Chapter 1
Introduction

1.1 Abstract:

The Constitution of Bangladesh is a Rigid Constitution in light of the fact that for changing the Constitution of Bangladesh there needs two third larger part votes in favor of the Parliament Members Vote. In a few different nations there need three fourth larger part votes in favor of correction of the Constitution. It is a developing standard of Constitutional Jurisprudence. The essential design principle is the adjudicator made teaching by which certain highlights of a constitution are past the constraint of the powers of change of a parliament. This teaching additionally applies just to the defendability of alterations and not to the common Acts of the parliament which should affirm to the sum of the constitution.

1.2 Introduction

The Constitution of Bangladesh, formally the Constitution of the People's Republic of Bangladesh is the preeminent law of Bangladesh. The record gives the structure that differentiates the Bangladeshi republic with a unitary, parliamentary vote based system, that cherishes crucial common liberties and opportunities, a free legal executive, majority rule neighborhood government and a public organization. The four key standards of the Constitution are patriotism, communism, a majority rules system and secularism. The Constitution tries to make a communist society in which law and order, key common liberties and opportunity, uniformity and equity, political, monetary and social, is gotten for every one of its residents. It commits Bangladesh to "add to global harmony and co-activity with regards to the dynamic yearnings of humankind".[1]

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

Judicial precedent is enshrined in Bangladesh's Constitution under Article 111,[2] which makes Bangladesh an integral part of the common law world. Judicial review is also

[1] *Ibid.,* Article 8.

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

supported by the Constitution. It was adopted by the Constituent Assembly of Bangladesh on 4 November 1972 and became effective on 16 December 1972. The Constitution replaced the Proclamation of Independence as the country's fundamental instrument of government. The Constitution became effective on Bangladesh's Victory Day, precisely one year after the signing of the Instrument of Surrender.[3]

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

1.3 Objectives of the Study

The **main objective** of this research monograph is to **"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 historical background of the constitutionalism is Bangladesh.
3. To find out the procedure to appraisal from the perspective Bangladesh constitutionalism.
4. To suggest ways for better constitutionalism is Bangladesh its start and problem.

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

1.4 Methodology of the Study

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

1.5 Limitations of the Study

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

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

Chapter- 2

Conceptual Analysis

2.1 Conceptual Framework

In Kesavananda, Justice Hans Raj Khanna propounded that the Constitution of India has certain basic features that cannot be altered or destroyed through amendments by the Parliament of India. Key among these "basic features", as expounded by Justice Khanna, are the fundamental rights guaranteed to individuals by the constitution.[4] The doctrine thus forms the basis of the power of the Supreme Court of India to review and strike down constitutional amendments and acts enacted by the Parliament which conflict with or seek to alter this "basic structure" of the Constitution. The basic features of the Constitution have not been explicitly defined by the Judiciary, and the claim of any particular feature of the Constitution to be a "basic" feature is determined by the Court in each case that comes before it.

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

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

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

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

In 1967, the Supreme Court reversed its earlier decisions in Golaknath v. State of Punjab. It held that Fundamental Rights included in Part III of the Constitution are given a "transcendental position" and are beyond the reach of Parliament. It also declared any amendment that "takes away or abridges" a Fundamental Right conferred by Part III as unconstitutional. In 1973, the basic structure doctrine was formally introduced with rigorous legal reasoning in Justice Hans Raj Khanna's decisive judgment in the landmark decision of Kesavananda Bharati v. State of Kerala.[4] Previously, the Supreme Court had held that the power of Parliament to amend the Constitution was unfettered. However, in this landmark ruling, the Court adjudicated that while Parliament has "wide" powers, it did not have the power to destroy or emasculate the basic elements or fundamental features of the constitution.[5]

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

---

[5] 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.

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

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

2.2 Background

The Supreme Court's initial position on constitutional amendments was that no part of the Constitution was unamendable and that the Parliament might, by passing a Constitution Amendment Act in compliance with the requirements of article 368, amend any provision of the Constitution, including the Fundamental Rights and article 368. In *Shankari Prasad Singh Deo v. Union of India* (AIR. 1951 SC 458), the Supreme Court unanimously held, "The terms of article 368 are perfectly general and empower Parliament to amend the Constitution without any exception whatever. In the context of article 13, "law" must be taken to mean rules or regulations made in exercise of ordinary legislative power and not amendments to the Constitution made in exercise of constituent power, with the result that article 13 (2) does not affect amendments made under article 368. In *Sajjan Singh v. State of Rajasthan* (case citation: 1965 AIR 845, 1965 SCR (1) 933), by a majority of 3–2, the Supreme Court held, "When article 368 confers on Parliament the right to amend the Constitution, the power in question can be exercised over all the provisions of the Constitution. It would be unreasonable to hold that the word "Law" in article 13 (2) takes in Constitution Amendment Acts passed under article 368."[7] In both cases, the power to amend the rights had been upheld on the basis of Article 368.

Golaknath case

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

In 1967, the Supreme Court reversed its earlier decisions in *Golaknath v. State of Punjab*.[8] 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

[7] *"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.*

[8] *Ibid.*

amendment of the Constitution is a legislative process, and that an amendment under article 368 is "law" within the meaning of article 13 of the Constitution and therefore, if an amendment "takes away or abridges" a Fundamental Right conferred by Part III, it is void. Article 13(2) reads, "The State shall not make any law which takes away or abridges the right conferred by this Part and any law made in contravention of this clause shall, to the extent of contravention, be void." The Court also ruled that Fundamental Rights included in Part III of the Constitution are given a "transcendental position" under the Constitution and are kept beyond the reach of Parliament. The Court also held that the scheme of the Constitution and the nature of the freedoms it granted incapacitated Parliament from modifying, restricting or impairing Fundamental Freedoms in Part III. Parliament passed the 24th Amendment in 1971 to abrogate the Supreme Court ruling in the Golaknath case. It amended the Constitution to provide expressly that Parliament has the power to amend any part of the Constitution including the provisions relating to Fundamental Rights. This was done by amending articles 13 and 368 to exclude amendments made under article 368, from article 13's prohibition of any law abridging or taking away any of the Fundamental Rights.[9] Chief Justice Koka Subba Rao writing for the majority held that:

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

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

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

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

2.4 Types of Basic Structure:

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

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

b) Basic Structure principle in real or substantive sense.

2.5 Basic Structure principle in general sense or Numerable sense:

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

2.6 Basic Structure principle in real or substantive sense:

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

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

2.7 The Basic structure of the constitution of Bangladesh:

The constitution shall be the supreme law of the land for all times. Nothing can be done which 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[10]:

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

2) Democracy which states in the preamble.

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

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

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

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

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

These structural pillars of the constitution stand beyond any change by amendatory process. If these principles are curtailed more than one permanent seat of the Supreme Court by exercising the amending power, then it 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

[10] *Ibid.*

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,[11] socialism,[12] democracy[13] and secularism.[14] 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".[15]

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.

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

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

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

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

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

2.9 Unitary Parliament Bangladesh

The **Government of the People's Republic of Bangladesh** [16]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, which are apportioned on elected party position in the parliament. The eleventh national parliamentary election was held on 30 December 2018.[17] 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

[16] https://en.wikipedia.org/wiki/Government_of_Bangladesh
[17] *The Daily Star*. 9 January 2014

Hossain. He succeeded acting chief Justice Md. Abdul Wahhab Miah on 2 February 2018.[18]

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.[19] 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 197220

The fundamental rights of the people[21]

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.
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

[18] Staff Correspondent. "Acting CJ Wahhab Miah resigns". *Prothomalo*. Retrieved 5 December 2021.
[19] *Prothom Alo* (in Bengali). Retrieved 2019-02-20.
[20] "Fundamental Rights". *Banglapedia*. Retrieved 2019-02-20.
[21] https://en.wikipedia.org/wiki/Fundamental_rights_of_the_people_of_Bangladesh#:~:text=The%20fundament al%20rights%20of%20the,law%20inconsistent%20with%20these%20rights.

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

Analysis of Judicial Power and Basic Structure Doctrine of Bangladesh Constitution

3.1 The Emergency (1975)

The Court reaffirmed and applied the basic structure doctrine in *Indira Nehru Gandhi v. Raj Narain*, popularly known as Election case. The constitutionality of Article 329A, which had been inserted by the 39th Amendment in 1975 was challenged in this case. Shortly after the imposition of the Emergency, a bench of thirteen judges was hastily assembled to hear the case. Presided over by Chief Justice Ajit Nath Ray, the court had to determine the degree to which amendments were restricted by the basic structure theory. Ray, who was among the dissenters in the Kesavananda Bharati case, had been promoted to Chief Justice of India on 26 April 1973, superseding three senior Judges, Shelat, Grover and Hegde (all in the majority in the same case), which was unprecedented in Indian legal history. On November 10 and 11, the team of civil libertarian barristers, led by Nanabhoy Palkhivala, argued against the Union government's application for reconsideration of the Kesavananda decision. Some of the judges accepted his argument on the very first day, the others on the next; by the end of the second day, the Chief Justice was reduced to a minority of one. On the morning of 12 November, Chief Justice Ray tersely pronounced that the bench was dissolved, and the judges rose.[22]

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

---

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

3.2 Development

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

3.3 Implied Limitations of the Amending Power

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

3.4 Evolution of the doctrine

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

Minister. Section 4 of the 42nd Amendment, had amended Article 31C of the Constitution to accord precedence to the Directive Principles of State Policy articulated in Part IV of the Constitution over the Fundamental Rights of individuals articulated in Part III. Section 55 prevented any constitutional amendment from being "called in question in any Court on any ground". It also declared that there would be no limitation whatever on the constituent power of Parliament to amend by way of definition, variation or repeal the provisions of the Constitution. On 31 July 1980, when Indira Gandhi was back in power, the Supreme Court declared sections 4 & 55 of the 42nd amendment as unconstitutional. It further endorsed and evolved the basic structure doctrine of the Constitution.[23] As had been previously held through the basic structure doctrine in the *Kesavananda* case, the Court ruled that Parliament could not by amending the constitution convert limited power into an unlimited power (as it had purported to do by the 42nd amendment).

In the judgement on section 55, Chief Justice Yeshwant Vishnu Chandrachud wrote,

Since the Constitution had conferred a limited amending power on the Parliament, the Parliament cannot under the exercise of that limited power enlarge that very power into an absolute power. Indeed, a limited amending power is one of the basic features of our Constitution and therefore, the limitations on that power can not be destroyed. In other words, Parliament can not, under Article 368, expand its amending power so as to acquire for itself the right to repeal or abrogate the Constitution or to destroy its basic and essential features. The donee of a limited power cannot by the exercise of that power convert the limited power into an unlimited one.[24]

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

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

---

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

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

This latter view of Article 31C was questioned, but not overturned, in *Sanjeev Coke Manufacturing Co v Bharat Cooking Coal Ltd.* (case citation: AIR 1983 SC 239). The concept of basic structure has since been developed by the Supreme Court in subsequent cases, such as *Waman Rao v. Union of India* (AIR 1981 SC 271), *Bhim Singhji v. Union of India* (AIR 1981 SC 234), *S.P. Gupta v. President of India* (AIR 1982 SC 149) (known as Transfer of Judges case), *S.P. Sampath Kumar v. Union of India* (AIR 1987 SC 386), *P. Sambamurthy v. State of Andhra Pradesh* (AIR 1987 SC 663), *Kihota Hollohon v. Zachilhu and others* (1992 1 SCC 309), *L. Chandra Kumar v. Union of India and others* (AIR 1997 SC 1125), *P. V. Narsimha Rao v. State (CBI/SPE)* (AIR 1998 SC 2120), *I.R. Coelho v. State of Tamil Nadu and others* (2007 2 SCC 1), and *Raja Ram Pal v. The Hon'ble Speaker, Lok Sabha and others* (JT 2007 (2) SC 1) (known as Cash for Query case). The Supreme Court's position on constitutional amendments laid out in its judgements is that Parliament can amend the Constitution but cannot destroy its "basic structure".[25]

3.5 Recognition

Bangladesh

The basic structure doctrine was adopted by the Supreme Court of Bangladesh in 1989, by expressly relying on the reasoning in the Kesavananda case, in its ruling on *Anwar Hossain Chowdhary v. Bangladesh* (41 DLR 1989 App. Div. 165, 1989 BLD (Spl.) 1).[26] 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

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

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

Justice Abdulai Conteh noted had been recognised by the Judicial Committee of the Privy Council in *Hinds v The Queen [1977] AC 195* which was not a constitutional amendment case as implicit in Westminster model constitutions in the Caribbean Commonwealth realm.[27]

The Supreme Court affirmed the doctrine in *British Caribbean Bank Ltd v AG Belize Claim No. 597 of 2011* [28]and struck down parts of the Belize Telecommunications (Amendment) Act 2011 and Belize Constitution (Eighth) Amendment Act 2011. The amendments had sought to preclude the court from deciding on whether deprivation of property by the government was for a public purpose, and to remove any limits on the National Assembly's power to alter the constitution. This was found to impinge on the separation of powers, which had earlier been identified as part of the basic structure of the Belizean constitution.

Malaysia

In Malaysia, the basic features doctrine was initially found to be inapplicable by the Federal Court in *Phang Chin Hock v. Public Prosecutor*. The Court remarked that the Indian constitution was drafted by a constituent assembly representative of the Indian people in territorial, racial and community terms, and not "ordinary mortals", while the same could not be said for the Malaysian constitution, which was enacted by an ordinary legislature. The basic structure doctrine was first cited with approval by the Federal Court in *obiter dicta* in *Sivarasa Rasiah v. Badan Peguam Malaysia*, before ultimately being applied by the same court in *Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Daerah Hulu Langat & Ano'r Case*[29] 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,

---

[27] 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.

[28] "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.

[29] ibid

of which a plurality of 8 accepted the basic structure doctrine as a basis for limiting the ability of the Parliament of Pakistan to amend the Constitution, 4 rejected the premise of such limitations, describing the basic structure doctrine as a "vehicle for judicial aggrandisement of power", and 5 accepted that some limitations exist but did not endorse the basic structure doctrine. The judgement identified democracy, federalism and independence of the judiciary as among the characteristics protected by the doctrine. Before this decision, it was unclear whether the basic structure doctrine applied in Pakistan. The doctrine was considered and rejected shortly after the *Kesavananda* decision, revived in 1997, and rejected again in 1998.[The 2015 decision addressed the issue directly and accepted the doctrine.[30]

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."[31]

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.

---

[30] 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.

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

Chapter -4

Constitution of Bangladesh

4.1 Written Constitution:

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

4.2 Definition of Constitution

The basic principles and laws of a nation, state, or social group that determine the powers and duties of the government and guarantee certain rights to the people in it.[32] 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.[33] 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.[34]

4.3 Rigid 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 Constitutional of Amendment:

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

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

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

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

constitutional convention with majority votes in two-thirds of state legislatures. Once it is ratified by Congress, it must be approved by three-fourths of the states.[35]

Definition of Amendments

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

4.5 Preamble:

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

4.6 Supremacy of the Constitution:

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

4.7 Unitary Government System:

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

4.8 Unicameral Legislature:

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

4.9 Fundamental Principle of State Policy:

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

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

4.10 Fundamental Rights:

Part 3 of the Constitution provides for 18 fundamental rights. The enjoyment and enforcement of those rights have been guaranteed in the constitution. No authority can make any law which is inconsistent with the provisions of fundamental rights and if any law made 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.[36] 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.[37] 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

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

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

are the basic Features of the constitution. Mr. Justice B.H. Chowdhury J, (as he then was) enumerated as many as 21 (twenty one) unique features of B Bangladesh constitution.[38]

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).[39]

4.15 How Did It Amend?

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

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

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

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

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

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

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

First Amendment

The Constitution (First Amendment) Act 1973 was passed on 15 July 1973. It amended Article 47 of the Constitution by inserting an additional clause which allowed prosecution and punishment of any person accused of 'genocide, crimes against humanity or war crimes and other crimes under international law'. A new Article 47A was also inserted, making certain fundamental rights 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.[40]

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

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

for holding national elections void and ultra vires to the constitution.[41]The Constitution (Thirteenth Amendment) Act,1996 (Act 1 of 1996), is ultra vires the Constitution and hereby declared void prospectively.[42] 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.[43]

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

Fourteenth Amendment

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

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

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

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

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

---

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

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

43 *Ibid*

Fifteenth Amendment

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

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

Sixteenth Amendment

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

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

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

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

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

16th amendment of the constitution was passed by the parliament on September 17, 2014 which gave power to the Jatiyo Shangshad to remove judges if allegations of incapability or misconduct against them are proved. On 5 May 2016, the Supreme Court of Bangladesh declared the 16th Amendment illegal and contradictory to the Constitution.[44]

Provision of 16th Amendment

Bangladesh Act No XIII of 2014 amended the Constitution of Bangladesh, empowering Parliament to impeach Supreme Court judges.[45] (Parliament and Judiciary: Striking a Balance). Part VI, chapter one, article 96, of the Bangladesh Constitution, which includes provisions on the tenure of office of the Supreme Court judges, now states:

(1) Subject to the other provisions of this article, a Judge shall hold office until he attains the age of sixty-seven years.

(2) A Judge shall not be removed from his office except by an order of the President passed pursuant to a resolution of Parliament supported by a majority of not less than two-thirds of the total number of members of Parliament, on the ground of proved misbehavior or incapacity.

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

[44] "16th Amendment illegal: HC". Prothom Alo. Retrieved 2016-05-07.

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

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 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.[46]

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

Chapter -5

Judicial Power and Basic Structure Doctrine Appraisal of Bangladesh Constitution

5.1 Judicial Power Doctrine of Basic Structure of Bangladesh Constitution

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 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.

5.2 Delimitation of Basic Structures:

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

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

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

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

5.4 Philosophy Underlying the Doctrine of Basic Structure:

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

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

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

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

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

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

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

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

Chapter-6
Constitution of Basic Structure in India

6.1 Separation of Powers: The Indian Plan

In India, there are three distinct activities in the Government through which the will of the people are expressed. The legislative organ of the state makes laws, the executive forces them and the judiciary applies them to the specific cases arising out of the breach of law. Each organ while performing its activities tends to interfere in the sphere of working of another functionary because a strict demarcation of functions is not possible in their dealings with the general public. Thus, even when acting in ambit of their own power, overlapping functions tend to appear amongst these organs. The question which is important here is that what should be the relation among these three organs of the state, i.e. whether there should be complete separation of powers or there should be co-ordination among them.

6.1.1 Constitutional position

The Constitution of India embraces the idea of separation of powers in an implied manner. Despite there being no express provision recognizing the doctrine of separation of powers in its absolute form, the Constitution does make the provisions for a reasonable separation of functions and powers between the three organs of Government.

By looking into the various provisions of the Constitution, it is evident that the Constitution intends that the powers of legislation shall be exercised exclusively by the legislature.[47] Similarly, the judicial powers can be said to vest with the judiciary.[48] The judiciary is independent in its field and there can be no interference with its judicial functions either by the Executive or by the Legislature. Also, the executive powers of the Union and the State are vested in the President and the Governor respectively.[49]

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

Article 50 lays down that State shall take steps to separate the judiciary from the executive. This is for the purpose of ensuring the independence of judiciary. Article 122 and 212 provides validity of proceedings in Parliament and the Legislatures cannot be called into question in any Court. This ensures the separation and immunity of the legislatures from

[47] See *Delhi Laws Act, 1912, In re,* AIR 1951 SC 332 at pp. 346-47

[48] *Ibid*, at p. 386 (AIR)

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

judicial intervention on the allegation of procedural irregularity.[50] Judicial conduct of a judge of the Supreme Court and the High Courts' cannot be discussed in the Parliament and the State Legislature, according to Article 121 and 211 of the Constitution. Articles 53 and 154 respectively, provide that the executive power of the Union and the State shall be vested with the President and the Governor and they enjoy immunity from civil and criminal liability.

The legislature besides exercising law making powers exercises judicial powers in cases of breach of its privilege, impeachment of the President and the removal of the judges. The executive may further affect the functioning of the judiciary by making appointments to the office of Chief Justice and other judges. Legislature exercising judicial powers in the case of amending a law declared *ultra vires* by the Court and revalidating it.[51] While discharging the function of disqualifying its members and impeachment of the judges, the legislature discharges the functions of the judiciary. Legislature can impose punishment for exceeding freedom of speech in the Parliament; this comes under the powers and privileges of the parliament. But while exercising such power it is always necessary that it should be in conformity with due process.[52] The heads of each governmental ministry is a member of the legislature, thus making the executive an integral part of the legislature. The council of ministers on whose advice the President and the Governor acts are elected members of the legislature. Legislative power that is being vested with the legislature in certain circumstances can be exercised by the executive.[53]

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

[50] See *Pandit M S M Sharma v.Sri Krishna Sinha,* AIR 1960 SC 1186

[51] See *L Chandra Kumarv.Union of India*, (1995) 1 SCC 400

[52] See *Keshav Singhv.Speaker, Legislative Assembly,* (1965) 1 SCR 413

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

functions.[54] Higher administrative tribunals should always have a member of the judiciary.[55] The higher judiciary is conferred with the power of supervising the functioning of subordinate courts.[56] 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.[57]

Applying the doctrines of constitutional limitation and trust in the Indian scenario, a system is created where none of the organs can usurp the functions or powers which are assigned to another organ by express or necessary provision, neither can they divest themselves of essential functions which belong to them as under the Constitution.[58]

Further, the Constitution of India expressly provides for a system of checks and balances in order to prevent the arbitrary or capricious use of power derived from the said supreme document. Though such a system appears dilatory of the doctrine of separation of powers, it is essential in order to enable the just and equitable functioning of such a constitutional system. By giving such powers, a mechanism for the control over the exercise of constitutional powers by the respective organs is established.[59]

This clearly indicates that the Indian Constitution in its plan does not provide for a strict separation of powers. Instead, it creates a system consisting of the three organs of Government and confers upon them both exclusive and overlapping powers and functions. Thus, there is no absolute separation of functions between the three organs of Government.

---

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

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

[56] Article 235 of the Indian Constitution

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

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

[59] 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,*[60] 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*[61]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

---

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

[61] 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,*[62] 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,*[63]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,*[64]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

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

[63] AIR 1989 SC 1899

[64] 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,*[65]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,*[66] 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*[67] 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

[65] 2008(1)SCC 683

[66] 2008(6) ALL MR 94

[67] 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,*[68] 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 discuss the usage of the doctrine of separation of powers in normal governance and entirely another to examine it under the unique circumstances of a national emergency. In such a period, the likelihood of any organ trying to exceed its power increases greatly as many of the checks and balances become suspended. However, it is commonly agreed that even during emergency, the doctrine must continue to be in force.[69]

This scenario was the matter of debate in the case of *Rameshwar Prasad v. State of Bihar,*[70] where the Court was required to determine whether the imposition of Art. 356 in the State without proper consultation with State authorities or considering the Governor's report, amounts to an excessive use of legislative power. Finding that the Central Legislature had sought to step into the shoes of the State Legislature and thereby usurp the power completely to itself, in the given case, the Court held there to be a clear violation of the doctrine of separation of powers. India's Executive had been found to have committed a constitutional misdemeanor, for which it needed to apologize to the court and the

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

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

[70] AIR 1958 Pat 210

parliament and then ask the latter to renew it confidence. If confidence was not renewed, the government would fall and a new government would have to be formed.[71]

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.[72]

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.[73]

There has been considerable debate about whether the Court was right in taking cognizance of such a matter, as it might be considered an intrusion into the duties of the executive. 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

[71] *Ibid.*

[72] *Ibid.*

[73] *Ibid.*

Court. Hence, it had to be accepted as a valid action, in consonance with its constitutional powers.[74]

[74] *Ibid.*

Chapter-7

Recommendations and Conclusion

7.1 Recommendations

i. Every provision of the constitution can be amended provided in the result the foundation and the structure of the constitution remains the same. In the other words the basic structure of the constitution cannot be amended.

ii. 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.

iii. 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.

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

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

vi. 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.

vii. The referendum is essential in the case of amendment of the important article of the Bangladesh Constitution. But basic feature of the constitution cannot be amended or destroyed.

7.2 Conclusion

It is seen from the above unique, that a couple of Amendments finished at one time under certain powerful circumstance were subsequently withdrawn by another Amendment, and furthermore that various of these had a cross country congruity. Be that as it may, a main a portion of the Amendments were supported without fitting contentions and exhaustive conversations concerning all the vow holders including individuals sticking to different, at some point varying, philosophical or stubborn perspectives. Corrections that were the result of unsophisticated idea, absence of regard for popularity based practices or appropriateness have plainly gone under serious objections, some of the time for reasonable intentions and once in a while for partisan political thoughts. All in all, we have no antagonism in sanctioning another Amendment by the present or forthcoming state run administrations, yet if and when this is finished, there should be involved discussions and commitment by every one of the ideological groups, scholarly people and fearful residents. Perusing the teaching of fundamental design for this examination proposes different models by which the principle might be recognized and assessed came up. The three molds used to look at the regulation are Basic Structure and the hypothesis of Originalism, Basic Structure goes about as adjusting device, and Basic Structure as an instrument of development. The apparatus is utilized to look at a portion of the limits of the fundamental construction regulation behind the scenes of feeble social orders and proposes a straying and moderate methodology in legal machines of protected principal convictions.

Bibliography

1. "India Law Journal". *www.indialawjournal.com.* Archived *from the original on 4 March 2016*. Retrieved 7 April 2018.
2. "13 member constitutional bench verdict (refer paras 316 and 317) in Kesavananda Bharati ... vs State Of Kerala And Anr on 24 April,1973". Archived *from the original on 14 December 2014*. Retrieved 5 December 2014.
3. "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.
4. *Austin, Granville (1999). Working a Democratic Constitution - A History of the Indian Experience. New Delhi: Oxford University Press. pp. 258–277.* ISBN 978-019565610-7.
5. *Satya Prateek (2008).* "Today's Promise, Tomorrow's Constitution: 'Basic Structure', Constitutional Transformations And The Future Of Political Progress In India" (PDF). *NUJS Law Review. **1** (3).* Retrieved 2012-07-17.
6. *Jasdeep Randhawa.* "Understanding Judicialization Of Mega-Politics : The Basic Structure Doctrine And Minimum Core". *Jus Politicum. Archived from* the original *on 2012-11-15*. Retrieved 2012-07-17.
7. "The basic features". The Hindu. *2004-09-26. Archived from* the original *on 2012-07-25*. Retrieved 2012-07-09.
8. "Kesavananda Bharati .... vs State Of Kerala And Anr on 24 April, 1973". *Indian Kanoon.* Archived *from the original on 2014-12-14*. Retrieved 2012-07-09.
9. "Kesavananda Bharati ... vs State Of Kerala And Anr on 24 April, 1973". *Indian Kanoon. Para. 316.* Archived *from the original on 2014-12-14*. Retrieved 2012-06-24.
10. "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.
11. "Revisiting a verdict". *Vol. 29, no. 1. Frontline. Jan 14–27, 2012. Archived from* the original *on 2013-12-03*. Retrieved 2012-07-09.