

Sonargaon University

Research Monograph

On

Concept of Basic Structure of The Constitution: An Appraisal From The Perspective of Bangladesh And India

This Research paper is submitted in partial fulfillment of the requirements of the degree of LLB (Honors) under Sonargaon University.

Supervised By:

MD.Deedarul Islam Bhuiyan

Head and Assistant Professor

Department of Law,

Sonargaon University

Submitted By:

Nasrin Sultana

ID No: LLB-1802014009

Batch: 15

Department of Law

Sonargaon University

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From beginning of my research, I am personally indebted to some book writers for their kind And valuable writings. Thanks to all from the bottom of my heart.

Signature

CERTIFICATION BY THE RESEARCH ADVISOR

This is hereby certified that the research Monograph on the topic **‘‘Concept of Basic Structure of The Constitution: An Appraisal From The Perspective of Bangladesh And India** submitted by **Nasrin Sultana**ID No: LLB-1802014009 in fulfillment of the requirements for LLB (hones from Sonargaon University, under my active supervision and guidance and that no part of this paper has been submitted any place earlier, as far as i know.

MD.Deedarul Islam Bhuiyan
Head and Assistant Professor
Department of Law
Sonargaon University, Dhaka.

DECLARATION

This is, a student **Nasrin Sultana** ID No: LLB-1802014009 of LL.B program of Department of Law of Sonargaon University, do hereby declare that the Research Monograph Titled, ` **Concept of Basic Structure of The Constitution: An Appraisal From The Perspective of Bangladesh And India** an original work. The assigned work has done by me for partial requirement of my LLB degree, as a part of academic curriculum. I certify that this thesis does not incorporate without acknowledgment any material previously submitted for a degree or diploma in any university; and that to the best of my knowledge and belief it does not contain any material previously published or written by another person except where dereference is made in the text.

I also declare that the presented work do not breach any existing copyright and no portion of this research monograph has been copied entirely from any work done earlier for a degree or otherwise.

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LETTER OF TRANSMITTAL

To,

MD.Deedarul Islam Bhuiyan

Head and Assistant Professor

Department of Law

Sonargaon University, Dhaka.

Subject: **For the submission of research Monograph titled Concept of Basic Structure of The Constitution: An Appraisal From The Perspective of Bangladesh And India.**

Dear Sir,

This is a matter of joy for me to submit the research monograph on the title '**Concept of Basic Structure of The Constitution: An Appraisal From The Perspective of Bangladesh And India**' While doing this research monograph, I have tried my level best to keep the required standard. I Hope, this dissertation will fulfill your expectation. I hope that you would be kind enough to go through this dissertation for you kind evaluation. I am always available for any clarification or any other necessity of any part of this research Monograph at your convenience.

Yours obediently

Student

Nasrin Sultana

ID No: LLB-1802014009

Batch: 15th

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ABBREVIATIONS

AD : Appellate Division

HCD : High Court Division

DLR : Dhaka Law Reports

BLD : Bangladesh Legal Digest

AIR : All India Reporter

SC : Supreme Court

PLD : Pakistan Legal Digest

BLT : Bangladesh Law Times

SCC : Supreme Court Cases

BLC : Bangladesh Law Chronicles

Abstract:

Constitution is the main directive in Bangladesh. The constitution of Bangladesh has the supreme power over all legislation in Bangladesh. 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 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 even handedness, political, economic and social.

CHAPTER -1

Introductory

1.1 Introduction:

Constitution is the main directive instrument in every democratic country. It gives the various fundamental rights to its citizens and also contains the provisions in relation to state policy. The Constitution of Bangladesh is Supreme over the legislations in Bangladesh. It represents Bangladeshis 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 December16, 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 even handedness, political, economic and social.1 Firstly, we have to know that, what the basic structure of the constitution is. This doctrine is not a settled principle of constitutional law. It is growing principle of Constitutional Jurisprudence. The basic structure doctrine .

1.2 Aims and Objectives

The aim and objectives of the research is to analyze the desirability of application of doctrine of the basic structure in Bangladesh and the judicial responses and to find its impacts on the constitutional development in Bangladesh. Following objectives will be carried out in the study,

- To assess whether there exists, really, the concept of basic structure in the field of constitutional jurisprudence or not.

- To examine the development of the concept of basic structure in a nutshell.

- To weigh up whether the amending power of the constitution is a constituent power or lies under some limitations.

- To ponder its necessity of application of the concept of basic structure in the field of constitutional jurisprudence in Bangladesh.

- To scrutinize the recent view of courts and the international, regional and national judicial responses, covering from statutory law to up-to-date judicial decisions, towards the concept of basic structure in adjudicating cases filing before it.

- To analyses what would be the privileges and shortcomings of the doctrine of basic structure if applied in the constitutional jurisprudence in Bangladesh.

1.3 Importance of the Study

Since the political leaders of our country are by and large corrupt and they amend the constitution in favour of them to retain the power for good in Bangladesh, there should have some fundamental main beliefs, as a safeguard of constitution, which are its structural supports which the parliament cannot amend by its amending power.

In this sense, there should have the application of the Concept of Basic Structure in the Constitution of Bangladesh. On the other hand, judges are becoming politically biased and courts structure is becoming weaker because of political interference in adjudicating any cases in Bangladesh in recent years. Therefore, there has great chance to be abused, by the judiciary, this doctrine in our country and accordingly some past judgment, in fact,

intensify this possibility. Hence, there has great controversy on the point of the application of the Concept of Basic Structure in the Constitutional jurisprudence in Bangladesh.

The application of the Basic Structure is desirable or not is the great concern in recent years. This study mainly focuses on this big issue to examine the existence and desirability of application of the Concept of Basic Structure in the Constitution of Bangladesh. Therefore, this study has enormous importance considering the present situation of the Constitutional jurisprudence in Bangladesh.

1.4 Scope and Limitations of the Research

The scope of my study is to check the desirability of the application of the doctrine of basic structure in Bangladesh. This research does not find out the specific causes behind the individual and community behavior pattern whereas the main focus area of this research is mainly the legal responses. For that reason, many domestic and Indian case references have been discussed here for better understanding. In my research I have faced some limitations also.

- Since the research topic is vast, actually, I have, comparatively, very limited time to meet and take some interviews of constitutional experts. Therefore, I have used here secondary materials only, such as: on books, internet, and various journals.

- As the focus area of this research is mainly on desirability and judicial responses in Bangladesh, based on landmark cases, I could not refer any data from internet for not being Bangladeshi references available here.

- In my research the views and expressions are exclusively mine accordingly any off beam enclosing in this research paper I will be accountable for that.

1.5 Methodology

The methodology of this research paper is basically analytical not empirical and by and large based on secondary materials though to some extent I have used primary data also. The secondary sources of information are Books, E-Books, DLR, BLD, BLT, AIR, PLD, online case reports, journals, websites and newspapers. In doing so, obviously, much more emphasis has been given on the Constitution by frequently referring and quoting the 5th, 7th, 8th, and 13th Amendment cases, especially on Anwar Hossain Chowdhury vs. Bangladesh popularly known as 8th amendment case by which the concept of basic structure has been recognized in Bangladesh. There are also given some Indian case references like Kesavananda case, Golak Nath's case and Indira Nehru Gandhi .Vs. Raj Narayan known as election case as these cases have momentous contribution in establishing the concept of Basic Structure in this subcontinent.

CHAPTER -2

2.1 What are Doctrines:

It is a principle or belief or set of beliefs that are well established and backed by logical. In constitutional law, Doctrines holds a very important role even when the doctrines are not mentioned in the constitutional instrument. Often the interpretation of a constitution refers back to the original intent of the creates and analyses what they might have thought during the creation of that constitution and that often helps the people to understand the doctrines behind a constitution.

2.2 The doctrine of Basic Structure:

In every constitution there are some fundamental elements that are considered as a main component of the constitution and if those particular elements are changed or violated than the main purpose of the constitution are hampered, therefore, in most of the constitution there are provisions that are preserved not to amend. These fundamental elements that are specially protected by the constitution itself are considered as the basic structure of the constitution.

In Bangladesh by the fifteenth amendment Article 7A and 7B were inserted in the Constitution in a bid to end takeover of power through extra-constitutional means. Specially Article 7B of Bangladesh constitution referred to Article 142, Part I, II subject to provisions of Part IXA (Emergency provisions) and Part III and other provisions of articles relating to the basic structures of constitution including article 150 of part XI shall not be amendable by way of insertion, modification, substitution, repeal or by any other means.

It is often accepted that the Doctrine of Basic Structure of Bangladesh Constitution was adopted from the Indian constitution and their remarkable judgments. To have a complete Idea we are going to put a shadow on some renowned case laws of the Indian Constitution.

Case: **Golaknath v. State Of Punjab** [1],Outcome: parliament has no right to amend the fundamental right [on the 24th Amendment their constitution] that was, "With the executive and constitutional power government can amend any provision of the constitution"

That was challenged by a subsequent case: **Kasabanka Bharati vs State of Kerala** [2]Outcome: Parliament can amend any provision including fundamental rights of the constitution but parliament cannot amend the provisions of the constitution which strikes the basic structure.

After that judgment another amendment was issued, (**Amendment 39**) Which articulated that "Court shall not able to raise any question in relation to any election of President, Vice-Precedent, Prime Minister, Speaker etc."

That was followed by another case; **Indira Nehru Vs Raj Narayan** [3]in its judgment the court said that "The amendment was a violation of the basic structure of The Indian constitution and cancelled the 39th Amendment of Indian Constitution.

Then Comes the **42nd Amendment (1976)** of Indian constitution relating the same issue, it should be mentioned that that amendment took place during an emergency period which basically said "No constitutional amendment including fundamental rights can be called in question in court" but the game is not over yet.

Another case followed that amendment, Case: Minerva mills ltd. Vs. Union of India and that case declared the previous (42) amendment fully unconstitutional with reference back to **Kasabanka Bharati vs State of Kerala.**

In **the 8th amendment,** the legislative among other changes changed Article 100 of Bangladesh constitution by which it decentralized the judiciary by setting up six permanent benches of the High Court Division outside Dhaka. That amendment was challenged by Mr Anwar Hussain by a Writ petition (Case; **Anwar Hossain Vs Bangladesh**) which finally reached to the appellate

[1] Golaknath v. State Of Punjab (1967 AIR 1643, 1967 SCR (2) 762),
[2] Kesavananda Bharati ... vs State Of Kerala And Anr on 24 April, 1973
[3] Indira Nehru Gandhi vs Shri Raj Narain & Anr on 7 November, 1975

division of Bangladesh Supreme Court and finally, the court recognized article 100 of the Bangladesh Constitution as part of the Basic Structure of the constitution so that cannot be amended.

2.3 Judicial Review Doctrine:

This doctrine simply imposes that, any act done by executive or legislative can be reviewed by the judiciary and by this power judiciary can verify in any act by executive or parliament is conflicting with the constitution or not.

This doctrine has Established from the judicial decision in the landmark case of USA; **Marbury v. Madison;**[4] in this case (Writ of Mandamus) state was a party thus the Justice referred to Article III, Section 2 of the [US]Constitution, which states in part that *"the Supreme Court shall have original Jurisdiction" in "all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party,"* and by bringing that to notice court has Established it's jurisdiction over the actions of Executives and other government bodies.

But this is not the first time that judiciary tried to limit the authoritarian action of executives, In 1610 England another similar case tried to approach in very similar way, In the case **Bonham [1610, England]** decided by Sir Edward Coke, chief justice of England's Court of Common Pleas, in which he asserted the supremacy of the common law in England, noting that the prerogatives of Parliament were derived from and circumscribed by precedent. He declared that "when an act of parliament is against common right or reason, or repugnant, or impossible to be performed, the common law will control it and adjudge such act to be void." but that idea never took the stand because the justice was later removed or coke himself has abandoned the idea.

Now, modern constitutions often have similar articles or clause to maintain the balance of power among the government organs. The Supreme Court of Bangladesh has also vested similar power by The constitution of Bangladesh.

[4] *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)

Article 7 of the Bangladesh constitution [5]ensures the supremacy of the constitution thus any law that is conflicting with the constitution, especially with part III shall be void and government shall not make any new law inconsistent with that part. (Article 26) and The Judiciary using the conferred power by Article 102 (2) can take/provide any efficacious remedy if otherwise not satisfied by any other law to protect the Basic Structure of the constitution using its judicial wisdom.

2.4 The doctrine of Political question:

The political question doctrine holds that some questions, in their nature, are fundamentally political, and not legal, and if a question is fundamentally political … then the court will refuse to hear that case. It will claim that it doesn't have jurisdiction. And it will leave that question to some other aspect of the political process to settle out.

— John E. Finn, professor of government, 2006

When a case is presented before the court the court will decide if there is any legal question or not and whether it would be appreciated to try that case or not?

The political question doctrine stems from Chief Justice Marshall's opinion in **Marbury v. Madison.** Even as he claimed the power to decide questions of law authoritatively for all three branches of government, Chief Justice Marshall recognized limitations on that power: The province of the court is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have a discretion. Questions in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court."

Apparently, Chief Justice Marshall assumed a sharp, stable distinction between issues of law that courts must resolve and political questions they must permit others to answer.

[5] Article 7 of the Bangladesh constitution

2.5 Doctrine of Efficacy:

This doctrine was justified and came into effect by the observation of Chief Justice Monir (Pakistan; 1895–1979) while a case was brought before him; it was **The STATE VS. DOSSO**[6] Where the among the issues one of the most important ones was, "whether the writs which had been issued would they abet by a virtue of clause 2 of clause 7 of article 2 of The Laws Continuance Enforce Order 1958"; that was in a nut shall a new constitution that was illegally enacted by the martial authority of the time that.

To address the issue Justice Monir took the help of "The Pure Theory of Law" by Hans Kelson where Mr Kelson through his philosophical view and jurisprudence tried to find out what is the norms to be a law hand how that works or empowered, on one point he delivered that, every law has certain beginning and of them is validated by efficacy.

Justice Monir has expressed this with his own view; as, "When a constitution on legal order is disrupted by an abrupt political change, not within the contemplation of the constitution that disruption is another way called revolution; if that is unsuccessful the person would be charged with treason but if it is successful then the coup d'etat is a recognized method of international law of changing a constitution and that takes effect the validity of the law and would be judged not the reference to the old order but to the new order because the old order is ceased to exist …. "

So, a conclusion from these jurists can be drown as, **where the chain of authority ends in an unconstitutional way, therefore requires new authority due to the ineffectiveness or vacant situation, thus a new authority of law can be started for the effectiveness of law and order.**

This Doctrine of Efficacy often use to validate the martial law around the world, another tool of martial law is Doctrine of Necessity

[6] **State v. Dosso I PLD 1958 SC 533**

2.6 Doctrine of Necessity:

Where there is a certain situation where it is necessary to take strict action to control that situation by postponing the constitution or certain provisions of the constitution for a certain time is the doctrine of necessity.

A remarkable case on this doctrine is **Begum Nusrat Bhuttovs.Chief of Army Staff and Federation of Pakistan**[7] General Mohammad Zia-ul-Haq's martial law was validated by this case when he suspended the constitution and detain many political personal.

Two similar cases were observed in Bangladesh too. On 5th April 1979, the **5th Amendment** was passed in the Parliament to validate certain actions and changes of the constitution of Bangladesh but later that was declared illegal by the Bangladesh Supreme Court in 2009.

Another case was brought on **the 7th Amendment of Bangladesh** Constitution that was designed to legalized the administration of the Martial law administrator of General Ershad for the actions and orders from 1982 to 1996. On 26th August 2010, The High Court Division declared that amendment illegal.

2.7 The doctrine of Severability /Eclipse:

To understand it easily we can say the primary purpose of the Doctrine of Severability is to separate the invalid part of any Law or the constitution. The concept is adopted from the law of the contract where in any part of the contract becomes invalid for some reason but the others or most parts or the main subject of the contract is still valid then only that invalid part will cease to exist. Similarly, if any law come to existence and some part of it is contradictory with the fundamental part of the constitution then only that part would be *void ab inition.*

Article 26 of the Bangladesh Constitution directly impediment this Doctrine for the Part III (Fundamental Rights) of the Constitution.

[7] **Begum Nusrat Bhuttovs.Chief of Army Staff and Federation of Pakistan**

Relieve case laws;

- BHIKAJI NARAIN DHAKRAS V. STATE OF M.P (AIR 1955 SC 781)[8]
- KHIHOTA HOLLOHAN V. ZACHITU (AIR 1993 SC 412)[9]
- K GOPALAN V. STATE OF MADRAS (AIR 1950 SC 27)[10]

2.8 The doctrine of Natural Justice:

The Doctrine of Natural Justice is basically a technical terminology from Jurisprudence, what is means that justice should be fair not bias. It follows few principals of law.

- *Audi alterem parton*: No one should be contempt unheard; means the accused must have the right to defend and tell his / her part of the fact and the situation.
- nemo iudex in causa sua: No one should be judged in his own case; means the person who is involved or have any interest in the case he/she must not have the power to determine the fate of the case because then there will be a change for baseness.

[8] BHIKAJI NARAIN DHAKRAS V. STATE OF M.P (AIR 1955 SC 781)

[9] KHIHOTA HOLLOHAN V. ZACHITU (AIR 1993 SC 412)

[10] K GOPALAN V. STATE OF MADRAS (AIR 1950 SC 27)

2.9 The doctrine of ultra vires:

This two word, **ultra and vires** mean Access and Power accordingly, When a person does something that is beyond his jurisdiction shall be declared as ultra vires.

Ultra vires acts can be challenged by writ [under **Article 102** of the Bangladesh Constitution], one of its forms is **Public Interest Litigation** (PIL); which is a litigation that is intended not for the benefit of one individual but for the benefit of a group of people, PIL can be placed before a court who has no interest on it.

PIL is properly explained in the case of **S.P. Gupta Vs. Union of India** in the judgement it was held that, "Where a legal injury or wrong has happened to a person or persons due to violation of constitutional rights or any other guaranteed rights and the aggrieved persons are not in a position to challenge the illegality due to poverty or helplessness or financial inability or cannot got to court such act or cause of action can be brought before the court by any individual who feels that justice must be brought to these aggrieved persons"

PIL has successfully established in Bangladesh via the case, **Dr. Mohiuddin Farooque and Another vs. Bangladesh,** 1997 [11] where similar observation like India were made in the case the court held that "Aggrieved party" means not the only person who is personally aggrieved but also one whose heart bleeds for his unfortunate fellow beings for wrong done by the government or local authority not fulfilling it's constitutional or other statutory obligation.

2.10 The doctrine of Legitimate Expectation:

This is a procedural doctrine, where any court or any other administrative authority provides any specific facility to any person and person on the same footing can legitimately expect that facility.

[11] *Dr. Mohiuddin Farooque. vs. Bangladesh* and *others*. Civil Appeal No. 24 of 1995. 17 BLD (AD) *1997*, Vol. XVII, Page-1 to 33; 1 BLC (AD) (1996)

This doctrine is based on the doctrine of natural justice to protect a procedural or substantive interest when a public authority rescinds from a representation made to a person and keeps public authority from abusing their power.

A procedural legitimate expectation rests on the presumption that a public authority will follow a certain procedure in advance of a decision being taken, while a substantive legitimate expectation arises where an authority makes a lawful representation that an individual will receive or continue to receive some kind of substantive benefit. In determining a claim for an alleged breach of a legitimate expectation, a court will deliberate over three key considerations:

(1) whether a legitimate expectation has arisen;
(2) whether it would be unlawful for the authority to frustrate such an expectation; and
(3) if it is found that the authority has done so, what remedies are available to the aggrieved person.

Chapter -3

3.1The origin and Development 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 HAQUE2. 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. The development of the Basic structure of the constitution in INDIAN jurisdiction. The first formal judicial formulation of this doctrine came out in the KESEVANANDA'S CASE. Before the Kesevananda's case the issue of the basic structure came to be applied indirectly in GOLAK NATH'S case. In Golak Nath's case the court held that- Parliament had no power to amend fundamental rights as to take away or abridge any of them. C.J Subba Rao said that Fundamental rights are assigned transcendental place under our constitution.

They are kept beyond the reach of parliament. But this judgment gave rise to acute controversy. It was apprehended that the fundamental rights in the constitution would become static creating hindrances in the way of enactment of socio-economic legislation required to meet the needs of a developing society. To get over this problem, Indian parliament passed the 24th constitution Amendment Act,1971 which laid down that, the parliament might in the exercise of its constituent power amend any provision of the constitution be it of fundamental rights or of any other one. The validity of 24th constitution Amendment Act,1971 and the 25th amendment Act which curtailed the power of judicial review was challenged in KESEVANANDA CASE. By majority the court overruling the GOLAK NATH'S case. It was held that- The parliament had the power to amend any or all the provisions of the constitution including those relating to fundamental rights. But this power of amendment of the constitution was subject to certain implied and inherent limitations. Parliament could not amend those provisions of the constitution which affect the basic structure or framework of the constitution. The Supreme Court of INDIA

also apply the principle of Kesevananda's case in the INDIRA GANDHI Vs. RAJ NARAYAN5. In the judgment of INDIRA GANDHI case there was involved the question of the validity of the 39th Amendment Act,1975 of the Indian constitution. It took away the power of any court. The Supreme Court to decide any doubts and disputes arising in connection with the election of the Four high officials of the state, that is: President, vice-president, prime minister and the Speaker.

3.2 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 sense .

1.Basic Structure principle in general sense or Numerable sense and
2. Basic Structure principle in real or Substantive sense.

3.3 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 saying for 6 and some are saying 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

3.4 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 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 7. D.

Chapter-4

4.1 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 ANWARHOSSAIN Vs. Bangladesh[12], 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 Ultra vires. 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.

4.2 These basic features are:

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.

[12] ANWARHOSSAIN Vs. Bangladesh

6). Separation of powers which is mentioned in article 22 of the constitution[13].

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.

A one party political system has been introduced instead of party political system. A new part "PART VI A " with new articles inserted for this purpose. Under new arrangement, the creation of the National party was left with the subjective satisfaction of the president. It was provided that in order to give full effect to any of the fundamental principles of state policy set out in part-2 of the constitution, the president could direct that there shall be only one political party in the state. Once the president made an order for one party under article 117A which states- all political parties of the state would stand dissolved. The president would take all necessary steps for the formation of National party. In accordance with article 117A of the constitution the president was declared the national party for the country under the name of "BAKSAL" on 24th February 1975. As a result, all existing political parties instantly stood dissolved. Bangladesh became the one party political state.

The judiciary lost its absolute independence. According to article 95, the appointment procedure of the Apex court, the chief justice would be appointed by the president and the other judges would be appointed after the consultation with chief justice. But in 4th Amendment Act-the word consultation with chief justice was deleted. In relation to security of tenure according to the article 96(2) of the original constitution -"a judge could not be removed unless parliament passed a resolution supported by majority of not less than two third of the total number of MPs on the ground of proved misbehavior or incapacity. But in 4th amendment Act deleted this provision of impeachment through parliament. Instead that the president could remove a judge including the chief justice simply by an order on the ground of misbehavior. Such misbehavior need not to be proved. It was just president's desire and wish.

[13] article 22 of the constitution of Bangladesh

The 4th amendment was direct attack on the press freedom. In June 1975, the government promulgated the newspaper (Annulment of declaration) ordinance which allowed only 4 newspaper(Dainik Bangla, Bangladesh Observr, Ittefaq and Bangladesh times [14]in fact owned and managed by the state) to continue their publication and rest of the newspaper was banned. In the case of IMDADUL HUQ CHOWDHURY Vs. BANGLADESH9, The HCD observed that by the 4th amendment the basic and essential feature of the constitution were altered and destroyed. In the same case the AD observed that "the first 3 amendments do not appear to have altered the basic structure of the constitution but the 4th amendment clearly altered the basic structure of the constitution.

[14] 4 newspaper(Dainik Bangla,Bangladesh Observr, Ittefaq and Bangladesh times

Chapter-5

Amendment of the Bangladesh Constitution

5.1 Fifth Amendment of the Bangladesh Constitution:

An unenviable feature of the constitutional development of the Bangladesh that it had to withstand two extra constitutionals (martial law regime). In 2000, through a writ petition (writ petition no-6016 of 2000) the validity of martial law was challenged. In 2005, by a division bench of the HCD declared that the 5th amendment was illegal and unconstitutional. It was declared also illegal and void according to martial law proclamation, including the martial law regulation -7 of 1977.This case was again revived in 2009 and recently the AD has declared the same judgment which is declared by the HCD.

Separation of Judiciary from other organs:

An independence of judiciary depends on

a) A fair appointment procedure,

b) Security of tenure,

c)Adequate remuneration of the judges.

Under article 14 and 16 of the constitution 4th amendment Act 1975, the requirement of consultation with the chief justice was omitted by amending article 95 and 98 of the constitution. From 1991, by the constitutional amendment Act,1991(12th amendment), the president may appoint the chief justice but in appointing the other judges of the supreme court, he or she is not bound to act on advice of the prime minister. There is no constitutional obligation to consult with the chief justice. So ultimately prime minister as the chief Executive of Bangladesh exercise the crucial role in appointing the judges of the Supreme court. Article 94 of the constitution demands independence of the supreme court judges. But in article 116A of the constitution enumerates

that the judicial officers including the magistrates have been declared to be independent in the exercise of their judicial functions. Besides this under article 115 and 1167 of the Bangladesh Constitution states that-the president makes the appointment and control of judges in the judicial service or as magistrates exercising the judicial duties which is conflicting each other. But finally the judiciary is now separated from the Executive by the well-known case of -- MAZDER HOSSAIN CASE

In 1995 by a writ petition number 2424, Mazder Hossain[15] along with 441 judicial officer who were judges in different civil court alleged that--a) Inclusion of judicial service in the name of BCS(Judicial) under the Bangladesh civil service order 1980 is ultra vires the constitution. b) Judges of the subordinate judiciary has already been separated by the constitution. Only the rules under article 115 of the constitution, if necessary, are required to be made for giving full effect to this separation of judiciary.

The court directed its historic judgment with 12 directives points on 7th may 1997. On an extensive examination of the constitutional provisions relating to the Subordinate court (article 114 to 116A) and services of Bangladesh (Article 133 to 136). The AD held that "Judicial service is fundamentally and structurally distinct and separate service from the civil Executive and Administrative service of the Republic with which the judicial service cannot be placed on par on any account and that it cannot be ambulated, abolished, replaced, mixed up and tied together with civil Executive and Administrative service(para 76)'It also directed that, the government for making separate rules relating to posting, promotion ,grant, leave, discipline, pay, allowance, pension and other terms and conditions of the service consistent with article 116 and 116A of the Constitution.

5.2 The judgment of the AD in this case also declared

The judicial service is a service of the Republic within the meaning of the article152(1) of the constitution. Under article 133, law or rules or Executive orders having the face of rules to

[15] writ petition number 2424, Mazder Hossain

posting, promotion, grant, leave, discipline, pay, allowance, pension and other terms and conditions of the service consistent with article 116 and 116A of the Constitution, as interpreted by the court, be enacted or formed or made separately for the judicial service and magistrates exercising judicial functions keeping in view of the constitutional status of the said service. The court also declared that to establish a separate judicial service commission. It also declared that in exercising the control of persons employed in the judicial service and magistrates exercising judicial functions under article 116 the views and opinion of the Supreme Court shall have primacy over those Executive.

5.3 Fifteenth Amendment:

In the 15th amendment of the constitution of Bangladesh there are revolutionary changed in the constitution. This amendment abolished the Caretaker government system abolished and Elections to be held under incumbent cabinet. This is not necessary for a Democratic country, I think. But this is not the proper time for amending this provision. Because the opposition political parties would not obey this amendment. The reason is that the political parties in Bangladesh has no minimum level of respect and belief to each other.

Islam as State religion and 'Bismillah-Ar-Rahman-Ar-Rahim' retained above the preamble. But Removal of 'Absolute Faith and Trust in Allah' from the constitution. and Revival of Article 12 to restore Secularism and freedom of religion though the State religion is "ISLAM" and Bismillah-Ar-Rahman-ArRahim' retained in the Preamble[16]. So how can it possible? This is just politics to win in political game by the political parties. It denies recognizing the indigenous people, will be termed as tribal and ethnic minorities. The people of Bangladesh shall be known as "Bengalese" as a nation and citizens of Bangladesh shall be known as "Bangladeshis". But argument is that why we known as "Bengalese" as a nation? Why the tribal are not known as

[16] 'Bismillah-Ar-Rahman-Ar-Rahim' retained above the preamble. But Removal of 'Absolute Faith and Trust in Allah' from the constitution. and Revival of Article 12 to restore Secularism and freedom of religion though the State religion is "ISLAM" and Bismillah-Ar-Rahman-ArRahim' retained in the Preamble

their own status, Tribals in Bangladesh should be known in their own identity that is "tribal" because they are not Bengalese. So I think they(tribal) are deprived by this amendment.

Inserted articles 7A and 7B in the Constitution after Article 7 in a bid to end take-over of power through extra-constitutional means and highest level of punishment would be awarded for those power capturers by extra- constitutional means. In the case of a dissolution Parliament by any reason, election should be held within 90 days of such dissolution. Increasing the number of women reserve seats to 50 from existing 45.

5.4. The 8th Amendment Case (1989)

Facts and the judgment

In its epoch-making decision in **Anwar Hossain Chowdhury v Bangladesh (1989**),[17]31 the Appellate Division entrenched the doctrine of basic-structure when it declared part of the 8th Amendment "unconstitutional". The 8th Amendment established seven permanent benches of the High Court Division (HCD) that was (according to the original article 100) an integrated division of the Supreme Court. The Appellate Division held that parliament's amending power under art. 142 of the Constitution was 'limited' (being a 'derivative' as opposed to an 'original' constituent power) and hence could not be exercised to alter 'basic structures' of the Constitution.

A brief narration of the facts would aid in better appreciating the associated legal arguments. After assuming power in 1982, the second military regime, through various martial law regulations, diffused the HCD into seven permanent benches (each composed of three judges), six being outside of Dhaka. Later, this change was codified by amending original art. 100 via the Constitution (Eighth Amendment) Act 1988. As a result, instead of one integrated HCD, there

[17] Anwar Hossain Chowdhury v Bangladesh (1989)

emerged 7 permanent benches with administratively defined territories, with pending cases having been transferred to the relevant regional permanent bench.

In the present case, the Commissioner of Affidavit refused to allow the appellant, Mr. Anwar Hossain Chowdhury, to affirm a counter-affidavit because the concerned writ petition stood transferred to the Sylhet Bench of the court pursuant to the Rules framed by the Chief Justice under art. 100(6) as amended by the 8th Amendment.

Mr. Chowdhury then filed a writ petition (No. 1252 of 1988) challenging the vires of the 8th Amendment and the said Rules, arguing that the Amendment materially altered the basic-structure of the Constitution and hence was beyond the parliament's amendment power. The High Court Division, Dhaka Bench, summarily rejected his petition on 15 August 1988, against which Mr. Chowdhury appealed to the Appellate Division.

Dr. Kamal Hossain was engaged as the lead counsel of Mr. Chowdhury's appeal. There were two other proceedings seeking similar remedies, of which one was an appeal33 and the other a civil petition for leave to appeal.34 These two proceedings were heard jointly with Mr. Chowdhury's.

In a 3:1 majority, the Appellate Division adopted the basic-structure doctrine and declared as unconstitutional the 8th Amendment for breaching the unitary character of the Supreme Court, a basic feature of the Constitution. The Court accepted Dr. Hossain's lead arguments that (i) the HCD's plenary judicial power over the whole Republic was a part of the unamendable basic structure of the Constitution35 and that (ii) a parliament with unlimited amending power would be incompatible with the notion of constitutional supremacy, another basic pillar of the Constitution.

Even the lone dissenting judge, Justice A.T.M. Afzal, agreed that parliament cannot "destroy" the character of the Constitution in the name of amendment.36 For Afzal J, a destruction by an amendment would occur if any of the three organs of the State ("structural pillars") were "destroyed" or "emasculated in such a manner as would make the Constitution unworkable"

Arguments of Dr. Hossain

When the basic-structure doctrine theorizes the unconstitutionality of a constitutional amendment, it points at two types of unconstitutionality, procedural and substantive. When any amendment breaches the amendment rules, it can be said to be procedurally unconstitutional. By contrast, an amendment that is procedurally constitution-compatible can yet be substantively unconstitutional when any basic constitutional feature or fundamental core is demolished. In his arguments,38 Dr. Hossain captured both prongs of the doctrine.

First, on the procedural front, Dr. Hossain argued that the 8th Amendment did not comply with the amendment rule of the Constitution contained in art.142[18], as the long title of the amendment bill did not set out the specific articles that were to be amended. It was argued that this requirement was a vital condition for the exercise of the amending power in the first place. As such, while amending art. 100, parliament by implication amended (or derogated from) several other articles and thus committed a fraud on the Constitution. This later argument was a mix of substantive and procedural unamend ability arguments.

On the point of substantive unconstitutionality, the core of Dr. Hossain's arguments was that parliament's amending power is inherently limited. To press his point on the concept of implied limits on amendment power, it was submitted as follows:

The amending power is a power within and under the Constitution and not a power beyond and above the Constitution. It does not empower Parliament to undermine or destroy any fundamental feature or 'structural pillar' of the Constitution Any power of amendment under the Constitution is subject to limitations inherent in the Constitution. The structural pillars or basic structures of the Constitution established by framers of the Constitution cannot be altered by the simple exercise of amending power.
The Parliament's unlimited power of amendment is inconsistent with the concept of supremacy of the Constitution which is expressly embodied in the Preamble and Art. 7 of the Constitution and is undoubtedly a fundamental feature of the Constitution.

[18] Dr. Hossain argued that the 8th Amendment did not comply with the amendment rule of the Constitution contained in art.142

Dr. Hossain then went on to focus on specific basic features of the Constitution, which he argued were irreparably damaged by the impugned amended article 100.

First, Dr. Hossain submitted that the unitary character of the Republic was derogated from. **Second**, he argued that the independence of the judiciary as a basic feature was dismantled. He further argued that the provision of executive notifications under clause (5) of the amended art. 100 as well as the power of the Chief Justice to enact Rules under clause (6), both affecting the "structure, status, jurisdiction, independence and effectiveness of the High Court Division", were tantamount to the delegation of constituent power to the administration and the Chief Justice, and hence incompatible with the basic structure of the Constitution. On the point of destruction of judicial independence, he argued as follows:

One cannot but marvel at the craftsmanship of Dr. Hossain's above arguments, through which he projected the independence of the judicial organ generally, and the structural integrity of the Supreme Court in particular. The learned counsel also profitably relied on several constitutional provisions. including arts. 44, 94, 101, 102, 107, 108, 109, 110 and 111, to buttress his arguments

Before proceeding to the next discussion, another aspect of Dr. Hossain's advocacy in the 8th Amendment case merits attention. This is the use of comparative constitutional law to help consolidate and entrench the basic-structure doctrine. As can be gleaned from his submission, he referred to 23 foreign judicial decisions, 2 Pakistan Supreme Court cases (of 1963 and 1968) and 8 scholarly writings. In order to substantiate his argument that parliament's amending power was impliedly limited by the Constitution itself, Dr. Hossain cited a 1978 piece by Professor Upendra Baxi on "the nature of constituent power" and a book by constitutionalist Walter F. Murphy titled Constitutions, constitutionalism, and democracy (1988). At a time when the validity of a constitutional amendment was being adjudicated for the first time in Bangladesh, not only was the basic-structure doctrine a relatively more controversial and nebulous idea than it is today, but it was also a daunting challenge for the court to extend its judicial review to a constitutional amendment, given the country's remarkably underdeveloped constitutional jurisprudence. Therefore, reliance on comparative constitutional material, especially the Indian doctrine of limited amending power of parliament, seemed a strategically profitable method. Although Dr.

Hossain relied on the Constitution of Bangladesh in earnest, the borrowing of constitutional reasoning from comparative sources greatly helped him in his efforts to convince the judges to adopt the doctrine.

5.6 The 13th Amendment Case (2011)

The judgment and consequences ,In Abdul Mannan Khan v Bangladesh (2012)[19],42 the Appellate Division by split decision (4 to 3) in May 2011 prospectively invalidated the Constitution (Thirteenth Amendment) Act 1996 that introduced the neutral and apolitical interim Caretaker Government (CtG) system. The CtG was to be in power during the interregnum between two elected governments (i.e., ninety days),

principally to oversee a free and fair national election. Before the system was abolished in 2011, national elections were held under the CtG on three occasions (1996, 2001 and 2009). In striking down the 13th Amendment, the Court reasoned that the institution of CtG, being an unelected government and involving retired chief justices in the system, was against "democracy" and "judicial independence," two elements of the basic structure of the Constitution.

Abdul Mannan Khan was an appeal against the HCD's decision in M Saleem Ullah v Bangladesh (2004)[20]. This case was filed as a public interest litigation by a lawyer on grounds that the CtG was incompatible with the Constitution's basic structures. Dismissing the challenge, the HCD held that the CtG system, instead of destroying the democratic character of the polity, helped democracy to consolidate. In regard to the constitutionality of engaging a retired chief justice as head of the CtG, the Court preferred not to interfere with political wisdom, leaving it for parliament to seek a better option. The legality of the CtG had been challenged earlier in another judicial review petition, but the challenge was rejected summarily (25 July 1996) as the Court found "no unconstitutional action" on the part of the "legislature" in enacting the impugned Amendment to provide for the CtG system for a "limited period".

[19] Abdul Mannan Khan v Bangladesh (2012)
[20] M Saleem Ullah v Bangladesh (2004)

These rationales of the HCD, underpinned by a trait of judicial restraint over structural or political/policy issues, were brushed aside by the Appellate Division. I had earlier argued that the plurality Court misapplied the basic-structure doctrine in this case. The misapplication of the doctrine resulted from a merely textual interpretation of the Constitution, to the exclusion of the local socio-political context. Further, the majority court implausibly turned down the arguments of six out of eight amici curiae including Dr. Kamal Hossain, who urged the Court to consider the validity of the Amendment in the compelling context of the then political crisis followed by consensus that culminated in the caretaker government formula.

It is not surprising that the Appellate Division's 13th Amendment decision had serious political implications. The decision effectively sharpened the then political crisis over the CtG issue. The Awami League government that assumed power following the 2009 elections earlier indicated that it would discard the CtG system. Within two months of the Court's "short order" on 10 May 2011, the government enacted the Constitution (Fifteenth Amendment) Act 2011 to eliminate the CtG system. This exclusion of the CtG was done without the concurrence of major political parties, including the main opposition party (the Bangladesh Nationalist Party). The opposition demanded the restoration of the CtG system, ultimately boycotting the January 2014 general election.

Ironically, the unilateral and whimsical exclusion of the CtG system on the plea of its being "undemocratic" resulted in a distorted and illiberal democracy, since the tenth parliament was a product of effectively a one-party election, with the Awami League once again in power but without any real opposition in parliament. Moreover, candidates in 153 constituencies (out of 300 general seats) were declared "elected" without contestation. It has therefore been a widely held view that the 2014 elections were deficient in constitutional legitimacy

Arguments of Dr. Hossain

In this case, Dr. Kamal Hossain appeared as an amicus curiae. His written submission, a copy of which I was kindly presented with, represents a classic essay in the law of judicial review of constitutional amendments. Dr. Hossain argued that the 13th Amendment or the system of an election-time caretaker government was not incompatible with the Constitution. His major points can be summarized as below:

(i) The 13th Amendment was a result of a political consensus and hence not unconstitutional;

(ii) It was not destructive of democracy, a basic feature of the Constitution, but an aiding mechanism to help democracy entrench itself and prosper; and

(iii) The CtG system did not breach the independence of judiciary, as the appointment of a retired Chief Justice as the Chief Adviser was not the only option.

First, Dr. Hossain saw the Constitution as a political process that evolves along the life, experience, and the needs of a society. He aligned this functional/social concept of a constitution with the ability of the court to determine the legality of any amendment. For him, the validity of a constitutional amendment, "which was made based on consensus of major political parties (and sections [of the public] including civil society) and had been acted upon by them in each of the successive elections, should not be the subject matter of a challenge going to the root of its constitutionality". "On a close analysis", he continued, "it appears that the grievances [of the litigants] are in fact about the manner in which the provision has been applied in specific cases/events, in particular, the mode/manner in which the Chief Adviser discharged his responsibility in 2001, and the manner in which the Chief Adviser was appointed and a number of actions taken by him in 2006 have raised questions about his role.

Dr. Hossain drew from the historical evolution of the CtG system, demonstrating how inevitable it was in the context of the tendency in Bangladeshi politics of manipulation and engineering of elections by the party in power. The 13th Amendment was an important constitutional device, since it fulfilled the political demands for a caretaker government to ensure free and fair elections for the sake of the constitutionally mandated democratic political order. it fulfilled the political demands for a caretaker government to ensure free and fair elections for the sake of the constitutionally mandated democratic political order.

Secondly, he asked the Court to adopt an approach of purposive or harmonious constitutional interpretation when defining democracy or adjudicating the vires of a constitutional amendment. Citing Mahmudul Islam's Constitutional Law of Bangladesh, Dr. Hossain argued that every "constitution is founded on some social and political values and legal rules are incorporated to build a structure of political institutions aimed to realize and effectuate those values. Therefore, the legal rules incorporated in the body of a constitution cannot be interpreted in isolation from those social and political values and the purpose which emerges from the scheme of the constitution".

The approach of the apex court thus ought "to recognize that the Thirteenth Amendment was made in the context of the situation created in 1996"

In the face of the argument that the CtG system was undemocratic, Dr. Hossain contended that the alleged constitutional inconsistency of the Amendment was misconceived. The foundation of democracy, he went on to say, is article 7 of the Constitution, that provides for popular sovereignty and constitutional supremacy[21]. "The Thirteenth Amendment by seeking to supplement the Election Commission to ensure free and fair elections, thus, contributes to strengthening the electoral/democratic process". To substantiate his argument Dr. Hossain quoted the following from Amartya Sen's The Argumentative Indian:

Public reasoning includes the opportunity for citizens to participate in political discussions and to influence public choice. Balloting can be seen as only one of the ways – albeit a very important way – to make public discussions effective, when the opportunity to vote is combined with the opportunity to speak and listen, without fear. The reach – and effectiveness – of voting depend critically on the opportunity for open public discussion.

To overcome the arguments of the petitioners that the CtG system, by involving the retired chief justices, breached the principle of independence of judiciary, Dr. Hossain made certain innovative

[21] article 7 of the Constitution, that provides for popular sovereignty and constitutional supremacy

and society-specific arguments. The maintenance of rule of law called for a truly independent judiciary, for which there needed to be a democratic government established by a fair and free election. Thus, the consensus about the retired Chief Justices' involvement in an election-time government ought not to be considered a breach of the principle of judicial independence. Further,it was argued that the "independence of the judiciary itself has to provide checks on the Caretaker Government to ensure that [that] independence is not infringed". Relying on the famous Masdar Hossain Case (2000), in which the Appellate Division observed that they found "no provision in the Constitution which curtail[ed], diminished[d] or otherwise abridge[d] this independence", Dr.Hossain argued that the Court by implication accepted the constitutionality of provisions of the CtG. Another opposing argument was that the incumbent government may seek to appoint and promote judges with the pre-determined objective of gaining undue advantage during elections from any judge so appointed. Dr. Hossain submitted that that would only depend on the integrity and inner strength of the judge concerned.

These arguments portray certain standards which a Court should adhere to when deciding a complex yet purely society-specific constitutional amendment. The most attractive of his arguments is that a constitutional amendment that reflects an overwhelming public demand and is based on sheer political consensus (reflected not necessarily in the voting in parliament) must not be seen as unconstitutional by mundanely looking at certain texts of the Constitution. I take this as having portrayed a 'limited doctrine' of basic-structure. In other words, Dr. Hossain's arguments can also be interpreted as having shown the dangers of abuse of the doctrine. The plurality court in the 13th Amendment Case did not, however, accept his arguments, and the nation has already witnessed unwholesome political consequences of this unwise refusal, as elections in Bangladesh have turned into a ploy at the hands of the incumbent government in power, leading to the boycott of the 2014 elections by all major political parties.

Undeniably, however, Dr. Hossain's arguments achieved remarkable success as three out of seven Justices accepted them. In his powerful dissent, Justice Muhammad Imman Ali, for example, reasoned that "the Thirteenth Amendment was neither illegal nor ultra vires the Constitution and does not destroy any basic structures of the Constitution.[22]" For Justice Ali, the republican and

[22] Dr. Hossain's arguments achieved remarkable success as three out of seven Justices accepted them. In his powerful dissent, Justice Muhammad Imman Ali, for example, reasoned that "the Thirteenth

democratic character of the State was no more infringed on or after this Amendment than it had been before the care-taker government system was introduced. Ali, further reasoned that in the aftermath of the 1996 political quagmire, the people chose the CtG system as a solution. Accordingly, the solution to the current crisis must come from the representatives of the people and ought to be worked out through dialogue in parliament. The other two dissenting judges, Justice Abdul Wahhab Mia and Madam Justice Nazmun Ara Sultana, also preferred to defer the issue to the people or the future.

5.7The 16th Amendment Case (2017)

Background and the judgment

On 3 July 2017, the Appellate Division in Bangladesh v Asaduzzaman Siddiqui (2017) invalidated the Sixteenth Amendment of 2014 that restored an original constitutional scheme regarding the parliamentary removal of Supreme Court judges[23]. By this, the Court endorsed the HCD's 2:1 decision in Asaduzzaman Siddiqui v Bangladesh (2016) Dr. Hossain appeared as an amicus curiae before both divisions of the Supreme Court, arguing that the Amendment was unconstitutional as it breached the principle of independence of judiciary I have argued elsewhere that the Appellate Division's decision was an inappropriate application of the basic-structure doctrine in as much as the 16th Amendment in effect restored an original constitutional system that the constituent people (by virtue of original constituent power) enacted in their 1972 Constitution. I have also argued that the 16th Amendment was not a breach of judicial independence, as there remained an option, under clause (3) of art. 96, to introduce by law a peer-review process within the system of parliamentary removal of judges. In this paper, however, I focus on the innovativeness of Dr. Hossain's arguments by which he successfully

Amendment was neither illegal nor ultra vires the Constitution and does not destroy any basic structures of the Constitution.

[23] On 3 July 2017, the Appellate Division in Bangladesh v Asaduzzaman Siddiqui (2017) invalidated the Sixteenth Amendment of 2014 that restored an original constitutional scheme regarding the parliamentary removal of Supreme Court judges

persuaded the Court that the 16th Amendment was unconstitutional in light of the changed political scenario in the country reflected in, among other things, the lack of independence of members of parliament and absolute parliamentary majority .

Bangladesh's original Constitution (1972) provided, in art. 96(2), for the removal of a Supreme Court judge by an order of the President, pursuant to a resolution of parliament passed by a two-thirds majority, but only on the ground of proven misbehavior or incapacity of the judge[24]. Before this provision was ever tested, the Fourth Amendment (1975) had completely done away with it, by providing for the removal of judges merely by an order of the President. In August 1975, the Constitution itself was thwarted and a lingering period of extra-constitutional regimes installed. The first military regime extra-constitutionally amended the judicial removal clause to introduce a peer-driven removal process called the Supreme Judicial Council (hereafter 'SJC') composed of the Chief Justice and two other most senior judges.

The system (art. 96) provided that a judge could be removed by order of the President, if the SJC upon a hearing and inquiry recommended his or her removal. This judiciary-led process of SJC was later affirmed by the Fifth Amendment (1979), which was struck down by the Appellate Division in 2010.63 The 5th Amendment decision of the Appellate Division, however, validated the SJC There was indeed no serious opposition to the system of SJC. Rather, the Supreme Court approved and appreciated the SJC. The government nevertheless replaced the SJC with the original scheme of parliamentary removal of Supreme Court judges. At first sight, the 16th Amendment's purpose seems to be honest insofar as it restored the original scheme. If one were to dig deeper into the background, however, the Amendment reveals itself as a product of a predatory and dominating politics. A couple of years before this Amendment was passed, senior ruling party leaders threatened in parliament to restore the power of parliament to remove judges of the Supreme Court. There emerged a tug of war between a particular judge of the HCD and the Speaker of the House of the Nation when the latter commented in the House that the judges were quite prompt in issuing decisions that concerned their own stake. The case centered around a decision of the HCD that involved the release of a government-owned property in favor. of the Supreme

[24] Bangladesh's original Constitution (1972) provided, in art. 96(2), for the removal of a Supreme Court judge by an order of the President, pursuant to a resolution of parliament passed by a two-thirds majority, but only on the ground of proven misbehavior or incapacity of the judge

Court. The leading judge in the concerned decision countered the Speaker's comments and warned that it might be regarded as seditious. This sparked a fierce debate in parliament regarding the alleged breach of 21the Constitution by the judge in question, and following further judicial and parliamentary exchanges, the issue seemingly faded away. It is in this background that the 16th Amendment was enacted.

Arguments of Dr. Hossain

As indicated above, given the nature of originality of the provisions reinstated through the 16th Amendment and the fact that Dr. Hossain was the Chairman of the Constitution Drafting Committee, it was not an easy task for him to develop an argument that the 16th Amendment was unconstitutional. In successfully arguing that the removal of judges by parliament was unconstitutional, Dr. Hossain employed contextual and purposive theories of constitutional interpretation. Based on the ground that the independence of judiciary was an unalterable core, he submitted that the impugned unconstitutionality had to be judged in light of the preamble and, among others, arts. 7B, 94(4), 96, 116A and 147. Of these articles, art. 7B was enacted into the Constitution via the 15th Amendment, to provide that certain basic provisions of the Constitution could not be amended. Dr. Hossain's arguments were that the 16th Amendment created an atmosphere of arbitrary exercise of parliament's power to remove a judge. For him, the constitutional principle of independence of judiciary precludes any kind of partisan exercise of power by the legislature in relation to the judiciary, in particular the power to remove judges of the Supreme Court. As regards the originality of the reinstated art. 96, Dr. Hossain argued as follow n the original 1972 Constitution, removal of judges by impeachment was based on certain assumptions, which in the light of subsequent amendment[s] would appear to be difficult to sustain. The impeachment power was vested in the Parliament on the premise that the Parliament being constituted by elected representatives of the citizens would exercise their power conscientiously and independently, free from any party directive's:

In other words, in the context of present-day politics in Bangladesh, the removal of judges through a peer-driven process, as was the case with the Supreme Judicial Council, became an unalterable basic structure of the Constitution, and hence unamendable under art. 7B that was introduced in 2011. This claim represents the crux of his arguments which the Appellate Division accepted as a forceful or meritorious argument Dr. Hossain also argued that the 16th

Amendment made the judges “vulnerable” to political force or vengeance and made their tenure “insecure”. Hence, the argument went, the Amendment was unconstitutional.

5.8 Conclusion:

A few Amendments ended at one time under certain situation were consequently detached by another Amendment, and also that numerous of these had a nationwide harmony. But most of the amendments were endorsed without giving the appropriate arguments. Amendments that were the consequence of unsophisticated thought, lack of esteem for democratic practices or suitability have clearly come under severe disapprovals, sometimes for suitable motives and sometimes for sectarian political ideas. Reading the doctrine of basic structure for this research proposes various models by which the doctrine may be identified and evaluated came up. The three molds used to examine the doctrine are Basic Structure and the theory of Originalism, Basic Structure acts as balancing tool, and Basic Structure as a tool of growth.

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