation. As a matter of fact, there are a few sound philosophical reasonings, which work behind this convention.

1. A constitution like a holy record is made composed with a proper statement by a vote based gathering particularly comprised for individuals for this reason fundamental with the end goal of saving its matchless quality as a grandiose vision for a country. Each composed constitution, in this manner, has specific central standards and targets which are its underlying support points and on which the entire structure of the constitution is raised and assuming these standards are removed or obliterated, the Constitution will lose its unique and inborn personality and character.

2. The parliament being an animal of the Constitution should practice its powers inside the protected limits and cutoff points. It, in this manner, can't expand its restricted power into a flat out ability to obliterate its fundamental components. On the off chance that parliament had the ability to obliterate the fundamental component of the Constitution, it would stop being an animal of the Constitution and turned into its lord. Besides, a Constitution which is officially proclaimed as a hallowed record and as the aide for the country can, not the

slightest bit, be considered as an object of rapine and loot on account of the parliament. As S. Ahmed, J says in eighth Amendment case, the precept of bar to change the essential construction is a viable assurance against successive alterations of the Constitution in secretarial or party interest in nations where a majority rules government isn't allowed any opportunity to create.

3. The statement of sacred matchless quality rather than the Parliamentary incomparability in the Constitution verifiably assumed the presence of an autonomous court or position to look at the lawfulness of activities done by the leader and regulative. However the legal executive like parliament is additionally the animal of the Constitution, it is the Constitution which simultaneously gives, some place straightforwardly and some place by implication, this legal executive the ability to assume the part of an umpire - to see that the leader and authoritative are not violating their protected cutoff points. For this reason the legal executive under a composed Constitution is known as the watchman of the Constitution. 86

The majority of the adjudicators so far have treated this convention according to numerative perspective. Somebody expresses that there are 21 fundamental designs, somebody says for 6, somebody 3, etc. For this reason no unanimity can be found among the adjudicators regarding the substance of this tenet. In the event that this tenet is implied from this general or numerable sense, there makes risk.

Moreover in eighth Amendment instance of Bangladesh the Judges couldn't come into an unanimity with respect to what comprise premise construction of the constitution. As per B.H. Chowdhury, J, 21 elements are fundamental component of our constitution. Equity Sahabuddin Ahmed has referenced six elements as essential which have been referenced before.

Presently we can say, there is no firm rule for fundamental component of the Constitution. Different adjudicator keep various perspectives with respect to hypothesis of essential construction. Yet, at one point they have comparative view that parliament has no ability to annihilate, change, or castrate the 'fundamental design' or system of the constitution. On the off chance that the authentic foundation, the preface, the whole plan of the constitution and the significant arrangements thereof including article 142 are remembered then there can be no trouble, in figuring out what are the fundamental components of the essential design of the constitution. These words apply with more prominent power to regulation of the fundamental construction on the grounds that, the government and majority rule design of the constitution, the division of abilities, the common person of our state are a lot of

more unmistakable than one or the other carelessness or normal equity. So for the security of government assistance state, major freedoms, Unity and trustworthiness of the Nation, Sovereign vote based republic and for freedom of thought, articulation, conviction, confidence and love, understanding of legal executive is required. We can say none is above constitution even parliament and legal executive.

Chapter-6
Constitution of Basic Structure in India

6.1 Separation of Powers: The Indian Plan

In India, there are three particular exercises in the Public authority through which the desire of individuals are communicated. The authoritative organ of the state makes regulations, the chief powers them and the legal executive applies them to the particular cases emerging out of the break of regulation. Every organ while playing out its exercises will in general meddle in the circle of working of one more functionary on the grounds that a severe division of capabilities is preposterous in their dealings with the overall population. In this manner, in any event, while acting in ambit of their own power, covering capabilities will generally show up among these organs. The inquiry which is significant here that ought to be the connection among these three organs of the state, for example whether there ought to be finished partition of abilities or there ought to be co-appointment among them.

6.1.1 Constitutional position

The Constitution of India embraces the possibility of detachment of abilities in a suggested way. Regardless of there being no express arrangement perceiving the teaching of division of abilities in its outright structure, the Constitution makes the arrangements for a sensible partition of capabilities and powers between the three organs of Government.

By investigating the different arrangements of the Constitution, it is clear that the Constitution means that the powers of regulation will be practiced only by the lawmaking body. Additionally, the legal powers can be said to vest with the legal executive. The legal executive is autonomous in its field and there can be no impedance with its legal capabilities either by the Chief or by the Council. Additionally, the chief powers of the Association and the State are vested in the President and the Lead representative separately.[45]

The constitution of India lays down a functional separation of the organs of the State in the following manner:

Article 50 sets out that State will do whatever it takes to isolate the legal executive from the leader. This is to guarantee the autonomy of legal executive. Article 122 and 212 gives legitimacy of procedures in Parliament and the Assemblies can't be raised doubt about in

[45] Article 53(1), Constitution of India

any Court. This guarantees the detachment and invulnerability of the assemblies from legal mediation on the charge of procedural abnormality. Legal direct of an appointed authority of the High Court and the High Courts' can't be examined in the Parliament and the State Council, as per Article 121 and 211 of the Constitution. Articles 53 and 154 individually, give that the chief force of the Association and the State will be vested with the President and the Lead representative and they appreciate insusceptibility from common and criminal obligation.

The assembly other than practicing regulation making powers practices legal powers in instances of break of its honor, reprimand of the President and the evacuation of the adjudicators. The leader might additionally influence the working of the legal executive by making arrangements to the workplace of Boss Equity and different appointed authorities. Council practicing legal powers on account of revising a regulation pronounced ultra vires by the Court and revalidating it. While releasing the capability of excluding its individuals and arraignment of the appointed authorities, the assembly releases the elements of the legal executive. Governing body can force discipline for surpassing right to speak freely in the Parliament; this goes under the powers and honors of the parliament. Yet, while practicing such power it is dependably important that it ought to be in congruity with fair treatment. The tops of each administrative service is an individual from the council, subsequently making the chief a fundamental piece of the governing body. The committee of priests on whose counsel the President and the Lead representative demonstrations are chosen individuals from the assembly. Regulative power that is being vested with the council in specific conditions can be practiced by the leader..[46]

If the President or the Governor, when the legislature or is not in session and is satisfied that circumstances exist that necessitate immediate action may promulgate ordinance which has the same force of the Act made by the Parliament or the State legislature. The Constitution permits, through Article 118 and Article 208, the Legislature at the Centre and in the States respectively, the authority to make rules for regulating their respective procedure and conduct of business subject to the provisions of this Constitution. The executive also exercises law making power under delegated legislation. The tribunals and other quasi-judicial bodies which are a part of the executive also discharge judicial functions. Administrative tribunals which are a part of the executive also discharge judicial functions.[47] Higher administrative tribunals should always have a member of the

[46] Article 123, 213 of the Constitution of India

[47] See *Shiv Kumar Chadhav. MCD*, 1993 (3) SCC 161

judiciary.[48] The higher judiciary is conferred with the power of supervising the functioning of subordinate courts.[49] It also acts as a legislature while making laws regulating its conduct and rules regarding disposal of cases.

All this shows that Indian Constitution does not opt for the strict separation of powers because it is undesirable and impracticable but implications of this concept can be seen in India in its diluted form.

Besides the functional overlapping, the Indian system also lacks the separation of personnel amongst the three departments.[50]

Applying the conventions of established constraint and confidence in the Indian situation, a framework is made where none of the organs can usurp the capabilities or powers which are doled out to one more organ by express or fundamental arrangement, neither could they at any point strip themselves of fundamental capabilities which have a place with them as under the Constitution..[51]

Further, the Constitution of India explicitly accommodates an arrangement of balanced governance to forestall the erratic or fanciful utilization of force got from the said preeminent record. However such a framework seems slow of the convention of division of abilities, it is fundamental to empower the fair and impartial working of such an established framework. By giving such powers, a system for the command over the activity of sacred powers by the individual organs is laid out.[52]

This obviously demonstrates that the Indian Constitution in its arrangement doesn't accommodate a severe division of abilities. All things considered, it makes a framework comprising of the three organs of Government and gives upon them both elite and covering powers and works. Subsequently, there is no outright detachment of capabilities between the three organs of Government.

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[48] See *S.P. Sampath Kumar v. Union of India*, (1987) 1 SCC 125

[49] Article 235 of the Indian Constitution

[50] Please visit http://www.lawyersclubindia.com/articles/-Separation-of-Powers-Encroaching-Boundaries–3014.asp; accede date 17 August 2022.

[51] Mittal D.P., *Natural Justice Judicial Review & Administrative Law*, Taxmann Allied Services (P.) Ltd., New Delhi.

[52] Please visit http://www.pucl.org/Topics/Law/2006/seperation-of-powers.html; accede date 17 August 2022.

4.2 Practical application of the doctrine in India

The debate about the doctrine of separation of powers, and exactly what it involves in regard to Indian governance, is as old as the Constitution itself. Apart from the directive principles laid down in Part-IV of the constitution which provides for separation of judiciary from the executive, the constitutional scheme does not provide any formalistic division of powers. It appeared in various judgments handed down by the Supreme Court after the Constitution was adopted. It is through these judicial pronouncements, passed from time to time, that the boundaries of applicability of the doctrine have been determined.

In the *re Delhi Laws Act case*,[53] it was for the first time observed by the Supreme Court that except where the constitution has vested power in a body, the principle that one organ should not perform functions which essentially belong to others is followed in India. By a majority of 5:2, the Court held that the theory of separation of powers though not part and parcel of our Constitution, in exceptional circumstances is evident in the provisions of the Constitution itself.

As observed by Kania, C.J.:

> *"Although in the constitution of India there is no express separation of powers, it is clear that a legislature is created by the constitution and detailed provisions are made for making that legislature pass laws. Does it not imply that unless it can be gathered from other provisions of the constitution, other bodies-executive or judicial-are not intended to discharge legislative functions?"*

In essence, this judgment implied that all the three organs of the State, i.e., the Legislature, the Judiciary, and the Executive are bound by and subject to the provisions of the Constitution, which demarcates their respective powers, jurisdictions, responsibilities and relationship with one another. Also, that it can be assumed that none of the organs of the State, including the judiciary, would exceed its powers as laid down in the Constitution.

But still, in practice, from time to time, disputes continued to arise as to whether one organ of the State had exceeded the boundaries assigned to it under the Constitution. This question of what amounts to an excess, was the basis for action in the landmark *KesavanandaBharti case*[54]of 1973. The question placed before the Supreme Court in this case was in regard to the extent of the power of the legislature to amend the Constitution as

[53] See *Re Delhi Laws Act*, 1912, In re, AIR 1951 SC 332: 1951 SCR 747

[54] See *KesavanandaBharati v. State of Kerela*, (1973) 4 SCC 225: AIR 1973 SC 1461

provided for under the Constitution itself. It was argued that Parliament was "supreme" and represented the sovereign will of the people. As such, if the people's representatives in Parliament decided to change a particular law to curb individual freedom or limit the scope of judicial scrutiny, the judiciary had no right to question whether it was constitutional or not. However, the Court did not allow this argument and instead found in favour of the appellant on the grounds that the doctrine of separation of powers was a part of the "basic structure" of our Constitution.

The doctrine of separation of powers was further expressly recognized to be a part of the Constitution in the case of *Ram JawayaKapur v. State of Punjab,*[55] where the Court held that though the doctrine of separation of powers is not expressly mentioned in the Constitution it stands to be violated when the functions of one organ of Government are performed by another. This means the Indian constitution had not indeed recognized the doctrine of separation of powers in its absolute rigidity but the functions of different parts or branches of the Govt. have been sufficiently differentiated and consequently it can very well be said that our constitution does not contemplate assumption, by one organ or part of the state, of functions that essentially belongs to another.

In *Asif Hamid v. State of Jammu & Kashmir,*[56]Legislature, executive and judiciary have to function within their own sphere as demarcated under the constitution. No organ can usurp the functions assigned to another. The functioning of the democracy depends upon the strength and independence of each of its organs. Judicial review is a powerful weapon to restrain unconstitutional exercise of power by the legislature and executive. However the only check on judicial power is the self-imposed discipline of judicial restraint. Therefore this doctrine cannot be liberally applied to any modern government, because neither the powers can be kept in water tight compartments nor can any government can run on strict separation of powers.

In *Suman Gupta v. State of Jammu and Kashmir,*[57]the respective State Government reserved certain seats in medical colleges for the students residing in the particular state on reciprocal basis, this policy of state was challenged on the ground that it discriminate among the students on the ground of place of birth. The Supreme Court rejected the policy on the ground of discrimination but meanwhile the students who are the beneficiaries of this policy had completed their substantial education, and now it is not in the interests of

[55] AIR 1955 SC 549: (1955) 2 SCR 225

[56] AIR 1989 SC 1899

[57] AIR 1983 SC 1235

justice to cancelled their admission, therefore here supreme court applied the doctrine of prospective overruling and held that the government must not apply the impugned policy from next academic year.

Therefore, by using the doctrine of prospective overruling in the above to cases, the Supreme Court maintained the balance between judiciary and other organs of the government. It can also be maintained by using the self restraint by the judges.

In *Divisional Manager, Aravali Golf club v. Chander Hass and Another,*[58]the Supreme Court warned the High court for it's over activism. The Supreme Court held that since there was no sectioned post of tractor driver against which the respondents could be regularized as tractor driver, the direction of the first appellate court and the single judge to create the post of tractor driver and regularizing he services was completely beyond their jurisdiction. The court cannot direct the creation of post. Creation and sanction of post is a prerogative of the executive or legislative authorities and the court cannot arrogate to itself this purely executive or legislative function, and direct creation of posts in any organization. The court further said that the creation of a post is an executive or legislative function and it involves economic factors. Hence, the courts cannot take upon themselves the power of creation of post.

Similarly, in *MadhuHolmagi v. Union of India,*[59] wherein one Advocate filed a public interest litigation challenging the "Agreement 123" i.e. Indo-US nuclear treaty proposed to be entered by the Indian government, petitioner contended that court must have to scrutinize the all documents relating to the agreement 123 and must have to prevent the Indian government from entering in to the nuclear deal. In this court dismissed the petition and also imposed a cost of Rs 5000 on the petitioner stating that it is an abuse of court proceeding. Because the question raised by the petitioner is a question of policy decision, which is to be decided by the parliament and not by the judiciary.

However, it was after the landmark case of *Indira Nehru Gandhi v. Raj Narain*[60] that the place of this doctrine in the Indian context was made clearer. It was observed: "That in the Indian Constitution, there is separation of powers in a broad sense only. A rigid separation of powers as under the American Constitution or under the Australian Constitution does not apply to India. Chandrachud J. also observed that the political usefulness of the

[58] 2008(1)SCC 683

[59] 2008(6) ALL MR 94

[60] 1975 Supp SCC 1: AIR 1975 SC 2299

doctrine of Separation of Power is not widely recognized. No Constitution can survive without a conscious adherence to its fine check and balance."

In *I.C. GolakNath v. State of Punjab,*[61] Supreme Court took the help of doctrine of basic structure as propounded in KesvanandaBharati case and said that Ninth Schedule is violative of this doctrine and hence the Ninth Schedule was made amenable to judicial review which also forms part of the basic structure theory. It was observed: "The Constitution brings into existence different constitutional entities, namely, the Union, the States and the Union Territories. It creates three major instruments of power, namely, the Legislature, the Executive and the Judiciary. It demarcates their jurisdiction minutely and expects them to exercise their respective powers without overstepping their limits. They should function within the spheres allotted to them."

Thus, referring to the above content, it proves that Separation of Power is practiced in India but not that rigidity. It is not embodied in the Constitution, though practiced. The three main powers do cross their limit and interfere in each other's task whenever necessary.

6.3 The Separation of Powers during Periods of Emergency

It is one thing to examine the use of the principle of partition of abilities in typical administration and completely one more to look at it under the exceptional conditions of a public crisis. In such a period, the probability of any organ attempting to surpass its power increments significantly as large numbers of the governing rules become suspended. Nonetheless, it is generally concurred that in any event, during crisis, the teaching should keep on being in force.[62]

, This situation was the issue of discussion on account of *Rameshwar Prasad v. Province of Bihar,* [63] where the Court was expected to decide if the inconvenience of Craftsmanship. 356 in the State without legitimate meeting with State specialists or taking into account the Lead representative's report, adds up to an unnecessary utilization of administrative power. Finding that the Focal Governing body had looked to step into the shoes of the State Council and in this manner usurp the power totally to itself, in the given case, the Court held there to be an unmistakable infringement of the principle of partition of abilities.

[61] AIR 1967 SC 1643: (1967) 2 SCR 762

[62] Please visit http://jurisonline.in/2010/11/separation-of-powers-constitutional-plan-and-practice-2; accede date 17 August 2022.

[63]AIR 1958 Pat 210

India's Leader had been found to have committed a protected misdeed, for which it expected to apologize to the court and the parliament and afterward request that the last option recharge it certainty. On the off chance that certainty was not recharged, the public authority would fall and another administration would need to be framed..[64]

6.4 Modern Developments in India

The issue of the relative jurisdictional boundaries of the organs of the State has acquired a new momentum in the recent period in the context of coalition politics at the center and in states. This can be seen in the instances such as those that occurred in some states in the State elections of 2005, particularly in Jharkhand, Goa and Bihar, where no party or coalition of parties had a clear majority. The situation was further complicated by the fact that neither the Governors of these states (who had the final powers to appoint a government) nor the presiding officers of the legislatures (who had the powers to conduct the proceedings of the House where the majority claimed by the new government was to be tested) were considered to be impartial in their decisions.[65]

In Jharkhand, after the elections in March 2005, the Governor conducted the swearing-in of a government headed by a member of the Union Cabinet, who however, did not seem to have a clear majority. He was given a fixed number of days to prove his majority on the floor of the House. The opposition parties, who claimed to have a majority, were not in favour of such a grace period being granted and hence filed a writ petition in the Supreme Court challenging the decision of the Governor. On March 9 2005 the Court passed an order, which *inter alia* gave directions to the Speaker to extend the Assembly session by a day and conduct a floor test between the contending political alliances. In the light of Court's decision, the earlier government formed by the Union minister decided to tender its resignation on the advice of the central government. An alternative government was then formed by a combination of other parties which was able to prove its majority on the floor of the House.[66]

However, in light of the fact that the executive was functioning in a biased manner, there were no other avenues available for redress apart from the decree of the Court. Hence, it had to be accepted as a valid action, in consonance with its constitutional powers.[67]

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[64] *Ibid.*

[65] *Ibid.*

[66] *Ibid.*

[67] *Ibid.*

Chapter-7
Conclusion

7.1 Recommendations

i. There was a provision in the Article96 of the 1972 constitution regarding impeachment of Supreme Court judges through the Presidential order by having two thirds majority in parliament for proved misconduct and incapacity.

ii. Later during the presidential form of government a new provision was incorporated in the constitution which stipulates that any judge of the Supreme Court may be impeached through a Presidential and incompetence

iii. According to the aforesaid provision no judge can be removed before giving him or her scope of replying shoe cause notice mentioning action against them on the ground of misconduct and incapacity.

iv. But, in 1977 and 1978 a provision was incorporated in constitution giving the authority of impeachment of Supreme Court judge on the grounds of misconduct and incapacity to the President following re commendations of the Supreme judicial council formed by the Chief Justice and two other senior judges of the Supreme Court.

v. If the amendment of the constitution is necessary must be reflect the will of the people of the Bangladesh. Because amendments to Constitutions sometimes have taken place to suit the interests of a particular person or to meet the interests of the party in power.

vi. If the amendment of the constitution is necessary must be maintain all the procedure which is mention in article142 of the Constitution of the People's Republic of Bangladesh.

vii. If the constitution is amended to be followed such other procedure as the constitution prescribes.

viii. Provision of amendment of constitution must be needed in any country because the society changes day by day.

ix. The amendment of the constitution cannot have the effect of destroying abrogating of the basic structure framework of the constitution. That means the basic structure or the essential feature of the Constitution cannot destroyed.

7.2 Conclusion

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. Finally, it seems to be a highly useful doctrine at least in a country like Bangladesh where many laws are passed purely for political purposes. The country where even a democratic government by its majority in the parliament did establish one party political system, curbed the independence of judiciary, banned the newspapers and so on, this doctrine undoubtedly will remain there as an effective check to such drastic autocratic steps to be taken through constitutional process in the future. However, in spite of the existence of the theory of basic structure in the jurisprudence of constitutional law in Bangladesh, still the actual number of basic structure is uncertain, due to the absence of clear judicial authority in this regard. Obviously, such a situation goes against this theory for lack of its preciseness and clarity, and even if it is argued that it will be settled from time to time what constitutes basic structure that also does not become free from the criticism that such a theory then creates an unknown restriction that will be determined after allegation of its violation is made.

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Salient features of 15th amendment: *HYPERLINK "http://www.thedailystar.net/newDesign/latest_news.php?nid=30610" Daily Star Caretaker system abolished*

'Despicable offence' committed